

2017

The Fall of the Priests and the Rise of the Lawyers, Philip R Wood, Hart Publishing, 2016, 273 pages: ISBN 9781509905560. Hardcover \$50.00

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This book review in a scholarly journal was originally published as:

Quinlan, M. (2017). The Fall of the Priests and the Rise of the Lawyers, Philip R Wood, Hart Publishing, 2016, 273 pages: ISBN 9781509905560. Hardcover \$50.00. *Australian Law Journal*, 91 (6).

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This is the author's version of a book review published in the *Australian Law Journal*, 2017.

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BOOK REVIEW:

PHILIP R WOOD, *THE FALL OF THE PRIESTS AND THE RISE OF THE LAWYERS*, (Hart, 2016)

273pp

Professor Michael Quinlan*

In 1967 Ludwig Wittgenstein observed that “[t]he aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something – because it is always before one’s eyes).”¹ Legal practitioners who are immersed in the daily practice of the law - the law which is always before their eyes – might enjoy this book. It provides an opportunity to look beyond the problems requiring resolution in a practitioner’s day to day practice and to take a step back and think more broadly about the law. Those interested in religion and its place in the world might also be drawn to this book. Although not anti-religious, this book seems to assume that its readers share the view that religion is an old fashioned idea. For example, it begins with a description of the role of the great religions in explaining the universe, providing purpose and morality and so on in the past tense.² Readers who are religious believers may find this – and some of the other comments made in the book about religion - a little off putting.

To understand this book it is necessary to know a little bit about the author. Philip Wood CBE, QC (Hon) is Special Global Counsel at Allen & Overy in London. He leads that firm’s Global Law Intelligence Unit which is “an executive team expert in comparative law”³ He holds a BA from the University of Cape Town, an MA from Hertford College, Oxford University and an honorary LLD from Lund University, Sweden. He was appointed honorary Queen’s Counsel in 2010 and has written many books on international finance law and practice. He was awarded a CBE in 2015 for services to English law and to finance law. He is a Visiting Professor at University of Oxford and at the London School of Economics & Political Science and a Distinguished Visiting Fellow at the University of Cambridge. The background of the author is evident in the book. Whilst it seeks to cover the world it really does so from a very Western perspective.

In this book Wood calls on readers to think very broadly about the law and much more. In fact, within its 273 pages, the author seeks to survey all of the major world religions and the world’s major legal systems. He argues that religion is in decline and that “the law can step into the gap left by fading religions” and that “the law can carry forward the flame.”⁴ If that mission were not substantial enough, Wood also considers the importance of economics and science in the world. It is a mammoth task and one which the author attacks in a very idiosyncratic and personal way. If you agree with Wood’s hypothesis – that religion is

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¹ Ludwig Wittgenstein, *Philosophical Investigations*, (1967, 3rd ed, Oxford) 50 [129]

² Philip R Wood, *The Fall Of The Priests And The Rise Of The Lawyers*, (Hart, 2016) 1-2

³ Allen & Overy, “Global; Intelligence Unit” 6 February, 2015 <<http://www.allenoverly.com/publications/en-gb/Pages/Global-Law-Intelligence-Unit.aspx>>

⁴ Wood above n2, 3

headed for the scrapheap of history around the world but that the “law is the one universal secular religion which practically everyone believes in,”⁵ that the law is “a great ethical system”⁶ and that the “law is a highly sophisticated moral system”⁷ which can readily take the place of religion- you might really enjoy this book. If you don’t come to the book with those preconceptions then this book is unlikely to convince you. The book seems to be designed for a general readership and should not be approached as an academic work. The references are few, there are no footnotes or index. As a result many of the author’s views are difficult to test because he does not sufficiently set out the justification for them.

Wood argues that the purpose of human existence is to stay alive. He says that “[t]he purpose of ensuring our survival is for humans to live long enough to unlock the secrets of the universe so that we can master it and continue to survive. So that we, as a species, can be immortal.”⁸ This suggests that Wood considers human life to have intrinsic value and that he may go on to postulate a theory of law by which the worth of any given law might be assessed – does or does it not promote human life and the survival of the species? Were this so it may suggest that Wood sympathises with natural law theory in which life is usually the first of the basic human goods to be identified.⁹ This view might also follow from Wood’s endorsement of international human rights conventions.¹⁰ However whilst Wood does make one mention of natural law it is hardly an endorsement:

In the past many legal philosophers debated how much law was given by God and how much by man. They debated what law was natural and what law was artificial and manufactured. This was an extraordinarily sterile debate, but one which has preoccupied writers on jurisprudence for centuries.¹¹

In a book seeking to argue that the law is an ethical and moral system which can take the place of what is said to be receding religion, it is disappointing that Wood dismisses natural law in this way. One might argue that, whether there is or not there is a natural law discernible by the use of human reason might be a particularly important question – rather than an extraordinarily sterile one -- to confront in a world without religion. As Charles Rice has observed:

So can natural law thinking really make a difference? It did for the victims of racial segregation in the United States as it had for the fugitive slaves a century before. Had it been acted upon, it could have

⁵ Wood above n2, 3. *Contra* Wood above n2, 31 “[t]he law is not a religion.”

⁶ Wood above n2, 17

⁷ Wood above n2, 3

⁸ Wood above n2, 2. See also 10-11

⁹ See e.g. John Finnis, *Natural Law and Natural Rights*, (2nd ed Oxford University Press, 2011) 81-84

¹⁰ Wood above n2, 56-59, 140

¹¹ Wood above n2, 41

saved the lives of victims of the Nazi regime. And natural law made a difference to Ingo Heinrich and Andreas Kuhnpast, two former East German border guards who were convicted of manslaughter by a German court in 1992 for having killed a fleeing refugee. The Court rejected the defence that the guards had been ordered to “shoot to kill” refugees. “Not everything that is legal is right,” declared Judge Theodor Seidel. “At the end of the 20th century, no one has the right to turn off his conscience when it comes to killing people on the orders of the authorities.”¹²

To assert as Wood does that the law is a moral and ethical system and that “[j]ust about everybody believes in a moral system, at least nominally, and of course if we asked people whether they believed in morality or whether people should be good they would normally say yes”¹³ really provides no foundations at all for what that system is, for what being “good” means and nor does it provide any argument for the general acceptance of any particular moral or ethical frame. Similarly Wood’s call for lawyers to be ethical and moral leaders lacks a solid foundation.¹⁴ For example, he does not explain what in particular in the current training or expertise of lawyers, equips lawyers— as distinct from any other member of society – for this role?

Wood wants to demonstrate the lifesaving value of the law. To do so he uses the example of the 33 Chilean miners trapped underground for 69 days in 2010 who all survived the ordeal. He argues that their survival resulted from the fact that they made rules with which they abided to share food and water equally and so on.¹⁵ In short Wood argues that it was law that saved them. What Wood ignores, in his example, is the fact that, according to the survivors, it was their religious faith that sustained them and saved them.¹⁶ We have no

¹² Charles Rice, *Fifty Questions on the Natural Law* (Ignatius Press, 1999) 29

¹³ Wood above n2, 187

¹⁴ Wood above n2, 253

¹⁵ Wood above n2, 8

¹⁶ Alejandro Bermudez, “Faith played major role in uplifting Chilean miners Now that they are rescued, stories emerging on important role of religion for the 33 trapped men,” 20 October, 2010, *OSV Newsweekly*; Trevor Persaud, “Chilean Miner: ‘God Has Never Left Us ‘Trapped miners owe a lot of their sanity to the 34th person in the tiny underground community,” 12 October, 2010, *Christianity Today* <

way of knowing what might have happened, absent the miners' faith, but their approach to their predicament and the rules that they formulated in order to survive did not come about in a vacuum. The same is true of our legal systems and in the Western legal tradition.

Christianity played a foundational role which goes largely unrecognised in this book. For example, the discussion of the historical origins of the rule of law omits any mention of Christianity.¹⁷ Intriguingly Wood includes Moses and Jesus Christ in his list of great heroes of the law.¹⁸ According to Wood "[t]hese men were among the first great lawyers. They formulated principles of moral behaviours, effectively basic rules of law, the foundation of legal systems."¹⁹ He must however not consider these "basic rules of law" really to be law because he also asserts that "[t]he contribution to the law by the Christian bible (about 50 to 100 CE) and by the Koran (about 650 CE) was small."²⁰ At least in relation to the Christian Bible's contribution to the Western legal tradition this statement is clearly false. As Patrick Parkinson has explained:

Christianity was to the formation of the Western legal tradition as the womb is to human life. The history of western law cannot be understood in isolation from religious influences, for at every level of society, and in every aspect of social and political life these influences were pervasive²¹

As Berman has explained:

<http://www.christianitytoday.com/gleanings/2010/october/chilean-miner-god-has-never-left-us.html>>; Patti Maguire Armstrong. "'God Drilled the Hole!': The Rescue of the 33 Chilean Miners" 13 November, 2015, *Aleteia*, < <http://aleteia.org/2015/11/13/33-chilean-miners-saved-by-miracle/>>; Sarah Butler, "The Chilean miners' miracles: How faith helped them survive" 4 August 2015 *CNN* < <http://edition.cnn.com/2015/08/02/world/chilean-miners-miracles/>>;

¹⁷ Wood above n2, 54-55

¹⁸ Wood above n2, 217, He also includes the scribes of Urukkinga, Ur-Nammu and Hammurabi, Zoroaster, Siddhartha Gautama, Muhammad, Confucius, Socartes, Plat, Aristotle, Cicero, Justinian, the authors of the Magna Carta, St Thoams Aquinas, bartolus, John Locke, Groptius, Lord Mansfield and many others..

¹⁹ Wood above n2, 238

²⁰ Wood above n2, 22

²¹ Patrick Parkinson *Tradition and Change in Australian Law* (5th Ed (2013 Lawbook Co) [2.70] 29: see also Roy Williams, *Post God nation?* (ABC Books, 2015) 38-39, 77-81, 87-92, 137-145

The centrality of law may...be traced to the origins of the western legal tradition. The Church was governed by law. Indeed, it has been said that "it was the Church that first taught western man what a modern legal system is like."²²

In Parkinson's view:

The moral authority of the law may also be traced to its history. The close relationship between law and theology in the formation of the western legal tradition, the belief in law as ultimately given by God, and the idea that there were natural laws which governed human relations meant that law was imbued with a certain aura of sacredness.²³

Concepts such as limited government, liberal democracy, human rights, individual rights, democracy constitutionalism, private property, freedom of religion, reasonable doubt and mens rea were all influenced by Christianity.²⁴ Like the failure to identify the role of religion in the survival of the Chilean miners, the failure to explain the intimate role of religion in the development of the law – certainly in the West - is a major flaw of the book as a whole. To suggest that it "seems highly unlikely" that care for the poor and the weak in Western societies was an outflowing of Christianity²⁵ betrays a certain hardness of heart. We do not know what the law in the Western world would be like had religion been absent. Similarly the absence of a discussion of the question of whether and for how long the law could develop if its Christian roots died entirely (as is Wood's thesis) in a book which argues that the law can survive without religion is a glaring one.

Part of the problem with the approach taken to religion in this book seems to be a lack of understanding about religion and a lack of appreciation of the relevance and currency of religion in the modern world. Wood's description of the "rational attacks on religion" focuses almost entirely on Christianity and is very superficial and easily addressed.²⁶ His conclusion that "[i]n the end the contest in relation to the supernatural is between the rationalists who rely on reason and the believers who rely on faith"²⁷ sets up a false dichotomy. Certainly the world's largest Christian denomination, the Catholic faith tradition, teaches that there is one truth such that if reason and faith appear to be in conflict the

²² Berman H, *The Interaction of Law and Religion* (SCM Press, London, 1974) 59

²³ Parkinson above n11 [2.290] 64

²⁴ Timothy Samuel Shah and Allen D Hertzke (ed), *Christianity and Freedom: Historical Perspectives* (Cambridge University Press, 2016); James Q Whitman, "The Origins of reasonable Doubt: Theological Roots of the Criminal Trial" 5 (2005). *Faculty Scholarship Series*. Paper 1 http://digitalcommons.law.yale.edu/fss_papers/1; Barry W. Bussey, "The Legal Revolution Against the Place of religion: The case of trinity Western University Law School" (2016) *Brigham Young University Law Review* 101, 108-109, 138

²⁵ Wood above n2, 210

²⁶ Starting perhaps with F.F.Bruce, *The New Testament Documents Are they Reliable?* (6th ed, 1981, William B Eerdmans Publishing Company); Craig L. Blomberg, *The Historical Reliability of the Gospels* (2nd ed, 2007 IVP Academic) and Richard Bauckham, *Jesus and the Eyewitnesses*, (2006 William B Eerdmans Publishing Company).

²⁷ Wood above n2, 204

thinker lacks sufficient knowledge or is misunderstanding one or the other. In that religious tradition as there is one truth, faith and reason cannot be in conflict.²⁸ Those who seek to pigeonhole religionists into the realm of irrational faith betray a misconception. An understanding of the extent to which religions have continued to grow in understanding and in application or their principles to new circumstances also appears absent from this book. For Wood “[t]he great religions had more or less settled their moral systems by around 900 CE at the latest (and often many centuries earlier).”²⁹ This would come as quite a shock to all of the moral theologians since the 9th century, particularly those who have been grappling with the major bio-ethical challenges of the last 50 years. As would Wood’s assertion that “[f]or some reason, the core moral systems of religions just froze as unchangeable ancient wisdom whose work was done.”³⁰ If that were not strong enough he later opines that “religious moral codes tended to ossify, petrify, many centuries ago...Their codes were cut off from the future and only look backwards to the mores of traditional agricultural societies, simple and uncluttered.”³¹ These statements simply ignore centuries of work by religious thinkers, moral theologians and leaders including Papal encyclicals on the contemporary issues of the day including environmental issues, the nature of work, the relationship between faith and reason, economic issues and developments in Catholic social teaching.

According to Wood “[o]ur societies may decide that they can do without religion, but they can’t do without law.”³² Again this misconceptualises religion for most of the world. Thankfully few countries in the world are theocracies and the Western world learnt long ago that religious freedom is a fundamental human right. This is a recognition that religion is not a matter for societies to decide but a matter for individuals to decide. For example, Australian courts have described religious freedom as “the paradigm freedom of conscience,”³³ “the essence of a free society,”³⁴ “a fundamental concern to the people of Australia,”³⁵ “a fundamental freedom”³⁶ and “a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.”³⁷ Where the State has decided that society can do without religion, such as in Stalinist Russia, attempts to achieve that outcome have led not to the collapse of religion but to the collapse of communism and the revival of religion.³⁸

Central to Wood’s thesis is his view that religion is in decline in the world. He asserts that Islam reached its greatest extent by 1700 and that Christianity was most popular in most

²⁸ Vatican Council I, *Dei Filius* [4] (1870) < <http://inters.org/Vatican-Council-I-Dei-Filius>>; *Catechism of the Catholic Church* (2nd ed, 2000, St Pauls) [[156]-[159]]

²⁹ Wood above n2, 14

³⁰ Wood above n2, 19

³¹ Wood above n, 46

³² Wood above n2, 12

³³ *Church of the New Faith v. Commissioner of Pay-Roll Tax* (1982-1983) 154 C.L.R. 120, 130 (Vict.); *Aboriginal Legal Rights Movement Inc. v State of S. Austl.* (1995) 64 SASR 551, 557.

³⁴ *Church of the New Faith* 154 CLR at 150.

³⁵ *Canterbury Municipal Council v Moslem Alawy Soc’y Ltd.*, (1985) 1 NSWLR 525, 543.

³⁶ *Aboriginal Legal Rights*, 64 SASR at 552, 555.

³⁷ *Christian Youth Camps Ltd. v Cobaw Community Health Services Ltd.*, (2014) VSCA 75, 560.

³⁸ Michael Burleigh, *Sacred Causes* (Harper Perennial, 2006)326-344,415-449

places in 1930.³⁹ Wood is certainly not the first to predict that religion will disappear but given that human beings search for meaning, happiness, truth and purpose in their lives⁴⁰ religion has proved itself to be very resilient. Wood is aware that his theory is inconsistent with the statistics or projections based on those who self-identify as religious. These show that we are in and entering the most religious phase of the world's history. About 9-in-10 people are expected to be affiliated with religion in 2030 compared with 8-in-10 in 1970.⁴¹ There is a strong upward trend in religious adherents but a decline in the numbers of atheists, agnostics and those unaffiliated with any religion anticipated from 2010 to 2050. This has much to do with the fact that Christianity and Islam are both growing in areas of the world with high fertility, particularly in the sub-Saharan and the Middle East-North Africa region.⁴²

As Wood recognises that projections based on self-identification do not support his thesis, he seeks to argue that self-identification of religious affiliation (but not of a lack of any such affiliation) produces false results. He argues that the relevant test is of those who actively practice their faith by participating in religious ceremonies and who believe in the core tenets of their faith. He asserts that applying these criteria religious faith is declining.⁴³ His own calculations use a methodology he devised and which he describes as “[b]rutally broad-brush, order of magnitude, chainsaw.”⁴⁴ This may be a frank description but hardly one on which to base a thesis. Leaving aside the accuracy of Wood's estimates there are very serious questions about the veracity of his approach. There are many reasons why people do or do not participate in external religious activities.⁴⁵ The extent to which a person's subscription at all times to a religion's doctrines is a necessary requirement for that person to be considered to be religious is also a very controversial assertion. As the Canadian Supreme Court has recognized an individual's right to religious freedom does not necessitate an inquiry into whether their “beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for court's to make.”⁴⁶ There are good reasons for considering the authenticity of an individual's religious beliefs to be best left to be determined by their self-identification than by the application of someone else's conception of what a “devotee” looks like.⁴⁷

The reality is that, contrary to Wood's thesis, religion is becoming more no less important in the world. Not only did the votes of Christian Evangelicals largely determine the results of

³⁹ Wood above n2, 117

⁴⁰ St Thomas Aquinas, *Summa Theologica* Part 2. Q.1. Article 8 see also St Thomas Aquinas *Summa Contra Gentiles*, book 3, chapter 37; see also Bussy above n24, 122,124, 186-187

⁴¹ Todd M. Johnson and Brian J. Grim, *World Religion Database International religious demographic statistics and sources* < http://www.worldreligiondatabase.org/wrd_default.asp>

⁴² Pew Research Center, “The Future of World Religions: Population Growth Projections, 2010-2050,” April 2, 2015 < <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>>

⁴³ Wood above n2, 180

⁴⁴ Wood above n2, 188

⁴⁵ Kaley Payne & Karen Mudge, “Weddings on the increase, but not in churches” 18 October 2012 *Bible Society* <http://www.biblesociety.org.au/news/weddings-on-the-increase-but-not-in-churches>, Heather McNeill “WA couples abandoning church weddings, getting married older” November 25 2015 *W.A. Today* < <http://www.watoday.com.au/wa-news/wa-couples-abandoning-church-weddings-getting-married-older-20151125-gl867r.html>

⁴⁶ *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

⁴⁷ See Luke 18:17 and Matthew 18:2-4

the 2016 US presidential election⁴⁸ but religion is now so important that, US Secretary of State, John Kerry acknowledged in 2013:

[I]f I went back to college today, I think I would probably major in comparative religion because that's how integrated [religion] is in everything that we are working on and deciding and thinking about in life today.⁴⁹

According to Wood, “[w]ithout law, there would be no democracy or safety from tyrants, no security from violence or theft, no protection of women from sexual attack, no property.”⁵⁰ Whilst these conditions may currently exist in some contemporary Western societies which have developed legal systems and respect the rule of law, the law itself guarantees none of these things. Just to mention Nazi Germany and Stalinist Russia is sufficient to establish that very sophisticated societies with laws can be very bad places indeed.

Wood correctly observes, that “if the sanctions of religion no longer have influence on people’s private moral conduct then we have a vacuum unfilled.”⁵¹ In other words for many in the West “State laws have become a de facto morality.”⁵² If this is correct it has fundamental consequences for lawmakers and lawyers. In Wood’s view:

There is no question that the law as an instrument to govern our conduct is sufficient for survival if properly framed and administered and that properly framed and administered legal systems would substantially fill the necessary gaps if religions ceased to be a force at all.⁵³

He gives some indication of what “properly framed” laws might be by providing seven propositions. In doing so he says that his propositions are his personal list which is designed to be sunny and optimistic, non- exhaustive, that they are not commandments or lists of virtues and that they “do not apply to everybody and would not suit everybody. For example, the very sick or the very poor have different priorities.”⁵⁴ So exactly what we are to make of them is quite unclear – they don’t appear to be put up as a benchmark against which laws might be judged as might be the case with natural law for example. The propositions are:

1. Honour and believe in the rule of law.
2. Let your moral life inspire others on your final judgement day.
3. Owe your fealty to all members of the planet, not just your group.

⁴⁸ Kate Shellnutt, “Trump Elected President, Thanks to 4 in 5 White Evangelicals” 9 November 2016, *Christianity Today* < <http://www.christianitytoday.com/gleanings/2016/november/trump-elected-president-thanks-to-4-in-5-white-evangelicals.html>>

⁴⁹ As quoted in Bussey above n 24, 180

⁵⁰ Wood above n2, 10

⁵¹ Woods above n,263

⁵² Michael Quinlan, “Religion, Law and Social Stability in Australia” paper presented at the 22nd Annual

International Law and Religion Symposium, Religion, Law and Social Stability, 6 October, 2015 Brigham Young

University < [http://www.nd.edu.au/_data/assets/pdf_file/0017/133037/Draft-Speech-Religion-Law-and-](http://www.nd.edu.au/_data/assets/pdf_file/0017/133037/Draft-Speech-Religion-Law-and-Social-Stability-Conference-BYU-Professor-Michael-Quinlan.pdf)

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⁵³ Wood above n2, 263

⁵⁴ Wood above n2, 265

4. Honour and believe in scientific progress.
5. Persevere in illuminating your mind.
6. In matters of sex, follow your best moral conscience.
7. Take delight in your existence.⁵⁵

Wood has written an interesting book. It is a book which forces the reader to really think about the law and its relationship with law, morality and religion. Wood is a strong believer in the civilising power of the law and in its ability to keep the human race alive but his book is slight in the justifications it provides for the view that the law, of itself, has the power attributed to it by Wood. All the indications are that religion will continue to be around in the world for as long as human beings exist so it seems unlikely that the planet will ever have to grapple with a world without religion in order to test Wood's hypothesis. Wood's analysis may have been more powerful had he limited it to a consideration of the United Kingdom or another single jurisdiction where the influence of religion is perhaps more demonstrably on the decline than is the case across the globe.

⁵⁵ Wood above n2, 265