

The Simon Greenleaf



Law Review

**A Scholarly Forum of Opinion Interrelating
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THE SIMON GREENLEAF LAW REVIEW

A Scholarly Forum of Opinion Interrelating Law, Theology & Human Rights

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EDITOR'S INTRODUCTION TO VOLUME VII

This number of the *Simon Greenleaf Law Review* features the complete text of the brief submitted by Simon Greenleaf's Christian Civil Liberties Union in the historic trial of "The Athens 3," May 21-27, 1986. When three missionaries received prison sentences for "proselytizing" in Greece, Simon Greenleaf sent its founding Dean, Dr. John Warwick Montgomery, to Athens to argue the human rights aspects of the case. Readers of the *Law Review* now have available to them the English-language text of the brief Simon Greenleaf submitted (the only written brief in the case). See for yourself why the Greek Court of Appeals reversed the lower court and freed the missionaries!

Dr. Montgomery described the setting in the following manner: "The atmosphere in the small courtroom, packed with hundreds of concerned spectators, was literally electric. Everyone knew how much was at stake: not only human rights and religious liberties in general, but also the public perception of evangelical witness to Jesus Christ. I had intended to argue only the technical human rights issues along the lines of our brief, but finally determined to serve as theological expert witness as well in order to counteract the gross misunderstandings of evangelical missionary proclamation offered by the prosecution. I learned that the President of the Greek Court of Appeals (the chief judge) had studied in Germany, so in my oral argument I used the distinction between the two German verbs "to know" (*wissen* — formal, scientific knowledge; and *kennen* — personal knowledge by acquaintanceship). The missionaries, I argued, had not been trying to change anyone's formal, doctrinal beliefs, much less had they been attempting to get their hearers to leave the Greek Orthodox Church and join some other denomina-

tion; instead, their whole object was to present a *personal acquaintanceship-knowledge of Jesus Christ*. Church membership has never saved anyone, and the missionaries were not in the church membership business; only Jesus Christ personally saves (whatever the church connection), and they were holding Him up to a lost world. Thus I was privileged to do some solid gospel preaching of my own in the Athens courtroom — and the tribunal got the message. Even the advocate general, in his recommendation to the three-judge bench, shifted over to our side, asking how the court could uphold prison terms for men who were only trying to counteract the secularistic immorality and meaninglessness engulfing Greek young people today.”

In the United States as well, Christians suffer legal impediments when spreading the gospel of Christ. Readers will appreciate Simon Greenleaf’s alumnus Thomas Alderman’s stimulating insights into “Secularism, Neutrality and the Establishment of Religion,” as well as Simon Greenleaf student Thomas Trueax’s critique of the profoundly influential secularistic legal philosophy of U.S. Supreme Court associate justice Oliver Wendell Holmes, Jr.

Other essays in the present volume demonstrate the application of legal reasoning to core issues of Christian apologetics. Simon Greenleaf professor John Moen and student Jeffrey Bauer, in separate but parallel essays, analyze the Resurrection of Jesus Christ from the standpoint of juridical standards of reasoning and proof, and former Simon Greenleaf law professor David Prescott exposes the fallacious reasoning of atheist Antony Flew in a paper titled, “The Presumption of Atheism Revisited: A Christian Lawyer’s Perspective.”

Volume Seven of the *Simon Greenleaf Law Review* also contains special treats for the theologian and for the litterateur. Professor Roger Martin offers the first in-depth study available anywhere of the apologetic impact of the great R.A. Torrey — with fascinating insights into his spiritual development and his reasons for holding to the entire trustworthiness of Holy Scripture. Simon Greenleaf M.A. graduate Martin Cothran summarizes his thesis on G.K. Chesterton, whose literary apologetic reminds one of the “Inklings” (C.S. Lewis, Charles Williams, J.R.R. Tolkien) a generation earlier and is equally valuable today. Cothran’s appended Chesterton bibliography is alone worth the purchase price of this number of the *Law Review*!

Finally, readers will not be disappointed with the wide ranging reviews of recent publications within what lawyers call the “terms of reference” of this unique Christian law school and its equally unique scholarly journal.

Editors
M.D.A.
R.H.C.

REVIEWS

Holy Writ informs us that "of making many books there is no end." The conclusion is therefore inescapable that a scholarly journal cannot review everything. The Simon Greenleaf Law Review has chosen to focus its attention on a limited number of recent publications which fall within the ambit of the School's special interests: integrating theology and law, examining the case for Christianity, and applying historic biblical faith to human rights.

THE CHIEF JUSTICE DESCRIBES HIS COURT

William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Morris and Company, Inc., 1987). 338 pp. \$10.95.

Chief Justice Rehnquist's stated objective for this work is to enlarge the layman's understanding of the Supreme Court, "the least understood of the three branches" of our government. There is no attempt at a comprehensive summary of constitutional doctrine or even an "up-to-date" analysis of the more controversial subjects (privacy, religious freedom, abortion, etc.), issues which not only divide the present court but render the previously dignified and perfunctory supreme court selection process into a bitter ideological war zone. This book offers a conversational and informal personal biography of Justice Rehnquist's experiences on the court, a summary of the lives and decisions of certain justices which Rehnquist believes

shaped the court, and a description of how the court today "goes about its business of deciding cases."

Rehnquist reviews the historic decisions which "established the judicial branch as the full partner in the tripartite system of federal government ordained by the constitution" without revealing much about his judicial predispositions (understandable considering his continuing role as Chief Justice). Rehnquist recites his experience as a law clerk to Supreme Court Justice Robert Jackson during the episode when Truman seized the steel mills during the Korean conflict (the court held this act to be unconstitutional).

This case and *Brown v. Board of Education* are examples, he explains, of instances where the Supreme Court has demonstrated itself as a co-equal in our government. But on the other side, Rehnquist sees a danger of the court expanding the provisions of the Constitution which restrict governmental authority "beyond their fair meaning" and thereby impairing not individual rights but the principle of majority rule. Rehnquist makes the point that just because a law is unjust, silly or vindictive does not make it unconstitutional and judges should fight the visceral reactions to so hold. The Supreme Court then is not the "conscience of the country" unless by that it is meant that it upholds the principles of the Constitution. The balance between liberty and authority and the state and the individual, for Rehnquist, must be found in the Constitution itself and not in the individual values of the several justices. The role of the Supreme Court is not "to uphold the claims of the individual" any more than it is to "exclusively uphold the claims of government." Where the scales are evenly balanced between these two interests, then

the laws enacted by Congress or a state or local government is entitled to a "presumption of constitutionality."

The strengths and weaknesses of Rehnquist's theory of constitutional interpretation can be illustrated by examining his analysis of the infamous *Dred Scott* decision; Rehnquist concludes this decision violated two canons of sensible constitutional interpretation. First, it decided a question of constitutional law which was not essential to the disposition of the case before the court. Second, the case fell short of that "minimum degree of plausibility" required before a court declares any act of Congress unconstitutional. The infamous Taney court decision, which overruled the Missouri Compromise, rested on no provision in the Constitution but upon a sense of "unfairness" to southerners in discriminating against the use of their property. Rehnquist argues that this sense of unfairness, however deeply felt, ought not be grounds for declaring an act of Congress void. Rehnquist finds agreement with former Chief Justice Marshall's opinion in *Marbury v. Madison* — holding that the "powers of the Supreme Court in declaring an act of the legislature unconstitutional is the linchpin of American constitutional law." He fears this fundamental principle will be undone if the subjective notions of justice override the original document.

One can sympathize with Rehnquist's desire not to subject every constitutional question to the moral principles found in each of the individual consciences of the nine justices, but isn't the legal positivism of Justice Oliver Wendell Holmes, although persuasive to Rehnquist, too narrow a basis for any overriding, justifiable standard for human dignity? Rehnquist

might have learned this lesson from his mentor Justice Robert Jackson who presided over the Nuremberg trials where the laws violated by the Hitler regime were not derived from any system of positive law (indeed the Nazis actions were legal in Germany) but from the conscience of all civilized men. While Rehnquist's "presumption of constitutionality" standard (the person who seeks to have a law held unconstitutional must carry the burden of proof in demonstrating that the right is well founded in the Constitution) lends itself to the flaws inherent in legal realism, it perhaps is the best we can do in a fallen world given the present trend of exalting subjective notions of individual liberties at the expense of societal coherence founded in the dignity of all persons. Rehnquist is right in warning those who see the Supreme Court only in terms of being the ultimate protector of individual liberties. The role of the court should not exclusively uphold the claims of the individual any more than it should exclusively uphold the claims of the government. With the increasing willingness of members of our society to express their individual notions of freedom at the expense of the common good (distributing obscene material, ending unborn life, etc.) Rehnquist's insistence upon only upholding freedoms that are "well founded in the Constitution," although an old doctrine, is of increasing importance in slowing the disintegration of our Republic.

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A CHRISTIAN CONSTITUTION?

John E. Eidsmoe, *Christianity and the Constitution* (Grand Rapids: Baker Book House, 1987), 415 pages. Price: \$19.95.

A discussion of the religious beliefs of thirteen of the most influential of the Founders of the American Republic and how those religious beliefs influenced their political philosophies and the institutions they created.

Eidsmoe effectively exposes the fallacy of characterizing the spirit of the Revolutionary epoch as predominantly deistic and rationalistic by showing that many of the leading Founders were not merely great patriots, but also heroes of the Christian faith. Especially for those unfamiliar with their private writings, the patriots' piety is a revelation. Moreover, the connections between their religious faith and their political philosophies are firmly established: transcendent law led to transcendent human rights; and human depravity led to the separation of powers. Also demonstrated is the fact that the central principles of the Founders' theory of government are now rejected by a modern orthodoxy of legal positivism and evolutionary constitutional interpretation.

Yet Eidsmoe is either unaware of the non-biblical influences on the Founders' ideology, or he carefully avoids discussing them. Nor does he mention the significance of the differences in the political landscape between their time and our own. As the work is intended partly as a call to heightened Christian activism, these are significant omissions.

The faith of the Framers was the reigning orthodoxy, practically by definition. Their frank discussions of the political implications of their faith in the Federalist Papers, in their Inaugural Addresses and in other public pronouncements were received with great respect. The influence of the Enlightenment was very important, but those rationalist ideas which had gained currency were not considered heretical. Consequently, though the most important features of the Founders' political philosophies were either based on the Bible or consistent with it, they did not as strenuously apply the biblical measure to all things as many today believe Christians ought to.

Moreover, the relationship between religious faith and temporal power was much different from what Christians face today. The religious establishment of their day had been answered with the First Amendment, so the Founders neither perceived established religion as an immediate threat to the republic, nor identified their political adversaries with such a threat. Modern secularism, on the other hand, evades the First Amendment by denying its religious nature, and the church's answer has been mostly an unimaginative, unprincipled and unproductive belligerence.

Restoring the transcendent basis for human rights is quite improbable until we learn to communicate with the rest of our civic community as equals — that is, as Americans to Americans, rather than as the righteous to the ungodly. Without a call to repentance from the pride and self-righteousness of socially active church people in the last two decades, and with an oversimplified view of the faith of the Found-

ers, Eidsmoe's call to still greater involvement risks continued excess.

Thomas O. Alderman
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Member of the Oregon Bar

LAW AND LITERATURE

Brook Thomas, *Cross-examinations of Law and Literature* (Cambridge: Cambridge University Press, 1987), xii, 300 pp. Price: 27.50 Pounds sterling.

Unique among law schools in the United States, the Simon Greenleaf School of Law requires its students to take a one-semester course in Legal Literature, thereby exposing them to the great authors who have given literary life to man's search for and encounter with justice across the centuries. For us, legal education is (or ought to be) a genuinely "liberal" study, in the original sense of the term: liberating us from narrowness of perspective and opening us up to our true nature *coram Deo*.

When, therefore, a book like the one under review comes along (and it is very rare that this occurs!), our interest is instantly piqued. Thomas, a member of the English Department at the University of Massachusetts, focuses on James Fenimore Cooper, Nathaniel Hawthorne, Harriet Beecher Stowe, and Herman Melville. He nicely interweaves literary interpretation with the realities of legal practice, employing the career of Chancellor Kent (author of the *Commentaries on American Law* — the "American

Blackstone") to illuminate Cooper, the activity of Simon Greenleaf's friend Joseph Story to assist in understanding Hawthorne, and the career of Lemuel Shaw, Chief Justice of Massachusetts and author of the classic judgment on circumstantial evidence in the celebrated Parkman murder trial, *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711 (1850), to examine Shaw's son-in-law Melville.

In spite of the author's scholarly meticulousness and thorough grasp of the sources, his book often fails to bring the writer or lawyer he treats to life. Perhaps this is because, not being a Christian, Thomas is often unaware of the sacral junctures in their activity — the times when one must remove one's shoes as holy ground appears. No mention is made of Chancellor Kent's conversion to Christ at the end of his life. Melville's *Billy Budd* — a Christ-figure if ever one appeared in literature — is merely said to "keep open a space in which an alternative to our present condition can be imagined" (p. 250).

In his "Closing Statement," Thomas writes: "The dilemma for many today is how to restore a ground for criticizing the present system without lapsing into a nostalgic longing for a transcendental world. For me, this ground must be found in historical analysis" (p. 253). What a window on literature would open up to him were he to apply rigorous "historical analysis" to the case for Jesus Christ! For there the transcendental world intersected history and became the proper object not of nostalgia but of veridical encounter. In the words of J.R.R. Tolkien (*Essays Presented to Charles Williams*): "There is no tale ever told that men would rather find was true, and none which so many skeptical men have accepted as true

on its own merits To reject it leads either to sadness or to wrath."^{*}

John Warwick Montgomery

^{*}Cf. John Warwick Montgomery, ed., *Myth, Allegory and Gospel* (Minneapolis: Bethany, 1974), pp. 117-118.

AIDS: THE WORST IS YET TO COME

Gene Antonio, *The AIDS Cover-Up? The Real and Alarming Facts about AIDS* (San Francisco: Ignatius Press, 1986), pp. 253. Price: \$9.95.

This book will curl one's hair and leave an impression so profound and deep that one may lose sleep over the issue. Perhaps this is due to the fact that the author has brought into play every negative aspect of the AIDS situation. And there are enough statistics and statements about AIDS for anyone to paint a very gloomy and dark picture. But when all is said and done there is little in the AIDS controversy to suggest that the critics have overblown the facts and have threatened us with what is really something not too serious.

The author has graphically described what homosexuals do for kicks but there have been other reports of such activities that are more frightening and disgusting than those in this book. He makes one fact perfectly clear: homosexuals are fighting a life and death struggle to justify their sexual practices. They want the public to believe that their sexual activities fall within the range of normality and should be regarded as good and endorsed as legitimate.

The homosexuals also make clear the fact that they have no intention whatever of doing that which will prevent AIDS from spreading. The call to homosexual celibacy has little chance of working. Taking precautions by drug users whose unclean needles cause AIDS in multitudes of cases does not yet work. Multiple sexual contacts in which a homosexual will have anal or oral sex with many partners is not apt to change now or in the future. Closing down the thousands of homosexual haunts in major and minor cities as well as homosexual bath houses is not taking place in a way that the disease will be overcome. Education is a partial solution to AIDS but the great majority of homosexuals do not respond to such efforts for the simple reason that it requires them to stop practices they have no intention of giving up. Gene Antonio speaks about these unpleasant truths in telling fashion while pro-homosexuals use every opportunity to play down the facts and assure people everywhere that the dangers from AIDS are remote.

The problem is not simply a United States or Western problem. In Africa the AIDS disease is epidemic. And in the West increasing numbers of women and children have this acquired syndrome through no fault of their own. Blood transfusions from tainted blood provided by those with AIDS has added thousands of cases of the disease. Women married to bi-sexual males have been contaminated via their husbands. Babies born to those who have AIDS has added to the dilemma. Asia will soon be decimated by AIDS as well.

AIDS is a contagious disease yet the notion that people with the disease should be separated from society as lepers used to be separated in bygone days

is regarded with horror by many. Moreover in the age of the new paganism the notion that AIDS is the judgment of God is regarded as a modern blasphemy. Since we live in a moral universe no one can discount the fact that God indeed is related to the penalty which flows from the failure to follow the moral laws of the universe. He who jumps from the top of a twenty-story building will find that the law of gravity functions when he plunges to his death. And even in the cases of those who become infected through no fault of their own lies the deeper truth that those, for example, who give tainted blood are responsible for passing on their diseases to others. Since we know how AIDS is contracted, those who engage in any activity which may lead to AIDS makes them accessories before and after the fact when they give blood or have sexual relations or do anything that endangers the lives of others. The innocent suffer along with the guilty and the plight of the innocent lies at the feet of those who harbor the germ that kills so surely.

Another nasty aspect of the AIDS problem which so alarms Gene Antonio in his book has to do with the efforts to discover a cure for the disease. There are two aspects of this endeavor that are scary. The first is that any discovery over the long haul will require greater and greater doses of the medication as the germ becomes resistant. The second and more frightening fact is that the virus mutates easily and hybrid forms of the germ will be immune to the vaccine just developed. It poses a never-ending threat for which there are no permanent solutions.

When Antonio's case has been discounted for over-emphasis it leaves a residue that cannot be bypassed or shrugged off as less than serious. AIDS is a modern

disaster. It will kill millions of people. And the solution at last will come when people everywhere begin to follow the biblical injunctions having to do with sexual conduct, drug use and the like. Medical miracles can have short-run success but he who breaks the moral laws of the universe will be broken by those laws sooner or later. There is a payday someday and it seems to have come right now!

Harold Lindsell
B.S., M.A., Ph.D., D.D.

THE SOFT-HEADED GENERATION

Francois-Bernard Huyghe and Pierre Barbes, *La Soft-Ideologie* (Paris: Robert Laffont, 1987), 214 pp. Price: 85 French francs (FF).

A political scientist and a journalist here team up to indict the yuppie thought-world of the 1980s. Their theme: "Times are tough, ideas are soft."

Ours is a generation of charity-rock, media communication rather than substance, unthinking tolerance, moral relativism, the left and the right indistinguishable in their promotion of essentially the same flaccid goals. Human rights vagaries are seen as a further example of the prevailing soft-headedness.

There is much truth in this analysis of the contemporary "consensus of apathy," and "senility of thought." Doubtless we are in a time of doldrums — like the

intermission between acts in a play. But where can secularism go to find meaning? The ideologies of the 19th century went bankrupt, and the 20th century has substituted only existential despair and the inhumanity of man toward his fellow men.

Historic Christianity offers the only way out of this soft-headed morass. The early Christians were said by their opponents to have out-thought, out-lived, and out-died them. Can we not offer the same vigorous apologetic to our day that Paul offered the Athenians on Mars Hill?

The Simon Greenleaf School of Law is on record as believing in a revelationally informed toughmindedness.

John Warwick Montgomery

THE CONSEQUENCES OF CONSEQUENTIALISM

L.W. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987) vi, 224 pp. Price: 22.50 Pounds sterling.

The author of this herculean effort to justify rights theory by way of a refined consequentialist ethic is professor of philosophy at the University of Toronto. Recognizing the problems with traditional ethical consequentialism (the view that acts are never intrinsically good or bad but should be judged on the basis of their outcomes), Sumner presents a more sophisticated, three-stage model of consequentialist goal-orientation: one must develop "(1) some set of basic, ultimate, objective, agent-neutral goods; (2) some

operation for combining these separate goods into a single global value; and (3) some function which specifies how this value is to be promoted" (p. 172).

The appalling danger to human rights of such question-begging relativism becomes particularly plain in the author's application of consequentialism to the right-to-life issue: "It is not my present purpose to try to show that the best policy will be to treat the acquisition of sentience as the criterion for having a conventional right to life (though I believe that this can be done). It is enough that it could be the best policy, in which case consequentialists will after all be able to support a moderate view of abortion" (p. 208); cf. the author's *Abortion and Moral Theory* (Princeton University Press, 1981).

Toward the end of his book, Sumner inadvertently points beyond the inadequacies of his own approach to a very different kind of solution to the dilemma of human rights. He sets forth three essential elements in the "profile of the ideal agent for a direct [human rights] strategy": such an agent would have an "unlimited domain of options" and he must be capable of "perfect information-gathering" as well as "perfect information-processing" — in short, the ideal agent will be someone "extremely powerful, highly knowledgeable, exceptionally bright, and rigorously impartial" (p. 187). The absence of such agency in a fallen world is precisely the reason why consequentialist ethics fails, for we can neither formulate our goals impartially nor clearly see the consequences of our actions in attempting to realize them. As Rousseau observed in his *Contrat social* (Bk. 2, chap. 7), "it would take gods to give men laws" — and it takes

God revealed in Jesus Christ to provide the creative and redemptive basis of human dignity.

John Warwick Montgomery

A CONVERT SPEAKS OUT ON HUMAN RIGHTS

Andre Froissard, *Le crime contre l'humanite* (Paris: Robert Laffont, 1987), 90 pp. Price: 52 French francs (FF).

In 1969, a little book of conversion literature electrified the French reading public: *Dieu existe, je l'ai recontre* ["God exists: I've met him"]. The author: Andre Froissard, distinguished member of the French Academy, prolific writer, journalist (his column, *Cavalier Seul* — "Lone Rider" — appears daily on the front page of *Le Figaro*). For a parallel conversion in the English-speaking world, one might think of Malcolm Muggeridge's highly visible entrance into the Kingdom.

Froissard's latest book is a testimony to the profound truth that, just as a good tree inevitably bears good fruit, so a genuine belief in Jesus Christ brings with it a passion for social justice. Froissard was one of the chief prosecution witnesses in the celebrated war crime trial of Klaus Barbie ("the butcher of Lyons") in 1986. Now he devotes an entire small volume to "crimes against humanity."

Two points made by Froissard are especially telling. First, he sees the defining mark of a crime against humanity in the fact that "one kills someone on the

sole pretext that he has come into this world." Illustrations: the Nazi treatment of the Jews, to be sure — but no less the slaughtering of the unborn through abortion-on-demand. Secondly, Froissard correlates the horror of our contemporary crimes against humanity (no century in the world's history has witnessed such slaughters as the 20th century has produced) with the rise of modern secular ideologies. The author holds quite simply that apart from a heart transformed by personal encounter with Jesus Christ, "everyone can become a Klaus Barbie."

John Warwick Montgomery

EDITOR'S NOTE

Simon Greenleaf School of Law welcomes scholarly contributions to the Law Review which seek to interrelate law, theology, and human rights. Manuscripts, reviews, and communications should be addressed to the co-editors.