II.

Rebuttal to a Skeptic

Boyd Pehrson

Introduction

My rebuttal here is directed to the response offered by Richard Packham[1] to my review[2] of his critique[3] of the legal apologetical method employed by Dr. John Warwick Montgomery. Richard Packham's arguments are sadly typical of an approach others have employed in critiquing evidential apologetics, namely, taking authors and sources out of context and building straw men therewith. It will be seen that, in attacking me, Packham merely reasserts his original arguments.

I have organized my response so as to treat the issues of credentials, ad hominem argumentation, hearsay, logical fallacy, and the miraculous. Using Packham's own references and resources, I reinvestigate the Ancient Documents Rule and its requirements concerning authentication, hearsay, and eyewitnesses—the topics Packham says I have treated deficiently. We shall see that Packham's response reveals even deeper problems than our prior analysis of his work demonstrated. It seems plain that he did not

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[1] *See* Richard Packham, *Response to Pehrson*. (2003) (personal webpage) *available at* http://home.teleport.com/~packham/pehrson.htm [hereinafter Packham, Response]

[2] *See* Boyd Pehrson, *How Not To Critique Legal Apologetics: A Lesson from a Skeptic's Internet Web Page Objections*, 3 *Global Journal of Classical Theology* (March 2002) *available at* http://www.trinitysem.edu/journal/pehrsonpap.html . [hereinafter Pehrson, How Not to Critique]

[3] *See* Richard Packham, *Critique of John Warwick Montgomery's Arguments for the Legal Evidence for Christianity* (2003) (personal webpage) *available at* http://home.teleport.com/~packham/montgmry.htm [hereinafter Packham, Critique]

learn from his initial mistakes. He takes arguments out of context and revises them rhetorically so as to tilt them in his favor. We regretfully conclude that Packham's critique of Legal Apologetics is self-discrediting at worst and mere sophistry at best.

My original review of Richard Packham's failed argument was directed in the first instance to the naive Christian apologists attempting to refute him. One Christian, in reply to Packham, merely accepted without question the atheist's unscholarly reaction to Dr. Montgomery's Legal Apologetics. That particular Christian advocate never questioned Packham's sources, logic, or appeal to personal experience. The Christian *defensor fidei* in question responded to Packham by posting a webpage of his own, under a pseudonym, attempting to support his conclusion that Legal Apologetics is "an anachronism." Thus, Packham's assertions of legal principle were taken at face value without any factual checking. That made it easy for Packham to ridicule what appeared to be Christian criticism of Legal Apologetics, thereby supporting his own diatribe against Christianity.

My analysis shows that Packham's problem lies, not with the use of legal principles in the defense of Christian faith, but with his own misunderstanding of those principles and their application to issues of religious truth. It is indeed truly remarkable that Packham has shown complete unawareness, to say nothing of appreciation, for the 2000-year-old

tradition of Apologetics in general, and for the 500-year-old tradition of Legal Apologetics.[4]

The question for our discussion in these pages is not: "Who is correct concerning Dr. Montgomery's legal apologetical method—Mr. Packham or Mr. Pehrson?" The proper question is: "Does Richard Packham establish and adequately support his arguments against Dr. Montgomery?" I earlier demonstrated the weaknesses of Packham's original critique; I shall here track Packham's continued scholarly declination as represented by his response to my review.

Credentials and Ad Hominem

Due to Packham's effort to wage an ad hominem attack against me, I must begin by treating the issue of credentials.[5]

Appeals to expert opinion and appeals to authority are proper and helpful when relevant to an argument. Regarding expert knowledge, such appeals, when unbiased and in

[4] Five hundred years by "modern" legal standards. Martin Luther, who was trained in law, treated Scripture as a record of objective fact. An excellent treatment on Luther's view of Scripture is found in John Warwick Montgomery's essay *Luther's Hermeneutic Versus the New Hermeneutic*: JOHN WARWICK MONTGOMERY, IN DEFENSE OF MARTIN LUTHER 40-85 (1970). In 1632, Hugo Grotius, the father of International Law, laid the groundwork for modern legal apologetics with his "De veritate religionis Christianae." *See* JURISPRUDENCE: A BOOK OF READINGS (John Warwick Montgomery ed., CILTPP 1974)

[5] I have been accused of resorting to ad hominem; yet I need not, nor did I intend to do so. Oxford Scholar and Archbishop Richard Whatley believed the use of ad hominem was only fallacious when it is used unfairly. For critical analysis of Whately's "The Sportsman's Rejoinder," *See* DOUGLAS WALTON, ARGUER'S POSITION: A PRAGMATIC STUDY OF AD HOMINEM ATTACK, CRITICISM, REFUTATION AND FALLACY 53-59 (1985)

context with no intent to mislead, are unquestionably useful.[6] Thus expert sources correctly offered in support of arguments are appropriate in Legal Apologetics.

Mr. Packham promotes himself as a retired, knowledgeable attorney:

> The statements of the rules of evidence that I have quoted are part and parcel of every attorney's everyday knowledge. We carry these rules around in our heads, just as the practitioner in any trade knows its basic facts without having to look them up. Any experienced attorney reading this will know what I mean. The astonishing thing to me is how anyone trained in the law, like Montgomery, can so greatly distort their meaning and their application.[7]

Thus Packham presents himself as an "experienced" lawyer—one who has the "everyday knowledge" of evidential rules which Dr. Montgomery "distorts." We are told by Packham that during his solo practice, and later when assisting at a small Roseburg, Oregon law office, he was "required almost daily to deal with the rules of evidence."[8] Therefore his observation, skills and knowledge of legal principles should show appropriate depth of understanding—*and the issue is whether they do or do not show this, not the nature of Packham's legal practice.* Interestingly, Dr. Montgomery, with four earned degrees in law, including the higher doctorate in law from Cardiff University and a record of cases argued successfully before the European Court of Human Rights, never presents his personal qualifications as an argument for accepting his views; he simply presents those views and the evidence for them.

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[6] DOUGLAS WALTON, LOGICAL DIALOGUE, GAMES AND FALLACIES, 40ff (1984)
[7] Packham, Critique, supra n.3
[8] Packham, Critique, supra n.3

Likewise, Packham reproaches me for not citing my credentials in support of my argument—though, remarkably, he says (in a rare moment of truth):

> [T]here is no indication of his [Pehrson's] legal background in the website where his article appears. Of course, it is irrelevant, but, then, my legal background should be irrelevant, as well.[9]

In point of fact, Richard Packham's credentials *have become relevant because he has integrated them into his critique of Dr. Montgomery*. He uses them, as we saw earlier, to give weight to his arguments. We shall clearly show where Packham has made blatant errors regarding his legal sources, casting doubt on his "expertise." The question then raises its head: Is Richard Packham grossly misinformed, is he careless, or is he merely engaged in not-so-clever anti-Christian sophistry? The lesson for the informed reader, once again, is that one should not accept, *prima facie, any* ideas or criticisms from foes of Christianity (or, for that matter, from its supporters) *without first checking the facts in context.*

Questioning My Credentials

During the several years since my article was published in the *Global Journal of Classical Theology*, a few letters to the Journal's editor raised the question as to whether my credentials were adequate for me to treat the subject of legal apologetics. But only one negative critique appeared on the scene--that of Richard Packham. No one, besides Mr. Packham, has offered any substantive criticism or specifically questioned the substance of any particular argument I presented.

The editors of the *Global Journal* never required me to present any personal biographical data or credentials as a basis for the publication of my article. This is not unusual, since acceptance or rejection of an article ought to depend squarely on the quality of the article. I did not offer my credentials, nor do I use them to support my arguments. My ideas and arguments stand or fall on their own merit. Apparently, the pursuit of genuine intellectual investigation and true scholarship is cherished at the *Global Journal*–as should be the case. In a well-known Old Testament passage, Balaam's ass offers a true word; the word is no less true coming from the mouth of a donkey!

Dr. Montgomery and Professor Simon Greenleaf have prodigious credentials and life achievements. That never gives Richard Packham a pause for reflection before characterizing those two fine scholars as gullible minds since "they are already believers." Packham resorts here to the classic logical fallacy of "poisoning the well." However, he evidently sees no problem in making a point of his own credentials! According to his web page autobiography,[10] Mr. Packham's area of expertise is that of a retired foreign language teacher at high school and college level. He earned his B.A. and M.A. in German. By his own admission, he washed out of his doctoral program in German. Later he earned the J.D., the American first degree in law studies.[11] He passed two bar exams,

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[9] Packham, Response, supra n.1

[10] *See* Richard Packham, *Autoboigraphy of Richard Packham* (1998) (personal webpage) *available at* http://home.teleport.com/~packham/bio2.htm

[11] The J.D., or Juris Doctor, is what used to be called the Bachelor of Laws (LL.B.) degree, which was its designation until about 1970. It is the basic law degree granted to everyone who graduates from a law school in the United States. *See* Black's Law Dictionary (1999). Packham claims to have earned a "Doctor

but he admits that he was never very successful at his law practice. Does this provide a solid foundation for his critical judgments in the realms of Jurisprudence, Historiography, Research Methods, Logic, Epistemology, and Theology?

In astonishing contrast—as we have already pointed out--Dr. Montgomery is eminently qualified to write on all the subjects he covers. Dr. Montgomery holds the basic law degree, the LL.B. (now called the J.D.) plus three additional advanced degrees in law, the MPhil in Law, the LL.M, and the rarely granted British LL.D. (bestowed on him by Cardiff University for the scholarship represented by the totality of his published books and articles in the legal field). Dr. Montgomery has been a distinguished graduate professor of law for thirty years. As a U.K. barrister-at-law and member of the Paris bar, he has won acclaim for victorious trials in the European Court of Human Rights, thereby securing religious freedoms for people in such diverse countries as Greece and Moldova. He holds over half a dozen advanced degrees in fields other than the law, including two other earned doctorates—the Ph.D. from the University of Chicago and the Doctorate in Theology from Strasbourg, France—all in the substantive areas employed in his defense of Christian faith (philosophy, classical languages, research methods, history, theology).

Richard Packham is unhappy with my synopsis of his on-again, off-again part-time work in law. He especially takes issue with the fact I did not reference a couple of years he was employed as a lawyer in a small office in Roseburg, Oregon:

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of Laws" degree, but this can only refer to his J.D., which is *not* an academic doctorate and does *not* permit

> One must ask: why would Pehrson overlook the most active years of my legal career? Was he so careless that he did not read it? Or is he so anxious to smear my credentials that he purposely omitted it? If he had some question, why would he not contact me to clarify or confirm?[12]

Packham is here implying that I neglected or covered up the fact that he was working as a lawyer under an attorney in Roseburg, Oregon from 1992-1994, after having been admitted to the Oregon State Bar--*prior to which he worked as a law clerk there.* These he calls his "most active years." He then "entirely" gave up law (for the second time) in 1995. In discussing Packham's claim to have practised law in Oregon, I did not say or imply that he had never been a lawyer there. But the distinction between being a licensed legal practitioner (an officer of the court) and a law clerk, who must not do more than assist a licensed attorney, is of considerable importance. It is interesting, to say the least, that Packham makes no distinction whatsoever between his work as a lawyer and his activity as a law clerk during the period in question:

> I practiced law for fifteen years, *the last five primarily in trial work and the preparation of appellate briefs*, where I was required almost daily to deal with the rules of evidence.[13]

If at anytime Packham "practiced law" though a mere law clerk and not a member of the State Bar, he was in violation of the rules of the Bar. Admittedly, in his autobiographical website he does mention being a law clerk during some of that same period of time. But if in saying he "practiced law" he is including his time as a law clerk (which would appear to be the case), then he is inflating his resumé—to say the least. In sum: Packham can blame only himself for any confusions relating to his curriculum vitae.

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one to use the title of "Dr."

[12] Packham, Response, supra n.1.

In his original critique of Dr. Montgomery, Packham never mentioned that he was a self-employed, part-time lawyer for the *majority* of his "legal career." Also, he never mentioned his work as a part-time legal clerk. This is precisely why I pointed out those facts and why I encouraged the reader to check Packham's autobiographical website for clarification. How can I possibly cover up anything when I ask readers to go to Packham's own published information?

Lessons Applied

Why have I gone to such lengths to discuss Packham's legal background? Because his essays belie his supposed expertise. In handling the Ancient Documents Rule and other legal issues relating to the case for Christianity, Packham has clearly evidenced a woeful lack of legal expertise. This disparity needs to be pointed up—if only because it was Packham himself who raised the credentials issue.

Obviously Packham wants others to think very highly of his expertise and training in law and to have confidence in his answers. Why then is Packham so upset that I directed readers to his autobiography? What he claims on his autobiographical website I take for the truth. I view Packham as innocent until factually proven guilty. So, I have merely re-iterated what Mr. Packham wrote about himself.

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[13] Packham, Response, supra n.1, *emphasis added*

We have noted that Packham fails to treat the writers of the New Testament with the same respect. He treats the information provided by the Gospel writers with disdain, suspicion and malice. He regards them as guilty until proven innocent! Packham fails (as usual) on a key legal principle: *Quisquis praesumitur bonus; et semper in dubiis pro reo repondendum,* i.e., "Everyone is presumed to be good, and doubtful cases should be resolved in favor of the accused."

Shadow of Doubt?

Packham presents Dr. Montgomery's position as follows:

> Montgomery's assertion, as quoted by Pehrson, is that Christian claims, after being subjected to "the most searching intellectual examination" will leave the honest and sincere investigator without even "a shadow of a doubt." Whether you can find "reasonable doubt" or a "shadow of a doubt" is, of course, up to you: you are the jury.
>
> Remember those standards as you read these arguments.[14]

Packham here ignores the context of Dr. Montgomery's statement. He takes the "shadow of doubt" reference out of context. I quoted from Dr. Montgomery's book *Faith Founded on Fact* where Dr. Montgomery speaks to *Christian believers* regarding their obligation to the non-Christian to distinguish clearly between empirical evidences and the subjective force of plain Scripture. Here is the original Montgomery quote:

> We must make clear to [unbelievers] beyond a shadow of a doubt that if they reject the Lord of Glory, it will be by willful refusal to accept his Grace, *not* because His Word is incapable of withstanding the most searching intellectual examination.[15]

[14] Packham, Response, supra n.1
[15] JOHN WARWICK MONTGOMERY, FAITH FOUNDED ON FACT, 42 (1978) *emphasis added*

The careful reader will observe that Dr. Montgomery is here expressly *warning Christians* that empirical evidences are *not* to be relied upon solely, and that the unbeliever still must wrestle directly with faith in God and His grace. In other words, Facts can't equal Faith. All Christians should know that without faith, it is impossible to please God. Did Mr. Packham misread the word "not" in that quotation?

An appeal to inductive exploration of the claims of Holy Scripture is not to say that unbelievers should be wrestled into the Faith through the brute force of reason. Dr. Montgomery could not have made this delicate balance clearer.

One would think that a critical appraisal of someone's work would include a solid effort to understand his or her meaning accurately, whether one agrees with the position or not. But straw men are easy to build.

Hearsay Again

Regarding a proper definition of hearsay evidence I wrote:

> Hearsay consists of any statements (written or oral) made outside of court and offered for their truth if the person who made them is unavailable to testify in court to that evidence. It is not hearsay if the opposing attorney has the opportunity to cross-examine the witness under oath, and if the jury can observe the demeanor of the witness.[16]

[16] Pehrson, How Not to Critique, supra n.2

Packham takes exception to my definition of the hearsay evidence rule:

> Pehrson does not indicate where he got this formulation of the rule, but it is incorrect. It is not what the person said outside of court that is the hearsay (what Y said), but the testimony of the person in court (X's report of Y's statement) that is hearsay. Furthermore, the second sentence is extremely misleading, because Pehrson is using the term "witness" to mean "declarant", that is, the person who really saw the events and who has the first-hand knowledge.[17]

Is my definition of the hearsay evidence rule truly incorrect, as Packham charges? My formulation of the rule is a composite from several standard sources:

> Hearsay is an out-of-court statement, written or oral, which is offered to prove the truth of the matter contained in the statement. Commentary on Fed. R. Evid. 801. (Supp. 2002)
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> "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Cal. Evid. Code § 1200 (Deering 2004)
>
> Finally, there is the rule against hearsay, which excludes out-of-court statements offered for their truth of the matter asserted. ROBERT P. BURNS, A THEORY OF THE TRIAL, 98 (1999)
>
> The definition of hearsay contained in Federal Rule of Evidence 801, quoted above, is affirmative in form; it says that an out-of-court assertion, offered to prove the truth of the matter asserted, is hearsay. McCormick on Evidence § 246, 730, (3rd ed. 1984)
>
> Generally speaking, hearsay may be defined as the repetition (or description) by a witness of an out-of-court statement (or writing or action) by another person (or occasionally by the witness himself) regarding the existence of a fact in issue when the statement is sought to be used to prove that fact. Civil Procedure Cases and Materials, 936 (5th ed. 1989)

[17] Packham, Response, supra n.1

> Hearsay evidence very simply defined is that of someone who is not present in court as a witness. MICHAEL ZANDER, CASES AND MATERIALS ON THE LEGAL SYSTEM, 334 (7th ed. 1996)

The reader will have no difficulty seeing that my concise definition squares precisely with the above-quoted legal authorities.

It is (again!) a straw man to criticize my statement of the rule by saying: "It is not what the person said outside of court that is the hearsay (what Y said), but the testimony of the person in court (X's report of Y's statement) that is hearsay." *Obviously,* we are not talking about out-of-court statements *presented out of court*; we are speaking about out-of-court statements made *in court, under oath,* and introduced *for the truth of their content.*

Packham criticizes me for not distinguishing "declarant" from "witness."[18] Does anything really turn on that semantic distinction here? But it is Packham who is imprecise. "X's report of Y's statement" may in fact be admissible evidence *that Y said something*—it may be admitted on the condition that *X is <u>not</u> offering it to prove the truth of Y's statement*. This is a critical distinction, for the fact that Y *said something* means that Y may need to be brought in to court to testify as to what he or she said (since X is in no position to do so). This is an essential, substantive element in understanding the hearsay rule, while the "declarant/witness" distinction is not.

[18] Interestingly, Packham himself, in setting out his own formulation of hearsay in his initial attack against Dr. Montgomery, didn't distinguish "declarant" from "witness". *See* Packham, Critique, supra n.3

I have to disabuse Packham of the notion that Dr. Montgomery has—or I have—ever maintained (as Packham puts the words in our mouths) that the hearsay rule is "outmoded or no longer applicable."[19] We have made the point again and again: "To be sure, *the underlying principle of the hearsay rule remains vital*: that a witness ought to testify 'of his own knowledge or observation…'"[20]

My original discussion on hearsay evidence was offered merely to demonstrate how Packham had the hearsay discussion wrong. At best he treated it superficially, especially when insisting, as he originally wrote, "no lawyer would attempt to introduce hearsay evidence in a trial." The pre-eminent scholar of trial practice Irving Younger disagrees with Packham, as I noted. When evidence labelled "hearsay" is shown to be subject to any of the enumerated exceptions to the hearsay rule, the label "inadmissible hearsay" is inapplicable. When ancient writings are deemed admissible by the Ancient Documents Rule, relevant evidence contained in them is no longer considered to be inadmissible hearsay.

I originally pointed to the general hearsay discussion in McCormick's standard hornbook on Evidence regarding citation of the case of *Moss* v. *FTC* (148 F. 2d 378). I used that McCormick on Evidence citation to demonstrate how admissibility of evidence is driven by logical relevance to the matters at hand in a case. If witnesses are unavailable for cross-examination, that fact in itself may well allow for the admission of what would

[19] Packham, Response, supra n.1
[20] John Warwick Montgomery, *The Jury Returns, A Juridical Defense of Christianity*, in EVIDENCE FOR FAITH, DECIDING THE GOD QUESTION 320 (1991) *emphasis added*

otherwise be regarded as hearsay. Packham responded with four complaints, which he says prove a lack of legal understanding on my part: 1) I did not properly cite the *Moss* decision in a way customary among lawyers; 2) the *Moss* decision is over 50 years old and such "old" decisions are only to be cited in rare or landmark cases or out of desperation; 3) the opinion of the judge in the case was not essential to determining the issues in the case, and not binding ("dicta")—the case was not conducted in a "regular court" with a jury (as Packham puts it); and 4) according to Packham, "the case was later reversed on appeal, on an issue other than the hearsay, at 155 Fed2d 1016."[21]

On all four of these points Packham is dead wrong. 1) I properly cited the case: Packham had no problem on the basis of my citation in locating the complete decision in the Federal Reporter. 2) The fact that the case is over fifty years old has no bearing on its relevance whatsoever, since the case has not been overruled (see below). Packham's idea that lawyers cite cases fifty years and older only in rare circumstances or out of desperation is ludicrous. Most of the classic English cases cited in American courts (such as those from the *Year Books*, Hale's *Pleas of the Crown*, or Coke's *King's Bench Reports*) precede the American Revolution; the leading case on strict liability in tort is the English case of *Fletcher* v. *Rylands* (1868) which is cited continually today in American courts. Relevance, not age, determines the value of a case. Wigmore on Evidence and American Jurisprudence (employed by Packham himself) routinely rely on cases one hundred to four hundred years old. 3) The opinion of the judge in *Moss* was central to the issues regarding proof of intention. This decision was binding, it set a strong precedent

[21] Packham, Response, supra n.1

regarding admissibility standards, and it was in fact decided within the standard legal system (administrative tribunals are a regular part of that system, as Packham well knows); the presence or absence of a jury is irrelevant. The Federal Trade Commission's orders were reviewed by the Second Circuit Court of Appeals—reported at 148 F. 2d 378 (2d Cir. 1945) (*Moss* v. *FTC*). 4) Packham is wrong when he says the case was reversed on appeal. *Moss* v. *FTC* was not reversed; it was in fact strengthened by the Second Circuit's decree; *see* 155 F.2d 1016 (2d Cir. 1946). The trial court decision was affirmed; only words clarifying and strengthening the original order of proof were added.

Packham tells his readers that he worked preparing "appellate briefs" while working during the years of 1992-1994 as a lawyer under an attorney in rural Roseburg, Oregon. Thus, at minimum, Packham should know how to read an appellate decision. Odd that here he appears to demonstrate the opposite.

The Ancient Documents Rule Revisited

1. Authentication

Packham reveals his unfamiliarity with the ancient documents rule:

> Pehrson conspicuously fails to explain how his formulation of the [hearsay] rule would help the hearsay problems inherent in the New Testament. Whom would Pehrson place on the witness stand? Luke? Mark? How would the opposing attorney cross-examine that witness? How would the jury be able to observe the witness' demeanor?[22]

[22] Packham, Response, supra n.1

The Federal Rules of Evidence (among countless legal authorities) tell us why there is an Ancient Documents Rule: it is to deal with the problem where *witnesses are dead or unavailable.* The law recognizes the fact that after some decades live testimony of the authenticity of a document becomes practically impossible to obtain. The law also recognizes that if a document has had a stable existence for twenty/thirty or more years in an appropriate location so that tampering with it is very unlikely, it deserves legal recognition. This does not automatically assure the value of the document (its reliability will still need to be established for the trier of fact), but *it will be admitted into evidence*: one cannot legally exclude it from evidential consideration.

Here the Federal Rules of Evidence (the notes of the Advisory Committee on Rule 801) offer a useful introduction. The Committee writes:

> …[T]he Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath; (2) in the personal presence of the trier of fact; and (3) subject to cross-examination. …The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. *No one advocates this position.* Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, *only clear folly would dictate an across-the-board policy of doing without.* The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.[23]

[23] FRE, 801 advisory comm. nn. (USCS, 1998) Emphasis added.

This bears directly on the matter of the impossibility of cross-examining the Gospel witnesses. The Ancient Documents Rule has as its very purpose the admission of documents satisfying its criteria where a foundation of live testimony is no longer possible. There is thus no way, based on general legal criteria or the Ancient Documents Rule, whereby Packham can exclude the Gospel evidences as "inadmissible hearsay."[24]

The current ancient documents rule in Federal Rule of Evidence 901 (8) states:

> Ancient documents or data compilation. Evidence that a document or data compilation, *in any form*, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and has been in existence 20 years or more at the time offered.[25]

Authentication of documents by circumstance is the reasoning behind the Ancient Documents Rule. A rationale for this approach can be found in McCormick on Evidence:

> § 222. …It is important to bear in mind, however, that authentication by circumstantial evidence is not limited to situations which fall within one of these [enumerated] recurrent patterns. Rather, proof of *any circumstances* which will support a finding that the writing is genuine will suffice to authenticate the writing.[26]

This is why the Evidence Code of the State of California establishes the exception for ancient documents when *they have been acted upon as true:*

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[24] Also well worth noting is the powerful argument by Professor F. F. Bruce of the University of Manchester that the presence of hostile witnesses to the life, ministry, and crucifixion of Jesus served as the *functional equivalent of cross-examination:* had the Gospel writers lied or mishandled the facts concerning Jesus, the Jewish religious leaders—with means, motive, and opportunity—would surely have destroyed their case.

[25] FRE 901(8)(a-b) (1998) *emphasis added*.

> § 1331 Recitals in ancient writings
> Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.[27]

This is echoed in the Evidence Code of the State of California at § 643,[28] Authenticity of Ancient Documents. Again, action upon, not signatures or originals, establishes an authentication. The actions of the writers of the New Testament, the Apostles, namely dying for their beliefs as being true, qualifies them as having acted upon their statements. And one must not forget that the astounding internal, external and bibliographical evidences for the New Testament documents offer corroboration going beyond anything available for the secular records of the classical world.

2. Copies of Ancient Documents

Packham complains that I did not face the implications of his citation of 7 Wigmore §2143, dealing with the authentication of copies of ancient documents:

> Pehrson also overlooks my citation to Wigmore's treatise on evidence, referring to copies of ancient documents (why does he overlook it?). I had written:
> "...The fact that they [the gospels] are copies of copies makes them inadmissible, as discussed at Wigmore, section 2143, where the general conclusion is reached that "...[copies] must fail [both] the custody and appearance test."[29]

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[26] McCormick on Evidence § 222 (a), 692 (3rd ed. 1984) *emphasis added*.

[27] Cal. Evid. Code §1331 (1984)
[28] *See* Presumptions and Inferences, Cal. Evid. Code §643 (1984)
[29] Packham, Response, supra n.1

Unfortunately for Packham, this section of Wigmore actually *supports* the use of copies in place of lost originals. 7 Wigmore §2143 (2) states:

> Where the alleged ancient *original* is *lost*, and an *ancient purporting copy* is offered, made by a private hand, the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule.[30]

3. Are Signatures Required?

What about Packham's repeated claim that signatures are required on Ancient Documents?

> Pehrson tries to find in Wigmore a way out of requiring a signature on a document.[31]

Once again: signatures are *not* one of the requirements of the Ancient Documents Rule. Packham fails to show *anywhere* that signatures are always legally required to authenticate such documents. He merely adds brackets to a citation from 29 AmJur 2d §1203, claiming that the section yet requires signatures on documents:

> Here I admit to an oversight. But my oversight was not in inventing something out of whole cloth. My oversight was in extending my summary from 29 AmJur 2d 1201 to include a statement from section 1203, which is on the following page:
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> "1203. Copies of ancient documents. Where the original of an ancient document is no longer in extistence, or has become so defaced as to be unintelligible, a copy or

[30] 7 Wigmore §2143 (2), (3rd ed. 1940) *Emphasis original*. The rules regarding copies are rules of preference not necessarily rules of exclusion. *See* FRE 1004, commentary, adv. comm. nn. (supp 2003); and McCormick, Evidence §237 (3rd ed. 1984).
[31] Packham, Response, supra n.1

> tracing of it, properly authenticated, may be admissible in evidence. However, there must be some proof of the execution of the original." ["execution" when referring to a document means signing the document by the person writing it - RP][32]

Packham wrongly asserts that "proof of execution" in 29 AmJur 2d §1203 means that signatures are required. However, the words "proof of execution" there mean "acted upon." We know this by the footnote given in that section. This footnote points to a specific case, *Schunior* v *Russell* 83 Tex 83, 18 SW 484, regarding "proof of execution." In this case it was *possession not signatures* that proved execution. Thus proof of execution in 29 AmJur 2d §1203, means to "carry into effect" or to "act upon" as supported, and intended to be understood by the author. Now proof of execution *may* be by signature, but signatures are *not required.* Observe, again, the wording of 29 AmJur 2d §1203—particularly the word "some" in the last line:

> Copies of ancient documents. Where the original of an ancient document is no longer in existence, or has become so defaced as to be unintelligible, a copy or tracing of it, properly authenticated, may be admissible in evidence. However, there must be *some* proof of the execution of the original.[33]

The following sections of 29 AmJur 2d, §1204 and §1205 tell how "proper custody" and "corroborating circumstances" may suffice to admit ancient documents without "proof of authenticity." In Legal Apologetics, "proper custody" means that the Gospels were preserved by the early church and its successor institutions, having been carefully maintained and copied by proper custodians and acted upon as true by their original authors and by successive generations of believers for two thousand years. The legal

[32] Packham, Response, supra n.1

notion of "corroborating circumstances" thus applies to these documents—the Apostles dying for the truth of what they and their colleagues had written on the basis of firsthand contact with Jesus, His ministry, His death, and His resurrection.

4. Originals

What about Packham's assertions that originals are always required? Four exceptions to producing the original are enumerated under Federal Rule of Evidence 1004:

> Admissibility of Other Evidence of Contents. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if- (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.

The three remaining exceptions in FRE 1004 (2-4) are for originals that are in existence, yet unobtainable. So, as we see the originals are *not required*.

The commentary on Rule 1004 included in the United States Code provides the legal reasoning as to why originals are not required in some cases:

> Rule 1004 recognizes that the Best Evidence Rule is a rule of preference, not necessarily a rule of exclusion. Rule 1004 (1) states that one excuse for the failure to produce the original of a writing or recording is its destruction or loss through no wrongdoing on the part of the proponent of the evidence. Under these circumstances, secondary evidence can be used to prove the contents of the document.[34]

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[33] 29 AmJur 2d §1203 (1962) *emphasis added*.
[34] FRE 1004, commentary, adv. comm. nn. (1998)

Notably, the rest of the commentary demands that copies are subject to the same legal requirements as the original (treating secondary evidence in place of the original). The commentary continues:

> One of the most significant things about Rule 1004 is that it recognizes no degrees of secondary evidence. According to the Advisory Committee, strict logic might call for extending the principle of preference beyond the original, but development of a proper hierarchy of preferences is too complex. Thus, if secondary evidence is admissible in lieu of the original, the proponent can offer *any kind* of proof on the point.[35]

We see that originals are preferred in law, but not required under circumstances of loss or unavailability. It should be obvious that most of the documents of antiquity are not "signed"! For Packham to demand that Christians produce original manuscripts signed by the four Evangelists is absurd. As a lawyer—in practice or retired—he should understand the Best Evidence principle.

McCormick on Evidence provides further clarification of the issue:

> §237. Excuses for Nonproduction of the Original Writing: (a) Loss or Destruction The production-of-documents rule is principally aimed, not at securing a writing at all hazards in every instance, but at securing the best obtainable evidence of its contents. Thus, if as a practical matter the document cannot be produced because it has been lost or destroyed, the production of the original is excused and *other evidence of its contents becomes admissible*. Failure to recognize this qualification of the basic rule would in many instances mean a return to the bygone and unlamented days in which to lose one's paper was to lose one's right.[36]

[35] FRE, 1004 (1998). See commentary, adv. comm. nn 630-633, *emphasis added*
[36] McCormick on Evidence §237, 714ff (3rd ed. 1984) *emphasis added*

5. Eyewitnesses

On the matter of the eyewitness nature of the Gospel accounts, Packham attacks me, and Legal Apologetics in general:

> Pehrson here simply repeats Montgomery and completely ignores the points I made in my original article, that the gospel authors do NOT "claim to be providing eyewitness accounts" - that claim is conspicuously lacking in their accounts. Perhaps this is a good example of the "big lie" technique: if apologists insist often enough that the gospels are "eye-witness accounts" then the gullible will eventually accept that as the truth.[37]

Packham is simply wrong when he says the Gospel writers do not claim to be eyewitnesses. When the Sanhedrin leadership commanded Peter and John to stop preaching, they replied that they "cannot but speak the things we have *seen and heard.*" The Sanhedrin threatened punishment, but couldn't find any reason to do so, for the people believed John and Peter.[38] Paul was arrested and tried before Festus and King Agrippa and the company of the chief priests. Paul told King Agrippa that the King must already knew what Paul had been talking about regarding Jesus and his resurrection: "The King knows of these things . . . None of these things are hidden from him, for this thing was not done in a corner." Agrippa concluded that Paul was indeed innocent.[39] The New Testament book of I John is widely considered to be written by the Apostle John himself, and here we find, at the beginning, the eyewitness principle (the "we" referring to the other Apostles who preached Christ and His resurrection):

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[37] Packham, Response, supra n.1
[38] Acts 4:20-21, KJV
[39] Acts 26: 26-32, KJV

> That which was from the beginning, which we have heard, which we have seen with our eyes, which we have looked upon and our hands have handled, of the Word of Life; (for the life was manifested, and we have seen it, and bear witness, and show unto you that eternal life, which was with the Father, and was manifested unto us;) That which we have seen and heard declare we unto you, that ye may also have fellowship with us: and truly our fellowship is with the Father, and with his Son Jesus Christ. And these things write we unto you that your joy may be full.[40]

Writers of the New Testament therefore do in fact claim to be providing eyewitness accounts. And even when they do not, they assert unequivocally that they are relying on firsthand investigations they have made and on sources they themselves have authenticated (Luke 1:1-4).

A valuable insight on New Testament eyewitness integrity can be obtained from the careful approach of an eminent legal scholar, the late Sir Norman Anderson, while Director of the Institute of Advanced Legal Studies of the University of London, wrote on the topic of the reliability of the New Testament evidence. In his book *A Lawyer Among the Theologians*, Dr. Anderson noted the remarkable eyewitness character of the New Testament narratives. From a lawyer's standpoint, he took the liberal theologians employing so-called "higher critical" method to task for the subjectivity of their attempts to dismember the New Testament writings. His conclusions warrant much reflection:

> It is in light of an examination of the available evidence along these lines, in as objective and critical way as I am capable of, that I am convinced that the historical reliability of a great part of the life and teaching of Jesus can be substantiated by the most rigorous historical and critical analysis. Nor can I believe that the interval between the events and the emergence of the Gospels was nearly long enough for the processes postulated by the more extreme Form Critics

[40] I John 1:1-4, KJV

> to have taken place- or, indeed, that these processes would not have been kept in constant check by the presence of eye-witnesses and the authority accorded to the apostolic tradition. …To the best of my ability I try to examine the evidence as a whole without imposing on that evidence my preconceived ideas; and it is the weight of that evidence, where it can be objectively tested, which leads me to certain conclusions which make it reasonable, as I see it, to accept the substantial accuracy of the records in those other points in which a similarly stringent objective corroboration is not available. And this, it seems to me, is an authentically "legal" approach.[41]

Anderson then made a detailed critical examination of the accounts of the resurrection of Jesus Christ and assessed the various hypothetical objections to these Gospel narratives. His judgment? "Frankly, I myself find the evidence for the resurrection completely convincing."[42] He concludes that the Gospel narratives are reliable historical records of the resurrection of Jesus—that they withstand the full weight of the law of evidence.[43]

Legal Problems with the Miraculous?

Packham offers a rather amusing criticism in light of our efforts to stick to historical facts and solid testimonial reporting:

> One more comment about Pehrson's objection to my "conjectures." It is quite astonishing that Pehrson finds my conjectures improper, and yet he and Montgomery offer quite wild conjectures, and expect the reader to accept them as proven.[44]

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[41] NORMAN ANDERSON, LAWYER AMONG THE THEOLOGIANS 63ff (1974)
[42] *Id.* at 37
[43] *Id.* at 66-195.
[44] Packham, Response, supra n.1

In point of fact, Dr. Montgomery appears to bend over backwards in providing proper citations to all his references, permitting his readers to inspect the use of his sources in context. We wish that Packham had done the same!

The late Rylands Professor of Biblical Criticism and Exegesis at the University of Manchester, Dr. F.F. Bruce,[45] as well as the great biblical archaeologist and New Testament scholar Sir William Ramsay, support Dr. Montgomery's position on the reliability of New Testament writings. Simon Greenleaf, the great 19th-century authority on Common Law Evidence, whom John Henry Wigmore extensively relied upon, [46] does the same. Other authorities include Oxford historian A.N. Sherwin White, and Lord Hailsham of St. Marylebone.

Apparently, Packham, as a dogmatic rationalist, means by "wild conjectures" the fact that we accept the facticity of miracles in the Gospel narratives:

> Furthermore, as I stated in my original article, the very laws of evidence which Montgomery and Pehrson are calling upon also tell us that we are free to disregard witnesses who testify to miracles. I cited there 81 AmJur 2d "Evidence" section 1037, and I will repeat it here:
>
> "Where an unimpeached witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited... But there may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made..."

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[45] *See* F.F. BRUCE, NEW TESTAMENT DOCUMENTS: ARE THEY RELIABLE? (1959) *also available at:* http://www.worldinvisible.com/library/ffbruce/ntdocrli/ntdocont.htm

[46] Interesting to note is the fact that Packham attempts to use Wigmore on Evidence in support of his own position—over against Simon Greenleaf (and JW Montgomery). John Henry Wigmore, though not a church person, revered Simon Greenleaf, basing his own treatment of the laws of evidence, used to this day, on Greenleaf's classic survey of the subject. Indeed, Wigmore edited and annotated the 16th edition of Greenleaf's *Evidence*.

> Thus, it is not simply a quirk of mine and of my fellow non-believers. Here we have it, as a statement of the law, that claims of resurrections, virgin births, ascensions into heaven, can be disregarded.[47]

Is Packham's citation and reading of 81 Am Jur 2d §1037 correct? Does it really free us to disbelieve all miracles *a priori*? Let us begin by reading the full citation:

> §1037. –Testimony in opposition to presumption. Where an unimpeached witness testifies distinctly and positively to a fact, and is uncontradicted, his testimony should be credited *if it has the effect of overcoming mere presumption*. But, there may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made; and the court or the jury may disregard the testimony of an interested witness, as against a presumption, *if the latter satisfies them*. This view applies in cases giving rise to a presumption of negligence, and a presumption arising from the fact of ownership or possession, or from an instrument or the recitals therein.

Now the reader can see what Packham left out of this section, namely "*the court or the jury may disregard the testimony of an interested witness, as against a presumption, if the latter satisfies them.*" What Packham has left out is critical to understanding the reasoning of §1037. This section actually deals with the legal principle *Res ipsa loquitur*, that is, "evidence that speaks for itself,"[48] with legal presumption, and with the weight of testimony offered against it.[49] Example: apparent negligence in aviation safety. If one travels on an airplane, and the wheels fall off during landing resulting in the death of passengers or of those on the ground, the presumption is that the airplane wheels failed because of a neglect of proper maintenance. If the maintenance supervisor provides

[47] Packham, Response, supra n.1
[48] *See* Black's Law Dictionary (1999)
[49] 81 AmJur 2d §1037 cites the cases of: Elwood v Western Union Tel. Co., 45 NY 549; quoted with approval Keene v Behan, 40 Wash 505, 82 P 884; and Adams v Hopkins, 144 Cal 19, 77 P 712.

sufficient evidence that proper maintenance was performed on the aircraft, then that may be sufficient to override the presumption of negligence. However if the supervisor offers little or no evidence, or evidence having "such a degree of improbability" as to be "deprived of credit," the court or jury may properly decide that the presumption of negligence, *Res ipsa loquitur*, should carry the day.[50]

This cited section from American Jurisprudence in no way relieves the court or the jury from dealing with evidence presented to it. The section and the evidential presumption it discusses still demands a judgment in favour of *the greater weight of evidence presented.* It follows that *the issue of the miraculous must still be decided on a case-by-case basis.*

In a relativistic, Einsteinian universe, neither Packham nor anyone else can exclude miracle evidence per se. And no one has a sufficient knowledge of the cosmos to argue that because, in general, people who die stay dead this must have been the case with Jesus. David Hume's 18th-century, Newtonian arguments against miracle evidence have been discredited by philosopher John Earman and others. The question of the resurrection turns out to be simply a question as to whether one is willing to shelve one's rationalistic prejudices and pay attention to the testimony of reliable witnesses to the empty tomb on Easter morning and the physical appearance of Jesus to over five hundred witnesses over the next forty days (I Cor. 15).

A Point of Logic and a Concluding Appeal

[50] 81 AmJur 2d §1037 cites the case of: Gulf, C.& S.F.R. Co. v Dunman (Tex Comm App) 27S.W.2d 116

Packham claims that I am guilty of fallacious logic, and to prove it devises a false deductive syllogism which allegedly represents our Legal Apologetic:

> Pehrson, Montgomery and Clifford all stress that the Gospels are "historical." This is another example of the "big lie" technique. If you say it often enough ("the Gospels are historical! the Gospels are historical!) like a mantra, it soon will be believed. I dealt with this problem in my original article, where I said:
>
> This "historical authenticity" argument is based on a great fallacy. It is a favorite argument of Christian apologists. The logic goes like this:
> -The gospels make many statements of fact that are confirmed as historically and geographically accurate by other sources (dates of reigns of rulers, locations of towns, details of cultural events, etc.)
> -Therefore other statements of alleged fact are likely to be accurate (Jesus was resurrected, Mary was a virgin, Jesus ascended into heaven, etc.)
>
> First, there is no rule of evidence which says that we must accept uncorroborated evidence because it comes from the same source as other evidence which has been corroborated.[51]

In reality, this is not what Legal Apologetics is doing at all. We are engaged in inductive reasoning, not presenting a formal, deductive argument. The case for the Gospels *as a whole* is built up by way of internal, external and bibliographical tests. Packham has never informed us of the criteria he uses for accepting some facts in the Gospels ("dates of the reigns of rulers, locations of towns, details of cultural events"?) while rejecting others ("Jesus was resurrected, Mary was a virgin, Jesus ascended into heaven"?)—even though *all of these events are recorded by the same writers and witnesses.* If Packham is saying that he rejects out of hand the miraculous material, that is tantamount to admitting that he is a dogmatic rationalist who knows more about the universe and its possibilities

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(1930); 72 ALR 90. (1930)

than the rest of us. If he is saying that he goes with the "higher critics," which one(s) and why? (The Jesus Seminar, having swallowed a gigantic dose of subjectivity by trying to determine New Testament authorship questions by stylistic analysis, *votes* on the reliability of Gospel materials by the use of colored balls!)

Packham would like to class the New Testament's claims about Jesus with religious claims in general, thereby removing them from factual testing. But the New Testament documents and the New Testament witnesses will have none of it. "We," they say, "have not followed cunningly devised myths when we made known to you the power and coming of our Lord Jesus Christ, but were eyewitnesses of His majesty" (2 Peter 1:16).

Perhaps the saddest commentary on all this is to be found in the last lines of Packham's website autobiography. As we have seen, he has every sort of trouble with the New Testament claims to facticity and historicity, but apparently has no trouble at all with baseless claims to *reincarnation*:

> I believe that the evidence is very strong that we have lived many lives before this one, and will probably live many lives more.[52]

Yet, the New Testament informs us in no uncertain terms that "it is appointed unto men *once* to die, but after this the Judgment: so Christ was once offered to bear the sins of many; and unto them that look for him shall he appear the second time without sin unto salvation" (Hebrews 9:27-28). We implore Mr Packham to take that coming Judgment

[51] Packham, Response, supra n.1

seriously and to rely, while there is still time, on the One who loved him and died for him. On that Last Day we shall all need good representation, and "the man who serves as his own lawyer has a fool for a client." The only satisfactory Counsel at the Last Assize is the Lord Jesus Christ, described quite properly by those who knew Him as "Christ our Advocate" (1 John 2:1-2).

Appendix

Do I exist?

Mr. Packham complains bitterly because, he says, I never sought contact with him before publishing my rejoinder to his web page critiques. But I did in fact contact Mr. Packham, and we had a brief and somewhat cordial e-mail correspondence regarding my objections to his writings. Mr. Packham finally brushed aside my concerns. He told me he didn't want to continue correspondence, stating that what he had written would stay posted and readers could decide for themselves what is right.[53] Mr. Packham then seemed to have forgotten all about me until I posted my objections by way of my *Global Journal* article--and now he seems to wonder who Boyd Pehrson is (did Dr. Montgomery somehow make him up?)![54]

A Personal Letter from Richard Packham to Boyd Pehrson

At 05:50 PM 7/17/00 –0700 Richard Packham <packham@teleport.com > wrote:

> >...[snip]...
> > The next e-mail "Part 2" is on its way....
> >
> I looked at your explanations and excuses, and, - I'm sorry - but they're

[52] Packham, Autobiography, supra n.10
[53] Packham's final missive to me is reprinted below, in the second section of this Appendix.
[54] I take this as a high compliment. No, I am not a figment of Montgomery's imagination!

> pretty lame. Only a gullible already-believer would accept them and be
> convinced, I think.
>
> Don't waste time on me. My material will remain on the web, people will
> see it, and they will be able to make up their own minds.
>
> Richard[55]

[55] E-Mail from Richard Packham (July 17th 2000), in final reply to my detailed objections to his Critique of Dr. John Warwick Montgomery's Legal Apologetic, as posted on his website.