

The Unity of Law and Religion: A Response to Ackroyd and Vining

by Joseph Allegretti*

When Professor Jack Sammons first called and told me about this symposium, I was honored and excited about the prospect of being a participant. But as I hung up the phone after talking to Jack, I suffered a moment of disorientation. My scribbled notes from our conversation read, “What can law offer theology?”

That wasn’t right, was it? I must have heard Jack wrong. Wasn’t it supposed to be the other way around—weren’t we going to discuss what theology and religion could contribute to the study of law and legal practice?

Remember the Mod Squad, the TV show with three heroes, “one white, one blonde, one black”? When I talked to Jack, I immediately jumped to the conclusion that this conference was going to be the academic equivalent of the Mod Squad—the first speaker would probably give a Jewish perspective on the practice of law, followed by a Christian perspective, and topped off with a Muslim or Buddhist perspective.

But then I realized that my notes were correct. Jack was serious. He wanted to approach the relationship between law and theology from the other side: What could law and legal practice contribute to theology? What could theologians learn from lawyers?

I’d like to pause here a moment. Why did I instinctively assume that this symposium would focus on the movement from theology to law and not from law to theology? Why did I take it for granted that theology must be the teacher and law the student? The reason is simple: *Because that’s the only way I had ever thought about the relationship between law and theology.*

* Douglas T. Hickey Professor of Business, Siena College. Colgate University (B.A., 1974); Harvard Law School (J.D., 1977); Yale Divinity School (M. Div., 1989). Author: *The Lawyer’s Calling: Christian Faith and Legal Practice* (1996); *Loving Your Job, Finding your Passion: Work and the Spiritual Life* (2000).

I think it might be useful to describe my usual way of approaching questions about law and theology. I suspect there are lessons here for this conference. By proceeding in this roundabout way, I hope to make it clear why I consider the works of Peter Ackroyd and Professor Joseph Vining to be so significant. As you'll see, I believe that they are laying the groundwork for a new and productive way of thinking about the relationship between theology and law.

My scholarly work deals with the relationship between religion and legal ethics. Because I am a Christian and write as a Christian, I gravitate towards questions such as: What are the implications of Christianity for the world of work and especially the world of lawyering? How can I balance my duties to God with my duties to courts and clients? How can I be both a good Christian and a good lawyer?

Notice that by posing questions such as these, I am presupposing a split or division between what Christian lawyers profess on Sunday and what they do on Monday. For example, in my book, *The Lawyer's Calling*, I find evidence of a spiritual crisis afflicting lawyers and the legal profession—lawyers increasingly are “disillusioned with their work, unhappy with their lifestyle, and doubtful about the wisdom of their career choice.”¹ I argue that this crisis is occurring because many lawyers are experiencing a tension between their personal religious values and their professional values. This leads them to separate their life into private and public spheres and relegate religion to the former. Religion and personal values then become irrelevant to the workplace. As a result, too many lawyers are living a schizophrenic life—they are one person at home and a different person in the office.

What's the solution to this problem? If lawyers are facing a spiritual crisis caused by a split between their personal and professional values, then the solution must be some sort of bridge between the two. I write, “There can be no cure for the malaise afflicting the legal profession unless and until individual lawyers and the profession as a whole begin to break down the walls that have separated work from faith, and approach the practice of law as an integral part of the spiritual journey.”²

Typically, my next step is to turn to theology and religion for help in bridging this gap. In some of my writings, I urge lawyers to read and reflect upon relevant passages in Scripture: the story of Solomon and the two harlots, the prophetic challenges of Amos and Isaiah and Jeremiah, the teachings of Jesus at the Sermon on the Mount, the parables of the

1. JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 4 (1996).

2. *Id.*

Good Samaritan and the Last Judgment, the epistles of Paul. I look to theologians like Aquinas, Luther, and Calvin. I recommend certain papal encyclicals and pastoral letters on work and the economy. I even suggest that lawyers watch the movie *A Man for All Seasons*. (Now I can add a recommendation that they read Mr. Ackroyd's biography of Thomas More.)

Sometimes, when pride gets the better of me, I go further and propose a number of ways to reconceptualize the practice of law. I argue that Christian lawyers should envision their relationship with clients as a *covenant* and not just a contract. I encourage them to approach litigation as a *healing ministry*—an instrument of reconciliation—rather than a gunfight at the O.K. Corral. My hope is that some or all of my efforts will help lawyers reconnect their faith and their work.

It's a humbling realization, but I can see now that my entire body of work is reducible to two words—I have been fighting a disease called *compartmentalization* with a treatment called *integration*. Lawyers should break down the pigeonholes that divide their life into compartments labeled "work," "faith," and "family." They should recognize that the God they worship on Sunday is the same God they serve on Monday. The various correctives I propose—a bit of Amos, a touch of Paul, a look at H. Richard Niebuhr—are only different ways to achieve the same end of integrating faith and work. In my approach, the relationship between law and theology has been markedly one-sided: I've considered law and lawyering the *problem*, with religion and theology the *solution*.

Now comes a sobering thought for an academic: *Maybe I've been doing this all wrong. Maybe I've been presuming a gap that doesn't really exist.* The life of Thomas More stands as a direct challenge to my way of proceeding. As I read Peter Ackroyd's wonderful biography, and heard him speak, it became painfully obvious that More had a completely different way of seeing the world and the relationship between law and theology. For More, there was no gap between law and religion. Both "were visible aspects of the same spiritual reality."³ As Mr. Ackroyd writes:

Religion and law were not to be considered separately; they implied one another. That is why law was considered to be perfect in itself, undamaged by the bad judgments of individual practitioners; the same argument, on the merits of the Mass as opposed to the virtue of the priest who offered it, was at the heart of Catholic eucharistic belief. That is why the law was also considered to be permanent; it was what was known to be true, withstanding change or decay That is why

3. PETER ACKROYD, *THE LIFE OF THOMAS MORE* 62 (1998).

it is misleading to separate "social" from "political," "legal" or "religious" matters in this period; they represent the same central concern of fallen man, which lay in understanding and organising his temporary sojourn upon the earth.⁴

As a result, More "wrote about the law in precisely the same way he described the Church. There was, for him, no essential or necessary difference."⁵ More experienced no split between private and public, sacred and profane, personal values and professional values. He lived in both worlds, equally at home. To be a good lawyer was his way of being a good Christian in the world. Mr. Ackroyd reminds us that More was "condemned for acting like a lawyer and, at the trial itself, he was also convicted for maintaining traditional law. He embodied law all his life, and he died for it."⁶ Yes, More died for the law—but when he died for the law, he was dying for his faith as well.

I doubt if More could even begin to fathom the post-Enlightenment world that we inhabit—a world which posits a rigid distinction between the secular and the sacred, often privatizes religion and bars it from the public square, and tempts legal ethics scholars to bemoan a so-called gap between lawyers' personal values and professional values.

And so I ask myself: What if this gap I've assumed doesn't exist or doesn't have to exist? What would that mean for my work? If there is no gap between the realms of faith and work, then legal practice need not be seen as a problem for which theology is the solution. The relationship doesn't have to be so one-sided. Now the movement can be in either direction. Better yet, I can stop using such misleading language altogether. I don't have to talk about movement between the two realms, for law and theology are not separate realms at all. As theologian Elizabeth Dreyer reminds us, "Gradually[,] we are learning that to be a good plumber, truck driver, nurse, or janitor is the way to be a good Christian."⁷ More, I trust, would say the same thing about lawyers.

Of course, More's vision of the unity of law and religion has its own problems. Is such a view antithetical to religious and political liberty? Will those who accept More's view be tempted to use the power of the law to enforce their religious beliefs? Will they demonize those who disagree with them as More demonized Martin Luther? This is a complex problem and deserves more attention than I can give it here. But Professor Michael McConnell provides a helpful way to begin

4. *Id.* at 63.

5. *Id.*

6. *Id.* at 400.

7. Elizabeth Dreyer, *Toward a Spirituality of Work*, 2 NEW THEOLOGY REV. 58 (1989).

thinking about the problem. McConnell argues that liberalism actually finds strong support in Christian doctrine. The ideas of original sin, separation of church and state (which, of course, does not imply the separation of the sacred and secular), the primacy of conscience, the fundamental equality of all humankind—these doctrines, which are found in Christianity, support and undergird liberal democracy.⁸ Unfortunately, Christians have not always been true to these core values. Nevertheless, McConnell's argument suggests that it is possible to affirm the unity of the sacred and profane, as More did, without feeling obligated, as More did, to hunt down and persecute religious rivals.

But there's another problem with More's view. To put it bluntly, how realistic is this talk of the unity of religion and law? We live in a pluralistic society and a political democracy. We embrace freedom of conscience and separation of church and state. We couldn't go back to More's time even if we wanted to, and we don't. Living in this time and place, how can we nurture a vision of the law as embodying spiritual values? Is it even possible to regard the practice of law as a spiritual discipline?

I'm not sure. But if we aspire to recapture a bit of More's sense of the unity of law and religion, we could do no better than take Professor Joseph Vining's comments as our starting point. What, he asks, is the implicit theology in the practice of law? What are the points of convergence between theology and law?

Professor Vining identifies a number of points of common interest. For example, both law and theology are interested in texts and the interpretation of texts. Both struggle with the distinction between the spirit and the letter. In theology we must decide whether to take a literal approach to interpreting Scripture or adopt the historical-critical method. In law we must decide whether to read the Constitution as a strict constructionist or a contextualist. As Professor Vining also points out, neither theology nor law is reducible to questions of process. He says, "Certainly legal and theological practice and analysis are open-ended, and thus continuing, and thus in process. Nonetheless they have a substantive object, however variously described. They are not even merely worlds of 'practice.'"⁹ For both law and theology, this substance, this something more, can be described as a person. Both recognize the

8. MICHAEL W. MCCONNELL, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 5-24 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella, eds., 2001).

9. Joseph Vining, *Is there an Implicit Theology in the Practice of Ordinary Law?*, 53 MERCER L. REV. 1047, 1049 (2002).

unique value of persons and both are concerned about the connections between persons. Both theology and law assert that we become authentic persons in our relationships with each other. Both would agree with philosopher Martin Buber when he says, "In the beginning is the relation."¹⁰ Law and theology, then, share an interest in creation—how and why do we become the persons we are? Furthermore, both law and theology deal with time in a similar way—past, present, and future are not easily separated, but are inextricably entangled. Both law and theology allow for what Professor Vining calls "an easy and pervasive transcendence of time."¹¹ Law deals with precedents, past and future facts, prospective laws and ex post facto laws; theology recognizes that *chronos* (clock-time) is not the same as *kairos* (God-time).

Professor Vining's thoughtful analysis brings to mind the pioneering work of law professor Harold Berman. In an early book on law and religion, Berman explores the complex interactions between the two spheres of life.¹² There is an irreducible tension between law and religion, says Berman. Religion challenges the deification of law and all other social systems, while a secular legal system guards against the politicization of religion.¹³ At the same time, however, "each is also a dimension of the other. A society's beliefs in an ultimate transcendent purpose will certainly be manifested in its processes of social ordering, and its processes of social ordering will likewise be manifested in its sense of an ultimate purpose."¹⁴ Law and religion depend upon each other. Berman observes:

But even in those societies which make a sharp distinction between law and religion, the two need each other—law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect. Where they are divorced from each other, law tends to degenerate into legalism and religion into religiosity.¹⁵

As Professor Berman reminds us, law and religion need each other. But it is not enough to recognize the interrelatedness of the two fields of inquiry. Professor Vining challenges us to take the more difficult but rewarding step of exploring the basic presuppositions of law and theology. What can each learn from the other? If law has an implicit

10. MARTIN BUBER, I AND THOU 18 (Ronald Gregor Smith, trans., Charles Scribner's Sons, 2d ed. 1958).

11. Vining, *supra* note 9, at 1050.

12. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974).

13. *Id.* at 136.

14. *Id.* at 24.

15. *Id.* at 24-25.

theology, what is theology's implicit jurisprudence? What habits of mind do each cultivate, what virtues and excellences, and what do these imply for the other?

Let me give one example of how we might proceed. Recently I was reading John Calvin's masterful exegesis of I *Corinthians* 6, a passage where St. Paul criticizes Christians who resort to the secular legal system.¹⁶ Calvin, who was trained as a lawyer, reads Paul seriously but not literally. Calvin argues that Paul was responding to a particular problem that plagued the community at Corinth, not laying down an absolute rule against all litigation.¹⁷ But that does not make Paul's words irrelevant to Christians living in other times and places. All Christians are called to love one another and to suffer wrongs patiently. Litigation fractures the community, impairs the bonds of love that should unite believers, belies the teachings of Jesus, and breeds vices such as greed and revenge. For all these reasons, litigation should be viewed as a last resort. Calvin's conclusion is lawyerly in the best sense of the word—a lawsuit can be undertaken—but only if it can be prosecuted without violating the fundamental command to love God and neighbor.¹⁸

Like More, Calvin envisions law and theology as a unity. He is a lawyer doing theology, a theologian doing law. As I read Calvin's exegesis of Paul, I cannot determine the precise point where his theology leaves off and his jurisprudence begins. But that is the point: Calvin embodies the common presuppositions of law and theology that Professor Vining identifies. For Calvin, like More, law and theology are aspects of one all-inclusive spiritual realm.¹⁹ We can learn much from studying Calvin—and other thinkers like Reinhold Niebuhr—whose work combines sensitivity to both theological and legal concerns.

Of course, there is another way that law and theology must converge. Recall Peter Ackroyd's observation that law and religion could not be neatly separated for More because "they represent the same central concern of fallen man, which lay in understanding and organising his temporary sojourn upon the earth."²⁰ Both law and theology are concerned with human beings living together in community. Both are interested in how to organize society to encourage human flourishing. In other words, both law and theology are committed to the search for

16. See Joseph Allegretti, "In All This Love Will Be The Best Guide": John Calvin on the Christian's Resort to the Secular Legal System, 9 J.L. & RELIGION 1 (1991).

17. *Id.* at 9.

18. *Id.* at 6.

19. See *id.* at 13.

20. ACKROYD, *supra* note 3, at 63.

justice. Ultimately, the holy is the just, and the just partakes of the holy.²¹ Perhaps this is so obvious that it need not be mentioned, but I doubt it.

Once again, my natural inclination has been to look to religion for what it can teach law and lawyers about justice. In *The Lawyer's Calling*, for example, I accept the common (if simplistic) notion of law as being more concerned with procedural justice than substantive justice, more concerned with *how* a result is reached than with *what* result is reached.²² Biblical justice, I argue, goes beyond this concern for rules and procedures: "Biblical justice thus transcends a narrow concern for rights and procedures and includes a loving concern for the other. In the Bible, the just society *is* the loving society. Justice is the instrument of love and love the root of justice."²³ As Judge John Noonan puts it, "Justice to persons, . . . may be identified with love—an active service to another, who is loved."²⁴

The Biblical vision of justice transcends procedures, but that does not make procedural justice irrelevant. Quite the contrary. I would argue that law and the legal system offer the best means available in our fallen world to achieve some measure of Biblical justice in society. Consider the Sermon on the Mount.²⁵ How are Christians to live out Jesus's call to love our enemies and refrain from retaliation? It seems impossible—none of us can love as completely and selflessly as Jesus commands. And even if we can approach such selflessness in our personal lives, certainly no society can (or should?) aspire to such an ethic of love.

Law can help. As Professor Berman writes, "[l]ove needs law."²⁶ Law and the legal system can give shape and form to Jesus's teachings about love and reconciliation by providing a vehicle to approximate the ideal. Even if we cannot live out the Sermon on the Mount perfectly, we can work to create a mechanism that takes the place of mindless revenge and a tit for tat mentality, honors and defends the intrinsic worth of all persons, guarantees due process for rich and for poor, and resolves disputes as fairly as possible. That mechanism is law.

21. BERMAN, *supra* note 12, at 137-38 ("At the highest level, surely, the just and the holy are one . . .").

22. ALLEGRETTI, *supra* note 1, at 105.

23. *Id.* at 107.

24. *Id.* (quoting JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 18 (1976)).

25. *Matthew* 5-7 (New Revised Standard Version).

26. BERMAN, *supra* note 12, at 88.

We might summarize these ideals in a phrase that seems almost trite if it was not so profound: *Equal justice under the law*. Theologian Reinhold Niebuhr puts it well when he says that the principle of equal justice is the approximation of Jesus's law of love in an imperfect world: "Since the law of love demands that all life be affirmed, the principle that all conflicting claims of life be equally affirmed is a logical approximation of the law of love in a world in which conflict is inevitable."²⁷ Thus the Biblical vision of love finds its partial realization in a legal system committed to treating all persons equally.

When we begin to see law as the approximation of the Biblical command to do justice, we find ourselves back with Thomas More, affirming the unity of the legal and religious spheres of life, and acknowledging that the work of lawyers has spiritual significance.

Who would have thought it? Perhaps a careful attention to the work of lawyers can yield important insights for theology. Beyond that, perhaps the study of law and lawyering can teach all of us something about what it means to live in a world where there is no real distinction between the sacred and the profane, a world where—as the prophet Jeremiah reminds us—to do justice is also to know God.²⁸

27. REINHOLD NIEBUHR, *AN INTERPRETATION OF CHRISTIAN ETHICS* 149 (1935).

28. *Jeremiah* 22:15-16 (New Revised Standard Version) ("Did not your father eat and drink and do justice and righteousness? Then it was well with him. He judged the cause of the poor and needy; then it was well. Is not this to know me? says the LORD.").

* * *