

The Catholic Lawyer

Volume 34
Number 2 *Volume 34, 1991, Number 2*

Article 2

January 2017

Christ and the Code: The Dilemma of the Christian Attorney

Joseph Allegretti

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CHRIST AND THE CODE: THE DILEMMA OF THE CHRISTIAN ATTORNEY

JOSEPH ALLEGRETTI*

INTRODUCTION

In *Christ and Culture*,¹ a classic work on Christian ethics, H. Richard Niebuhr identified and evaluated a number of typical approaches that Christians have taken towards culture in society at large, ranging from the absolute rejection of secular culture in the name of Christ, to the whole-hearted embrace of secular culture on behalf of Christ. This essay is intended to adapt Niebuhr's typology and examine a number of approaches open to the Christian attorney as he or she seeks to balance the loyalty to God with the professional duties owed to courts, clients, and the public. How is the Christian attorney to render to Christ what is Christ's and to the Code what is the Code's?

The word "Code" is used herein as shorthand to signify the basic principles of professional ethics that govern the attorney's work in our legal system. No detailed examination of the provisions of the Code of Professional Responsibility or the more recent Model Rules of Professional Responsibility will be performed, for despite their differences they express a common vision of legal ethics. Each embodies what will be referred to in this article as the "standard paradigm of the lawyer's role."²

* Professor of Law and Assistant Director for Law and Religious Ethics, Center for Health Policy & Ethics, Creighton University. J.D. 1977, Harvard Law School; M.Div. 1989, Yale Divinity School. An earlier version of this essay was presented as a lecture at the Creighton University School of Law in October 1988. A transcript of that lecture appeared in the Spring 1990 edition of that school's alumni magazine.

¹ H. R. NIEBUHR, *CHRIST AND CULTURE* (1951).

² See Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73-81 (1980) (discussing standard paradigm of legal ethics); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672-75 (1978) (same); see also D. Luban,

This paradigm is marked by two principles: zealousness and nonaccountability. First, the lawyer is the zealous partisan of his or her client. The client is the attorney's only master, and the attorney must do all that is possible to achieve the client's lawful objectives despite any doubts about the moral or social merits of the client's cause. Second, the lawyer is neither professionally nor morally responsible for the means employed, or the ends achieved, as long as the lawyer stays within the boundaries of the law and the profession's own rules. "Nonaccountability" is meant to insulate the attorney from moral scrutiny for his or her professional actions.

With this in mind, let us turn to several models of the Christian's relationship to the legal profession and to its standard paradigm.

I. CHRIST AGAINST THE CODE

To be explored first is an adaption of Niebuhr's first model, what he called "Christ against culture."³ The first letter of John is a good example of the application of this model. It views the world as an evil place that the Christian must avoid. Secular society is rejected for the sake of Christ. This approach to culture is represented in some strands of monasticism, in groups like the Mennonites, and in the works of Tertullian and Leo Tolstoy.

When applied to the legal profession, the analogous model might be termed "Christ against the Code." Let me illustrate it with a story. I had been at divinity school only a few weeks when I met another student who was also a lawyer. She told me that she had quit the practice of law because she could not square it with her Christian beliefs. She had grown tired of being a "hired gun" whose job was to help clients avoid their moral obligations. "I couldn't be both a lawyer and a Christian," she told me. She even purported to have Biblical grounds for her view, in 1 Corinthians 6, where Paul expressed his dismay that Christians were bringing lawsuits against each other. Paul wrote that Christians should not bring each other before pagan courts, but should suffer wrong rather than seek a legal remedy.

There are other ways to read this passage, of course, in light of particular pastoral problems confronting Paul at Corinth.⁴ Few observers would adopt this student's reading, and fewer, if any, would consider the practice of law "off limits" to Christians. Nevertheless, the story illus-

How Standard is the Standard Conception?, LAWYERS & JUSTICE 393-403 (1988) (fundamental concepts of ethics in legal practice).

³ See H.R. NIEBUHR, *supra* note 1, at 45-82.

⁴ See C.K. BARRETT, A COMMENTARY ON THE FIRST EPISTLE TO THE CORINTHIANS 134-143 (1968); W. ORR & J. WALTHER, I CORINTHIANS 193-99 (1976) (modern historical-critical reading of I Corinthians 6).

trates one model of the relationship between Christ and the Code. This model bluntly insists that a Christian cannot be a lawyer. Christians are to have as little to do with the structures and institutions of secular society as possible. Between Christ and the Code is a gulf that cannot be bridged. In its more moderate form, this model may motivate those who seek to establish Christian tribunals, divorced from the normal legal process, in which Christians can resolve disputes between themselves through mediation and fraternal correction.

This model deserves respect for its single-minded devotion to following Christ. At the same time, however, it risks forgetting that sin resides not just in social structures but also in the human heart, and that God is at work redeeming not only individuals but of all creation. It forgets that Christ came to reconcile all things to God, and that Christians are called to follow Him into the world and make disciples of all nations. Still, even for those of us who do not advocate this model, it can serve as a cautionary note. Have we been too quick to accommodate our religious beliefs to the dictates of our culture and our Codes? Have we sold out? Have we bought in?

II. CHRIST IN HARMONY WITH THE CODE

This leads the reader to a second model. Niebuhr writes about the "Christ of culture."⁶ According to this view, there is no tension at all between the Gospel and the world. Instead, Christian values are thought to be identical with the highest values of civilization. In the life and teachings of Jesus, we see the ultimate goal toward which the world is directed.

Perhaps this model reached its culmination in nineteenth century liberal Protestantism, which so often saw Jesus as a Victorian gentlemen who came preaching liberty, tolerance, and evolutionary optimism. The values of democratic society were equated with the Gospel's central message.

As applied to the legal profession, one might call the analogous model "Christ in harmony with the Code." Its adherents see no conflict between their work as lawyers and their lives as Christians. When lawyers act in accordance with the standard paradigm, they not only avoid legal trouble, but they act in a manner that is "fundamentally right." The Code itself embodies a morally appropriate vision of the lawyer's role. Thus, it seems to raise no ethical problem if a lawyer makes an honest

⁶ See H.R. NIEBUHR, *supra* note 1, at 83-115. Niebuhr also talks of "Christ above culture." *Id.* at 116-48. That model views Christ's relation to culture in a way similar to the "Christ of culture" model, but also holds that Christ gives to culture a new center of value. It is a value expressed by St. Thomas Aquinas, among others. For our purposes, it need not be considered separately.

witness look like a liar, or reveals only that portion of the truth favorable to the lawyer's client, or defends what he or she knows to be an unjust cause. Under these principles, what the Code says you can do, you can do, and what the Code says you must do, you must do, so to speak.

It is this understanding that underlies the model of "Christ in harmony with the Code." There is no tension between Christian values and professional life, because the practice of law serves noble ends, or is noble in and of itself. By fulfilling the lawyer's role in the adversary system, the attorney can be confident that he or she is in fact doing what is "good and right" in the eyes of God.

This interpretation has its own strengths. Initially, it reminds us that the whole world is the arena in which God's kingdom is being realized. It recognizes that God is at work in institutions as well as in individuals. Concurrently, however, it gives rise to a risk that whatever is acceptable to the wider culture will come to be perceived as "God's will." No longer would it be presumed that Christ sits in judgment upon culture. The end result may be that "loyalty to contemporary culture [will have] so far qualified the loyalty to Christ that he [will have] been abandoned in favor of an idol called by [H]is name."⁶

This model presents risks for the Christian lawyer as well. It can lead the attorney to abdicate moral responsibility for his or her actions, which in turn can lead to the collapse of the lawyer's moral universe. It is suspected that society's recognition of this moral abdication results in much of the criticism levied at the legal profession and to the scathing attacks on lawyers as "prostitutes," "mouthpieces," or "hired guns."

III. CHRIST IN TENSION WITH THE CODE

Cynics and skeptics might assume that all lawyers fit the description of this second model. But the author's experience is that many attorneys are aware of the unavoidable tension between Christ and the Code. They wish to be both good people *and* good lawyers, and come to realize that the two may not be identical. It is suggested that once an attorney begins to reflect upon the problem of serving two masters, the attorney no longer fits within this second model. Instead, a third model needs to be considered, based upon what Niebuhr called "Christ and culture in paradox."⁷

This third paradigm lies between the first two. The first, the reader will recall, rejects the secular world as incompatible with Christian values. The second accepts the secular world as embodying Christian values. Our third model avoids this "either/or" for a "both/and" approach, but it does have some similarities to each. Like the first model, it admits that human

⁶ *Id.* at 110.

⁷ *See id.* at 149-89.

culture is sinful, and to be involved with it leads to sin. Like the second, it insists that our sinful world is sustained and redeemed by a loving God.

Christian theologians who favor this model are fond of paradoxical language. They juxtapose law and grace, God's wrath and God's mercy. They describe the individual as simultaneously both saint and sinner. This supposition can be seen variously in the theology of Augustine, Martin Luther and Reinhold Niebuhr. Christians inhabit two worlds, a private realm in which they relate to God as individuals and are bound by the teachings of Christ, and a public realm in which they live and work and must make accommodations to the sinfulness of the human condition. Christ and culture are in conflict, yet each must be obeyed. Hence, the Christian is subject to two moralities, and must live "precariously and sinfully in the hope of a justification which lies beyond history."⁸

This model has its own advantages. It is frank about the moral ambiguities and the interwoven joys and tragedies of everyday life. It captures the central insight of the Reformers—that nothing we can do can make us right with God. That, however, is the whole point. While we were yet sinners, Christ died for us and reconciled us to God.

As applied to the legal profession, one might call the analogous model "Christ in tension with the Code." Here, the attorney admits that sometimes he or she does things that a non-lawyer should not do. The attorney admits that "ordinary" morality would sometimes condemn the attorney's actions. The lawyer argues, however, that everyday morality is not applicable to professional life. The attorney's professional obligations give rise to a unique set of concerns. As an agent of the client, the lawyer should be judged solely by the rules of legal ethics embodied in the Code. According to Richard Wasserstrom, the result is that the lawyer becomes, in essence, an "amoral technician," who inhabits a moral world far simpler and less ambiguous than the moral world of everyday life.⁹ It becomes easy to "turn aside so many ostensibly difficult moral dilemmas and decisions with the reply: but that is not my concern; my job as a lawyer is not to judge the rights and wrong[s] of the client or the cause; it is to defend as best I can my client's interests."¹⁰

As in our second model, the appeal to the principles of zealousness and nonaccountability remain. But there is a difference. The individual in the second model has no doubts that a good lawyer can also be a good Christian, while the lawyer in the third model hopes that it is possible to be both, fears that it is not, and knows no way out of the dilemma. The result can be a kind of "moral schizophrenia." The attorney compartmen-

⁸ *Id.* at 43.

⁹ See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 H.M. Rts. 1, 2-15 (1975) (examining ways in which attorney-client relationship affects lawyer's moral stance).

¹⁰ *Id.* at 9.

talizes his or her life. The public and private dimensions of life are separated and the attorney concludes that his or her Christian values apply only to the private. On the professional side of life the lawyer insists that he or she be judged only by the rules of the legal profession.

Such a situation is inherently unstable. Something has to give, and it is no surprise that studies indicate that if a lawyer argues positions that conflict with personal values, over time those values will change.¹¹ Taken to an extreme, the role can actually absorb the personality. Consider as parallel a distressing epitaph eyed in a Scottish cemetery: "Here lies John McDonald, born a man, died a grocer."

IV. CHRIST TRANSFORMING THE CODE

As a final model, Niebuhr writes of "Christ transforming culture."¹² In some ways this resembles our third model. It also recognizes that culture is sinful, yet acknowledges that Christians have obligations to culture. Unlike the third model, however, this one claims that the Christian need not be immobilized between the demands of Christ and the demands of culture. The Christian is one under the power of Christ, and Christ is the one who redirects and reinvigorates our world. The Gospel is seen as penetrating all of life, converting both people and institutions. This model is exemplified in Christian theology in the philosophies of Augustine and John Calvin.

It is suggested that this model has a strong Biblical foundation as well. Jesus teaches that the kingdom of God has arrived. It is presently in our midst, growing like a mustard seed, penetrating all of life. It is here, but it is not yet fully realized.¹³

Lawyers who maintain analogous views conform to the model I will call "Christ transforming the Code." Such talk is admittedly imprecise. Critics of Niebuhr have commented at length on the slipperiness of terms like "transformation" and "conversion." Vital questions remain unanswered. What does it mean to say that Christ is at work transforming culture? What counts as evidence? And how would this apply to the work

¹¹ See Chemerinsky, *Protecting Lawyers from Their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 31-32 (1980).

¹² See H.R. NIEBUHR, *supra* note 1, at 190-229.

¹³ See, e.g., *Matthew 13* (parables). The meaning of the Kingdom of God in Jesus' teaching and in Christian theology is too large a topic to explore here. For a concise overview, see T. GROOME, *CHRISTIAN RELIGIOUS EDUCATION* 35-55 (1980). According to Groome, most modern commentators would agree that "the Kingdom has already come definitively in Jesus Christ; it will come completely and with newness at the end of time; but its working out is an intrahistorical reality and our present time has something vital to contribute to its final perfection." *Id.* at 44-45. The stress on the working out of the Kingdom in the present fits nicely with the "Christ transforming culture" model.

of lawyers?

Despite these difficulties, this model at least recognizes that Christ is the Lord of all, even those in the legal profession, and that Christians are called to serve Him in their private *and* professional lives. Moreover, this model has the great advantage of rejecting the artificial separation of life into private and public realms, with religion limited to the former. The Christian attorney is to bring his or her values into the workplace, with the hope and trust that these values might revitalize and transform the lawyer's relationships and, ultimately, the profession itself. The lawyer is not a "hired gun," or an "amoral technician," and cannot avoid moral responsibility for his or her actions by resorting to professional rules and roles. The attorney is a "moral agent," whose actions have moral consequences for which the attorney is responsible, not just personally and to others, but ultimately to God.

This model is unfamiliar to most attorneys. Its implications are uncertain. It seems to threaten traditional attorney-client relations. Let me try to advance the discussion by briefly sketching three avenues for reflection. Each is an attempt to realize the goal of a legal profession transformed by the saving power of Christ.

A. *The Lawyer's Vocation*

First, it is suggested that we need to take a fresh look at the concept of "vocation." A "professional" is what one professes to be, but a vocation is what one is called to be, what God calls one to be. Luther and Calvin were aware that any occupation can be a calling if its primary motive is to serve God and neighbor. In an insightful article, Charles Kammer has argued that the concept of vocation can serve as a check upon the tendency of professionals like doctors and lawyers to prefer their own self-interest to the public good.¹⁴ According to Kammer, a profession that understands itself as a vocation "can escape many of the problems generated by . . . narrow self-interest because it is governed by a higher vision of the purposes the profession is intended to serve."¹⁵ As the professional is liberated from self-interest, he or she is set free to serve others. Work becomes an avenue of discipleship to Christ. "Our vocation becomes that of loving our neighbor through our occupation."¹⁶

Still, several questions come to mind. Does it make sense to talk of a "lawyer's vocation"? In what ways can a lawyer's work be a vehicle of service to God and neighbor? More concretely, how would viewing law as

¹⁴ See Kammer, *Vocation and the Professions*, 1981 ANN. SOC'Y CHRISTIAN ETHICS 151, 151 (T. Ogletree, ed.).

¹⁵ *Id.* at 174-75.

¹⁶ *Id.* at 170.

a vocation affect the attorney's relationship to clients, courts, and adversaries? What would be the impact on the standard paradigm of legal ethics and the principles of zealousness and nonaccountability?

B. The Lawyer as Prophet

A second approach would be to focus on the traditional Biblical notions of priest and prophet. Sociologists have been quick to point out that the legal system plays a cultic role in society. It is the mechanism by which society resolves conflicts that threaten the social fabric. It has its own myths and rituals, its own language, its own garb. To the layperson, the legal system can be a mysterious dispenser of blind justice. In the "temple" of the law, the courthouse, lawyers and judges are the priests.

Yet we know from the Scripture—from Jeremiah, Ezekiel, and Jesus—that priests can also be prophets. Lawyering can be seen not only as a priestly profession, but as an avenue for prophetic ministry.

Generally speaking, a prophet interprets the signs of the time in the light of faith, and speaks God's word for that time and place. The prophet criticizes people and institutions, but not as an outsider. The prophet stands with the sinful as one of the sinful, confronting the terrible majesty of God's justice. At the same time, the prophet holds out a vision of God's mercy and faithfulness, and of the new life possible on the other side of judgment. The task of the prophet "is to bring to expression the new realities against the more visible area of the old order."¹⁷ The prophet offers an alternative vision of reality based upon God's freedom and God's will for justice.¹⁸

What would it mean to claim a prophetic role for lawyers? What is the alternative perception of reality to which they might point? First and foremost, the acceptance of a prophetic role would mean a new commitment by lawyers to the just distribution of legal services. In today's America, the poor have little access to legal counsel, and the middle-class is finding it increasingly difficult to afford legal assistance. As long as legal representation is a commodity to be purchased like any other, those who can afford lawyers will have them, and those who cannot will be left without the means to assert their legal rights. As the old law school adage goes, a right without a remedy is no right at all. Legal rights without the means to enforce them are a sham.

Although there have been a few notable exceptions, by and large, lawyers in America have served as defenders of wealth, power, and entrenched privilege. An appreciation of their prophetic role would spark a new concern for the weak and poor, those who have little voice in today's

¹⁷ W. BRUEGGEMANN, *THE PROPHETIC IMAGINATION* 23 (1978).

¹⁸ *See id.* at 110.

system. It would lead lawyers to question the prevailing assumption that *pro bono* work is a deed of charity rather than a duty of justice.

Furthermore, this prophetic role shines new light on the ethical problems that lawyers confront in their daily practice. A heightened sense of social justice, for example, would force attorneys to reexamine their cherished commitment to the standard paradigm. Perhaps unqualified loyalty to the client produces injustice and social harm. Perhaps attorneys should no longer be immune from moral criticism for the ends they achieve or the means they employ. The prophetic dimension raises disturbing questions about the social and personal costs of the principles of zealotry and nonaccountability.

A prophetic role for Christian attorneys would build upon the rich legacy of the Hebrew prophets. Amos, Isaiah, and the others refused to separate worship of God from the duty to help those who could not help themselves. They attacked all who trampled the poor, turned aside the needy, exploited the weak, and corrupted the legal process. Indeed, the plea of Isaiah could almost serve as a credo for the Christian attorney: "Make justice your aim; redress the wronged, hear the orphan's plea, defend the widow."¹⁹ Jeremiah put it succinctly—to know God is to do justice to the poor and needy.²⁰

C. *An Ethic of Care*

Finally, one might follow the lead of Thomas Shaffer, and begin to explore a vision of lawyering which puts less stress on the dictates of position and more on the duty to care.²¹

The conventional wisdom too often views lawyers as possessing only two options when they have moral qualms about their client's case. The lawyer must commit to do everything legally possible to win for the client—or withdraw from the case. This view of the lawyer-client relationship assumes that lawyers and clients are morally isolated from each other, and do not influence each other. Neither is open to change. Reality is quite to the contrary. An ethic of care recognizes that lawyers and clients are not morally autonomous. They are not islands unto themselves. As they come together they become mutually dependent. In their dependence each is open to change. Conversion is possible. What Buber called

¹⁹ Isaiah 1:17.

²⁰ Jeremiah 22:16.

²¹ T. SHAFER, ON BEING A CHRISTIAN AND A LAWYER 4-12, *passim* (1981). The author is indebted to Shaffer for much of the discussion of the ethic of care, especially Chapter 3, "The Ethics of Care". See *id.* at 21-33; see also R. JACK & D.C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS *passim* (1989) (arguing lawyers need to develop a "morality of care" to supplement their traditional commitment to rights and duties).

the "I-Thou" relation can emerge.²² Openness, risk and vulnerability characterize such a relationship.

The recognition of an ethic of care would produce an epochal shift in lawyering, away from the amoral provision of technical assistance, towards service to the client as a person. Shaffer writes:

The broader professional consequences could be revolutionary: Lawyers would have to become morally attentive, attending, that is, to the persons of their clients as much as to the problems clients bring to them. Law students would come to insist on education which trains them in the skills of sincerity, congruence, and acceptance. Every level of the legal enterprise would come again to think of moral development as part of its task, all toward a professional ethic of receiving as well as giving—of unfurling rather than imposing, to use Buber's phrase.²³

Such an ethic ultimately rests upon the conviction that God is at work in all human relationships, and therefore all things are possible. God is the "invisible third party" in every human encounter.

Again, we need to consider the impact of such a view on traditional attorney-client relationships. Would an ethic of care intrude upon client autonomy? How would it inform the attorney's approach to particular ethical duties like confidentiality? Would lawyers who adopted an ethic of care become more or less committed to the principles of zealousness and nonaccountability? Is an ethic of care even possible? Perhaps an attorney can have a relationship of openness and vulnerability with a flesh-and-blood client, but what about the attorney who represents a corporation, a union, a pension board?

An ethic of care is inherently tentative and open-ended. It provides no definitive answers to ethical questions, because only in the give-and-take of the relationship can the morally responsible course of action be discerned. Nevertheless, it deserves further exploration by those who seek an integration of the personal values and professional life of the attorney. Is it actually an attempt to bring the force of the Gospel message to bear upon the lawyer-client relationship? Here, perhaps, is the seed for a new understanding of the Christian lawyer, a hired gun no longer, but (dare I say it?) a minister to his or her clients.

CONCLUSION

The preceding describes but a few of the ways in which Christian attorneys could begin to explore the model of "Christ transforming the Code." My guess is that such a model may lead to some surprising results.

²² See M. BUBER, *I AND THOU passim* (R. Smith trans. 2d ed. 1958). See as well the thoughtful discussion of Buber's ethics in T. SHAFFER, *supra* note 21, at 28-33.

²³ T. SHAFFER, *supra* note 21, at 30.

There may be times when we find ourselves less committed to the single-minded pursuit of our client's interests, while at other times we may find ourselves more deeply committed to the client than ever before. It is possible, for example, that the difficult question of how an attorney can defend a client will be replaced by the equally troubling question of why attorneys do not defend the guilty more often.²⁴ We may find ourselves questioning and even discarding many of our cherished assumptions about the attorney's professional role. That at least should not surprise us. As Deitrich Bonhoeffer reminded us, when Christ summons us, he bids us come and die.²⁵ He calls us to die to our illusions of power and importance, to the idolatrous demands of our culture, and to the vain promises and false security offered by our social and professional rules. If we are serious about transforming ourselves and our profession, then we can hardly avoid these "little dyings." We know that there is no growth without change, no conversion without repentance, and no Easter Sunday without Good Friday.

²⁴ See *id.* at 56.

²⁵ See D. BONHOEFFER, *THE COST OF DISCIPLESHIP* 79 (rev. ed. 1959).

