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### Symposium: Mission of a church-Related Law School - The Lutheran Tradition

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# SYMPOSIUM

## Mission of a Church-Related Law School

### THE LUTHERAN TRADITION

ALFRED W. MEYER\*

The law school halls are alive with the sound of — religion? Yes, the subject has emerged from the closets of poorly attended and infrequently held symposia on “law and religion.” Holmes told us that “the law deals with all of life” so it is not surprising that the renaissance of religious discourse in our contemporary culture has invaded our legal communities. Religious issues pervade both our appellate court reports and the legal literature. Former Chief Justice Burger was even moved to complain that too much of the Supreme Court’s time was devoted to religious issues.<sup>1</sup> Although the topic of this symposium does not warrant an attempt to account for this phenomenon, one should observe its ancient and honorable lineage: “Ever since its birth in ancient Greece, legal philosophy has freed itself from theology *only with difficulty*.”<sup>2</sup> And for those of us who have chosen to affiliate with church-related law schools, we may chorus: “Thank God for the difficulty.”

The planners of this occasion have invited participants from four religious traditions to address the significance of church-relatedness in legal education in the hope that we may bring to bear our distinctive perspectives on the subject. As we do so, however, it would be a mistake to assume that the resurgence of religious issues in the courts and the literature has been accompanied by an increase in number or significance of church-related law

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1. *E.g.*, Marshall, *Introduction, Religion and the Law Symposium*, 19 *CONN. L. REV.* 697 (1986).

2. Note, *Critical Legal Studies as an Anti-Positive Phenomenon*, 72 *VA. L. REV.* 983, 984 (1986) (emphasis added).

schools. Nothing could be further from the truth. Rex Lee, the founding dean of the Brigham Young University Law School, reported in 1985 the mainstream view that there is *no* role for the religious law school in American Legal Education — that “the optimistic pronouncements made at the beginnings of a church-affiliated law school about teaching the laws of God and the laws of man have seldom, if ever, withstood the test of time” and that the law schools of prominence are “invariably those that have long since ceased to take their religious moorings seriously.”<sup>3</sup> The Lee quotation underscores the fear which prompted Valparaiso University’s legendary president, Dr. O.P. Kretzmann, to warn that the danger which confronted Valparaiso is that it might become just another Princeton. Rex Lee conducted a survey of deans at the thirty law schools with religious affiliations to determine the significance of their church-relatedness. Not more than three or four could point to any statements of mission from which administration, faculty, or students drew any sense of special character or purpose. Several of the law schools had simply been inherited by religious universities “without fanfare” and of the others, only a handful were begun with any explicit recognition of their religious connections.<sup>4</sup> Lest you associate Rex Lee with the views of his respondents, I should emphasize that *he* argued that the religiously affiliated law school has “a unique opportunity to enrich the perspectives and the quality of American legal education.”<sup>5</sup> In his view, what is good and moral in our profession has religious roots in the second of the two great commandments: to love one’s neighbor as oneself. The response to this command will distinguish the church-related school from others and will enable it to educate better (more moral, more ethical) lawyers.<sup>6</sup> I have not found this an enduring and satisfying rationale. I can state my difficulty rather simply. Love of God and love of neighbor are the two great commandments. The first, love of God, requires the second. But the second, love of neighbor, does not require the first. The noble pagan and the secular humanist bear compelling historical and contemporary witness to the truth of this proposition. One suspects, contrary to the adage, that there may even have been atheists in fox holes. One is sure, however, that there were and are non-religious persons marching side by side with Jews and Christians in the causes of racial and economic justice.

The appeal to religion for moral rectitude in the practice of law is not a high visibility issue in legal education. But our journals are full of attacks and counter-attacks involving a movement called Critical Legal Studies. The CRITs propose a deconstruction of the legal system which they see as masking political choices under the guise of applying legal rules. It is a

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3. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175 (1985).

4. *Id.* at 1177.

5. *Id.* at 1175.

6. *Id.* at 1185.

guise because the rules are indeterminate to the extent that they can be manipulated to produce results according to the arbitrary whim of the deciders. The battlegrounds are our most prestigious law schools with curricular, appointment, and tenure decisions at stake. Opponents argue that the CRITs are legal nihilists who, to the extent that they deny the "idea" of law, forfeit their entitlement to positions on a law faculty. All of this (which cannot even be fairly summarized here) would not be germane to today's symposium if the debate employed the ordinary legal discourse of reasoned argumentation. But in the essay which fired the opening salvo, Dean Paul Carrington of the Duke Law School employed the language of profession, belief, faith, and hope: "The law . . . is a mere hope that people who apply the lash of power will seek to obey the law's command. Let us not be modest: it is an act of considerable courage to maintain belief in such a hope. . . . We love law not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible."<sup>7</sup> Carrington did not ground this leap of faith in an expressly religious tradition. Rather, he was appealing to that civil religion of which we hear so much in the public addresses in this year of the bicentennial celebration of our Constitution: inalienable rights, popular sovereignty, consent of the governed, constitutionalism, separation of powers, limited government, ordered liberty, etc. Explicit in the opposition of the CRITs is the appeal to values which transcend our capacity to support them with traditional "legal" arguments. If faith, hope, and charity have become members in good standing in the word of legal education, the scene is set for continuing dialogue between the secular and the religious. What is especially ironic is the claim by one of the CRIT founders, Roberto Unger of the Harvard Law School, that *his* position is distinctively Christian. In correspondence with a reviewer of his book, *Knowledge and Politics*, he wrote:

It is a Christian book because it affirms that mankind can progress toward the ideal (beatitude) in history but that they cannot achieve it in history. The union of immanence and transcendence, the synthesis of the mode in which universals and particulars are merged and the mode in which they are separated, cannot be fully realized in the world. This perspective is in turn associated with the Christian conception of man as embodied and transcending spirit that is drawn directly from the theology of incarnation and grace and which constitutes the core of the doctrine of the self I defend.<sup>8</sup>

Now, if someone had read that to me and asked me to name the author, I would have replied "Martin Luther." If I am right in identifying Roberto

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7. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-28 (1984).

8. Kronman, Book Review, 61 MINN. L. REV. 167, 203 (1976).

Unger's thought with Luther's, it is not surprising that a participant on a recent radio quiz show could not answer the question: "Who was the founder of the Lutheran church?" The participant had obviously misassociated Luther as the founder of the Critical Legal Studies movement. In case you have not noticed, I call your attention to the fact that I am now addressing my responsibility to discuss the significance of Lutheranism to legal education.

Luther's two kingdom theology of law and love is an obvious candidate for examination of the significance of a Lutheran perspective on legal education — so obvious in fact that one of our panelists, Tom Shaffer, subjected it to critical scrutiny in the 1983 Seegers Lectures on this campus.<sup>9</sup> We are indebted to him for raising our consciousness as to how the two kingdom theology might result in a two-ethic approach in our private and public lives. In the legal profession, the villain would be the adversary ethic and what Shaffer would see as the lesser morality of that ethic.<sup>10</sup> Shaffer was either too charitable or too worried about his personal safety to blame Luther for what he arguably conceded may be a misreading of what most theologians would describe as a complex and a highly controversial topic. Oh, for a return to those days of one's youth when both theology and life were much simpler. I could really identify with that Sunday School instruction which said that we Lutherans had the right idea in the belief that faith, not works, was the essential ingredient in the life of a Christian. And we all smiled when someone quoted Luther as saying, "Sin Boldly." I suspect that even then I would have thought that Jim Bakker's recent behavior was carrying this command too far. But that simplistic approach of faith, not works, carried over into the culture of our forbearers, a culture which turned inward upon itself resisting involvement in government and community affairs except, of course, in those communities where all or mostly all were Lutheran. Valparaiso University, under its Lutheran auspices, began in this setting. But before recounting some of *that* history, it is essential to refer to an earlier period.

The Reformation roots provided an auspicious beginning for Lutheranism and education. Basic to Luther's philosophy was the freedom of investigation. The disciplines of theology, philosophy, and science had to be pursued with integrities of their own. Here the theology of the two kingdoms could be understood in the conviction that God is the creator and Lord of the earthly as well as the heavenly kingdom — an understanding that is crucial in the support of our modern concept of academic freedom. But the history of Lutheranism and its educational institutions in this country did not remain true to its heritage. Our immigrant forefathers insulated them-

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9. Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U.L. REV. 3 (1983).

10. *Id.* at 15-16.

selves and their colleges from the mainstream of the developing state universities and those private institutions which were becoming increasingly secularized. The speeches at the inauguration of Valparaiso University's first Lutheran president in 1925 were preoccupied with the concerns of harmonizing science and religion, protecting Christian character from a godless world, creating a safe place for Lutheran sons and daughters, etc.<sup>11</sup> But slightly more than a decade later, a rescue was effected at the inauguration of another Valparaiso President. Vice President Baepler recorded the occasion as follows:

Dr. O.P. Kretzmann's inaugural address in 1940 completely repudiated this negative approach to Christian education which led, as he said, to vicious obscurantism. He broke with sectarian, fundamentalistic language and topics. There is not a single reference to the Bible, save for a final mention of Valpo's motto from a Psalm. The name "Lutheran" does not appear once. Yet the entire address is an expression of the dramatic, biblical vision of the world. For him the reality of God and the fact of the atonement are forever relevant to that struggle for the heart and soul and mind of man which is the theme of human history and in which a church-related university is destined to find its identity and mission. And the church-related university must be: "the most catholic and universal and democratic institution in the modern world."<sup>12</sup>

The history of the relation between Valparaiso University and its conservatively oriented church has been one of tension. But, except for some occasional headaches, the tension has been constructive. Each has important things to say to the other and not always in words that the other will like. The university must pursue its calling wherever the search for truth leads, mindful, however, of the relativity of its successes and failures on this side of history. The church must issue its call for repentance and forgiveness mindful of the need for the university to be sufficiently independent of it to be responsive to it. Lutherans may recall and rejoice that these notions are a part of their heritage in a Reformation which was born in a university. What about the law school? As an integral part of the university, its relationship to the church may not require particularization. Perhaps, however, several points bear emphasis. Just as our undergraduate colleagues need to welcome to their midst the non-Christian scholar to prevent any return to the stifling parochialism of the past, we in the law schools need to

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11. Baepler, *The Ecumenical Alternative*, in THE SPLENDID HERITAGE, PROCEEDINGS OF THE GOLDEN ANNIVERSARY SYMPOSIUM AND CONVOCATIONS CELEBRATING VALPARAISO'S FIFTY YEARS AS A LUTHERAN UNIVERSITY 19, 20 (1976).

12. *Id.* at 20-21.

welcome diversity as moral and legal ideas are tested in the crucible of academic debate. Loving one's neighbor as oneself can be a unifying theme for a normative discipline as long as we realize that we are bound to come up short in that peace which the world cannot give. Lifting high the cross can make it all seem worthwhile. We need a community to remind us of this. As one of those communities, the university where religion is taken seriously provides a hospitable environment for a law school to take law seriously.