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HOLISTIC JURISPRUDENCE: LAW SHAPED BY PEOPLE OF FAITH

KENNETH A. SPRANG*

*He has told you, O mortal, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God.*¹

To be a lawyer and at the same time to be a faithful Christian or other person of faith is difficult—some would say impossible.² Some resolve the crisis by tossing in the towel and leaving the profession.³ Others resolve their cognitive dissonance by rationalizing that there is no conflict between law and faith at all.⁴ Still others recognize the tension between the challenges of the faith and the demands of the law, and seek to maintain some balance between the two.⁵

The tension is not new, of course. The writer of Luke's gospel tells the story of Jesus lambasting the Pharisees because

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¹ *Micah* 6:8 (New Revised Standard Version). The New American Bible says it a bit differently: "You have been told, O man, what is good, and what the LORD requires of you: Only to do the right and to love goodness, and to walk humbly with your God." *Micah* 6:8 (New American Bible).

² See JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING* 10-20 (1996).

³ See *id.* at 11-12 (recounting personal stories of people who were forced to exit the legal profession due to their religious convictions and their feeling that they could not reconcile those beliefs with the legal profession).

⁴ See *id.* at 14-17 (stating that some lawyers "envision no possible conflict between their lives as Christians and their work as lawyers . . . because they refuse even to consider the possibility that the gospel might be relevant to their work").

⁵ See *id.* at 17-20 (discussing a third model where lawyers live Christian private lives and a professional life guided by the ABA Code and a fourth model where Christian lawyers bring their religious values with them into the workplace).

they neglected justice and the love of God.⁶ One of the lawyers in the crowd complained that by admonishing the Pharisees, Jesus also insulted the lawyers. Jesus answered:

Woe also to you scholars of the law! You impose on people burdens hard to carry, but you yourselves do not lift one finger to touch them. Woe to you! You build the memorials of the prophets whom your ancestors killed. Consequently, you bear witness and give consent to the deeds of your ancestors, for they killed them and you do the building Woe to you, scholars of the law! You have taken away the key of knowledge. You yourselves did not enter and you stopped those trying to enter.⁷

Law schools have an obligation to address this issue, to seek to bring greater integrity, honor, and discipline to the legal profession and thereby to help address the conflict. It is an obligation that arises from the monopoly and power that law schools enjoy in educating lawyers. Our religiously affiliated law schools, however, have a more compelling obligation, one that arises not simply from our relationship with and duty to students, but from the essence of our faith and from the directives of our God. If our schools are to embrace the deepest teachings of our religious heritage, then they must go beyond simply improving the image and integrity of the legal profession. Indeed, we in the religiously affiliated law school community are called to address the very essence of the law itself.⁸

Many, if not most, religiously affiliated law schools, despite the best of intentions, are not meeting that challenge.⁹ I have taught at three such schools, all Catholic. Each has struggled with its identity and the challenge of how a Catholic law school

⁶ See *Luke* 11:42-54 (New American Bible).

⁷ *Luke* 11:45-52 (New American Bible). The New Revised Standard Version uses "lawyers" rather than "scholars of the law." See *Luke* 11:45-52 (New Revised Standard Version).

⁸ I have written this article from a Christian perspective, indeed from a Catholic Christian perspective, for that is who I am. I believe, however, that my basic premise—that people of faith must craft a jurisprudence consistent with that faith, extends beyond my own tradition. Indeed, I hope so.

⁹ See Randy Lee, *Catholic Legal Education at the Edge of a New Millenium: Do We Still Have the Spirit to Send Forth Saints?*, 31 GONZ. L. REV. 565-66 (1996) (stating that religiously affiliated law schools are not preparing their students to integrate the Catholic religion with their practice of law) (citing Thomas L. Shaffer, *The Erastian and Sectarian Arguments in Religiously Affiliated Law School*, 45 STAN. L. REV. 1859, 1864 (1993)).

might be distinguished from a non-religiously affiliated school. But not one seems to have found the definitive answer. Friends have told me anecdotally that the same issue exists at Jewish law schools.

I believe that many religiously affiliated law schools aspire to be different, as witnessed in mission statements that may reference religion, a kinder, gentler environment, the ethical practice of law, or recognition of the social and moral forces that shape and direct the law. But at the end of the day, most students graduating from religiously affiliated institutions are not measurably different from those graduating from secular institutions. Moreover, we in the religiously affiliated legal community have not found an effective voice or vehicle through which to examine and change the practice of law and indeed the law itself.

A voice and vehicle may now be available through a relatively new school of thought known as therapeutic jurisprudence,¹⁰ which suggests that law should have a therapeutic rather than an antitherapeutic effect.¹¹ It is a concept born within the study of mental health law that has now expanded to numerous other areas of the law. I propose, however, a further step—the development of a new jurisprudence, which I have named “holistic jurisprudence.” Holistic jurisprudence reflects the values of both the Christian gospel and the Judeo-Christian tradition.

This article explores the spiritual and moral dilemma facing law schools and lawyers today through the perspective of the law as a faithful calling,¹² and suggests that viewing both the practice of law and the substance of law through the lens of therapeutic/holistic jurisprudence provides a means for religiously affiliated law schools to live out their missions. Part I

¹⁰ See Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17–18 (1997) (explaining how therapeutic jurisprudence is built on the idea of law as a social force that has both positive and negative consequences for the “mental health and psychological functioning of those it affects”).

¹¹ See *id.* (stating that the laws should seek to maximize therapeutic effects and minimize antitherapeutic effects).

¹² See ALLEGRETTI, *supra* note 2, at 29 (questioning whether the law can be regarded as a calling, but then explaining how professions exist to serve others and therefore have a “natural propensity” to become a calling).

explores the dilemma of lawyers of faith. Part II discusses the concept of therapeutic jurisprudence and invites the development of holistic jurisprudence. Part III provides illustrations demonstrating how both the practice and substance of law might be changed, if informed by therapeutic/holistic jurisprudence.

I. CAN ONE BE A CHRISTIAN AND A LAWYER?

In his book *The Lawyer's Calling*, Professor Joseph Allegretti tells the story of his first days at the Yale Divinity School and the response of his classmates upon learning that he is a lawyer.¹³ One of Allegretti's classmates told him that she quit practicing law because "a Christian can't be a lawyer."¹⁴ Some years later, when he shared with non-lawyers the fact that he was working on a book examining the relationship between faith and the practice of law, they responded with amusement. This was "the lawyer joke to top them all."¹⁵

Professor Allegretti shares three additional examples that illustrate the perceived conflict between being Christian and being a lawyer. First, he recounts the statement of a lawyer friend who is also a deacon at his church.¹⁶ Professor Allegretti praised the man for "his willingness to donate his time and talents to the church," to which the friend responded, "I've got to do something on the weekend to make up for what I do the rest of the week."¹⁷

Similarly in a somewhat "apocryphal" story, a law student who, upon learning the result in a particular case, declared "[b]ut that's not just!"¹⁸ The law professor responded sharply, "[i]f you wanted to study justice, you should have gone to divinity school!"¹⁹

¹³ See *id.* at 1. Professor Allegretti, whom I have known for more than 20 years, taught labor and employment law for several years before leaving law teaching to attend divinity school. Later, he returned to Creighton University School of Law as the A.A. and Ethel Yossef Professor of Legal Ethics. He has written about faith, ethics, and Catholic thought for a number of years. For a synopsis of Professor Allegretti's work, see the back cover of his book, *The Lawyer's Calling*. See *id.*

¹⁴ ALLEGRETTI, *supra* note 2, at 1 (internal quotations omitted).

¹⁵ *Id.* at 1.

¹⁶ See *id.*

¹⁷ *Id.* (internal quotations omitted).

¹⁸ *Id.* (internal quotations omitted).

¹⁹ *Id.* (internal quotations omitted).

Finally, Professor Allegretti tells the true story of a law professor who asked his students to identify the purpose of a trial.²⁰ "To discover the truth," volunteered one student, in response to which the class burst out in laughter.²¹ The professor responded cynically, "Who cares what truth is?"²² The student responded, "I do."²³ "Well," the professor replied, "in your discussions with God you can pursue that further."²⁴ He then unceremoniously turned to another student and asked, "What's the purpose of a trial?"²⁵

Doubtless many of us in the law school and legal communities can recount similar stories. In light of the seeming heartlessness of our profession and its tarnished image, one might legitimately ask whether religiously affiliated colleges and universities should have law schools at all. After all, there is a thread in some faith traditions of withdrawing and separating oneself from the world and its perceived evil. The answer, however, lies not in disassociating ourselves from the profession, but in seeking to change it. The great irony is that many of us, and not just those in religiously affiliated law schools, go to law school because of altruistic motives about doing good and making a contribution to the world. Law schools have an obligation to help fulfill that vision.

It is also ironic that law historically was a sacred trust.²⁶ Law, along with medicine and the ministry, was one of the traditional learned professions.²⁷ The very concept of "profession" comes from the Latin word meaning "to take a vow."²⁸ Somewhere between that historical sacred trust, exemplified by the stature of men like Saint Thomas More, and the development of the legal practice as it exists today, with its blaring television commercials, yellow page ads, and sometimes "cut throat" practice, accompanied by increasing unhappiness

²⁰ See *id.* at 2.

²¹ *Id.* (internal quotations omitted).

²² *Id.* (internal quotations omitted).

²³ *Id.* (internal quotations omitted).

²⁴ *Id.* (internal quotations omitted).

²⁵ *Id.* (internal quotations omitted).

²⁶ See *Stamper v. Commonwealth*, 228 Va. 707, 718 (1985) (observing that the practice of law was akin to a sacred trust).

²⁷ See ALLEGRETTI, *supra* note 2, at 24.

²⁸ *Id.*

and exodus from the profession,²⁹ we lawyers have “lost [our] way.”³⁰ Today we face a true “spiritual crisis.”³¹ We need a way to “link” our job as lawyers to our very “deepest values and commitments.”³² We need to find ways to practice law that feed our souls, or at least do no harm to them.

We need to attend to the sacred in our lives.³³ And our faith calls those of us in religiously affiliated schools to find a way to respond to that need and hunger for the sacred. We in religiously affiliated legal education must not only prepare lawyers to meet the challenge of the law without losing their faith—we must also join our students in the quest. We need to help law students and lawyers to replace or supplement the traditional images of the profession “with a *new* self-understanding that better integrates their faith and their work.”³⁴ Law is a “noble instrument for the ordering of human affairs and the just resolution of disputes.”³⁵ It is our challenge to preserve and enrich the nobility of the law and those who labor within it.

A. *Christ Against the Code*

Borrowing from the work of the theologian H. Richard Niebuhr,³⁶ Allegretti suggests that there are four models through

²⁹ See, e.g., Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 282 (1999) (noting the high rate of depression among lawyers and the prevalence of discontented lawyers); see generally BENJAMIN SELLS, *THE SOUL OF THE LAW* 31, 99–100 (1994) (noting high levels of depression among lawyers and a rise in the number of lawyers dissatisfied with their work).

³⁰ ALLEGRETTI, *supra* note 2, at 3. In recent years, there has been, among other things, a “disturbing rise in incivility” within the legal profession. SELLS, *supra* note 29 at 31. In one survey, 56% of the lawyers polled cited obnoxiousness as the most common, unpleasant quality they encounter among other lawyers. See *Id.*

³¹ *Id.* (stating “[a]t its core the legal profession faces not so much a crisis of ethics, or commercialization, or public relations, but a spiritual crisis” and that “[l]awyers and the profession have lost their way”); see also C.M.A. McCauliff & Paula A. Franzese, *Mother Teresa’s Legacy to Lawyers*, 28 SETON HALL L. REV. 765 (1998) (arguing lawyers renew their spiritual vision and help others to do the same).

³² ALLEGRETTI, *supra* note 2, at 4 (stating that lawyers need to reconnect what they do in their professional lives “with what they profess and pray on Sunday”).

³³ See *id.* at 5 (stating the belief that spirituality is the “*attentiveness to the presence of the sacred* in our [lives]”).

³⁴ *Id.* at 8.

³⁵ *Id.* at 7.

³⁶ See H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1956).

which lawyers can resolve the seeming conflict between being a lawyer and being a Christian.³⁷ He characterizes the first model as "Christ Against the Code."³⁸ In this approach, the lawyer concludes that being a Christian and being a lawyer are simply irreconcilable, as the practice of law requires one to do things that no faithful Christian can in good conscience do.³⁹ The chasm between Christ and the practice of law is "so wide and so deep" that it can never be crossed.⁴⁰ One who embraces the thinking of "Christ Against the Code" may forsake a legal career. Society at large often embraces this point of view, which "insist[s] that a Christian cannot be a lawyer."⁴¹ Thus, for example, Professor Allegretti's divinity school classmates often asked, "How can you be a Christian and a lawyer?"⁴² To the layperson, the two paths are often seen as contradictory.

Although this model has some appeal to people of faith, and one must admire the conviction of those who abandon the profession out of devotion to their faith, it is not terribly helpful for society. Some resolve the problem by creating "Christian tribunals," a forum for resolving disputes among Christians that is separated from the legal process.⁴³ This solution addresses the effect of the problem, but not its cause. The truth is that we need God's people in law offices, universities, and courtrooms.

As Allegretti notes, God is at work in the whole world, not just in the world of His faithful.⁴⁴ Many lawyers do great good for individuals and society despite the undesirable things that may tarnish the profession. The Kingdom of God can be found in

³⁷ See ALLEGRETTI, *supra* note 2, at 7-23. The four Models set forth in Allegretti's work are: (1) "Christ Against the Code;" (2) "Christ in Harmony with the Code;" (3) "Christ in Tension with the Code;" and (4) "Christ Transforming the Code." *Id.* at 10-22. Allegretti uses the word "Code" to mean the "standard vision" of the lawyer's role. *Id.* at 8. The term reflects, but is not limited to, the professional codes of ethics that apply to lawyers in each state. *See id.*

³⁸ *Id.* at 10-13.

³⁹ *See id.* (stating that those who embrace this view feel "[l]awyers inevitably do things for clients that no true follower of Christ could countenance").

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² *Id.* at 12 (internal quotations omitted).

⁴³ *See id.* at 11-12 (stating that "there is a movement among some evangelical Christians, including lawyers, to establish 'Christian tribunals,' divorced from the normal legal process, where Christians can bring their disputes with each other for mediation and fraternal correction").

⁴⁴ *See id.* at 20.

the courthouse and the law office, but only if men and women who are obedient to God remain there.

B. *Christ in Harmony with the Code*

Professor Allegretti's second model is "Christ in Harmony with the Code."⁴⁵ Those who embrace the second model suggest that there is no conflict at all between law and faith or law and conscience.⁴⁶ Professor Allegretti tells the story of a successful lawyer whom he met while a law student. Allegretti asked whether the lawyer felt any misgivings when he did something for a client that violated his personal morals. The lawyer was perplexed and declared, "It's never happened."⁴⁷ Allegretti gave an example in which a lawyer knows that the witness for the other side is telling the truth, yet the lawyer tries to discredit the witness.⁴⁸ Allegretti then asked, "Does that raise any problems?"⁴⁹ "No," responded the lawyer, "That's my job. I'm hired to win."⁵⁰

This "hired gun" model,⁵¹ which is the most recognizable and criticized model identified by Allegretti, has the advantage of freeing the lawyer to zealously represent his or her client.⁵² It encourages candid conversations between lawyer and client, which are protected by the lawyer-client privilege.

There are, however, significant problems with the second model. The approach is essentially an amoral one. Those embracing this model of "Christ in Harmony with the Code" suggest that the lawyer's job is to *empower* the client, not to question the client's morality. As one author suggests, "the

⁴⁵ *Id.* at 14-17.

⁴⁶ *See id.* at 14 (stating that adherents of this model see "no possible conflict between their lives as Christians and their work as lawyers").

⁴⁷ *Id.* (internal quotations omitted). Professor Allegretti notes that he had this conversation with a "prominent big-city lawyer." *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.* (internal quotations omitted).

⁵⁰ *Id.* (internal quotations omitted).

⁵¹ *See id.* at 64-68. The goal of the "hired-gun" lawyer is to represent his client with total allegiance. The lawyer's only goal is to save his client, and he is to achieve this end by all means and at any cost.

⁵² *See id.* at 15 (stating that the "Christ in Harmony with the Code" model frees lawyers from doubt they may have concerning their representation, which permits them "to focus with confidence on their duties to their clients").

lawyer must help clients do their thing, or get out."⁵³ The focus is ostensibly on client autonomy and may result in "people being treated as means and not as ends."⁵⁴ One of the problems with this model is that it ignores the reality of the client as a complex person and the fact that clients more often come to a lawyer for help *in* their relationships than for help *from* their relationships.⁵⁵ The focus is only on the consequences for the client, and little or no regard is given to the consequences of the lawyer's action upon others, including perhaps, persons with whom the client has a relationship, e.g., a spouse or former spouse. The hired gun who exalts client autonomy to the exclusion of all else, "places significant restraints on the conscience of the lawyer."⁵⁶

Perhaps most importantly, it secularizes the gospel's message. Like it or not, the message of the Christian gospel is revolutionary. Jesus of Nazareth was not crucified because he preached the status quo. If Jesus had been just another moral teacher like many of the philosophers and thinkers of the ages, then the "scandal of the cross and the mystery of the resurrection"⁵⁷ would have become trivialized and all Christians compromised. St. Paul boldly declared that "if Christ has not been raised, then empty [too] is our preaching, empty, too your faith."⁵⁸ As Professor Allegretti eloquently explains it:

Sin as a reality, sin that taints each of us and all of our actions and social structures, sin that cannot be overcome by any of our feeble efforts but only by the Anointed One who takes our place and dies for us—there is no place for such an unwelcome truth in the *Christ of Culture* model.⁵⁹

The great problem of this second model is that it allows the lawyer to hide behind the law and the Code. The Code becomes the boundary of the lawyer's moral and ethical universe, the sole

⁵³ THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 16 (1994) (quoting Stephen Wexler, *Practicing Law for Poor People*, 79 Yale L.J. 1049, 1064–65 (1970)).

⁵⁴ EDWARD A. DAUER & ARTHUR A. LEFF, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977), quoted in SHAFFER & COCHRAN, *supra* note 53, at 18.

⁵⁵ See SHAFFER & COCHRAN, *supra* note 53, at 18.

⁵⁶ *Id.* at 18–19.

⁵⁷ *Id.*

⁵⁸ 1 *Corinthians* 15:14 (New Revised Standard Version).

⁵⁹ ALLEGRETTI, *supra* note 2, at 15–16.

document defining integrity. The lawyer becomes an "amoral technician."⁶⁰ If the Code says one may do it, there is no problem. If the Code says not to do it, the inquiry stops.⁶¹ It is this amorality which may be largely behind the public's dislike and distrust of lawyers. How can a non-lawyer be asked to understand President Clinton's now famous statement "I have never had sexual relations with that woman [Monica Lewinsky],"⁶² a statement that may have been technically correct within a narrow, legalistic definition, but which was perceived by the public as a blatant lie. How can we ask the public to believe in so amoral a system?

The unsettling state of the profession is illustrated by an episode of the television series *The Practice*,⁶³ a popular program about lawyers primarily engaged in criminal cases. A 15 year-old girl accused of murdering her baby is read her Miranda⁶⁴ rights. Subsequently, however, the prosecutor induces the girl to trust her, by lying and saying that she, the prosecutor, once had an abortion. The prosecutor manipulates the young woman, leading her to believe that by baring her soul she will be able to get out of jail. Later, when the prosecutor seeks to use the confession, the defense counsel argues that the client's Miranda rights have been compromised. The prosecutor responds, "This isn't a moral arena, it's a legal one."⁶⁵ She goes on to say that if morality were to be exalted over the Constitution, prosecutors would never "get" anyone.⁶⁶ The judge struggles with the issue and is offended by the prosecutor's acts. The judge concludes that as offensive as the behavior was morally, it was not unlawful or unconstitutional. The program, I believe, reflects the very reason that the public mistrusts the legal system and lawyers in general—the problem with the very concept of the "Christ in Harmony with the Code" model.⁶⁷

⁶⁰ *Id.* at 16 (internal quotations and citation omitted). Allegretti describes lawyers as moral technicians because "the lawyer is one person at church on Sunday and another person at work on Monday." *Id.*

⁶¹ *See id.* at 16 (indicating that lawyers must follow the Code).

⁶² Starr Report, H.R. DOC. 105-310, at 133 (1998).

⁶³ *The Practice* (ABC television broadcast, Apr. 2, 2000).

⁶⁴ *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁵ *The Practice*, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ *See* ALLEGRETTI, *supra* note 2, at 14-17.

C. *Christ in Tension with the Code*

The third model described by Professor Allegretti is "Christ in Tension with the Code."⁶⁸ Those who adhere to the third model, in which the lawyer seeks to inhabit both the world of faith and the world of the law, are known as "dualists."⁶⁹ Under this scheme, the faithful lawyer lives in two separate worlds, the "public sphere where they live and work and must make accommodations to the sinfulness of the human condition," and the private world where the lawyer is bound by the teachings of the faith.⁷⁰ Thus, the Christian lawyer "inhabits two worlds, subject to two inconsistent moralities."⁷¹

This model has all the characteristics of a legalistic maneuver. The lawyer seeks to serve two masters. Yet Christ clearly declares that "[n]o man can serve two masters. He will either hate one and love the other or be attentive to one and despise the other. You cannot give yourself to God and money."⁷² Those who embrace this model thus suffer from a "moral schizophrenia."⁷³

This kind of life is "inherently unstable."⁷⁴ If a lawyer must take stances at odds with his or her personal values, eventually the values will change to comport with the lawyer's public behavior.⁷⁵ Such a change must occur for the lawyer to survive psychologically.⁷⁶ Gradually, the third model looks more like the

⁶⁸ *Id.* at 17–20.

⁶⁹ *Id.* at 17. The term "dualists" was coined by H. Richard Niebuhr to refer to adherents of this model, which recognizes that "Christians owe their obedience to two authorities who do not agree yet must both be obeyed." *Id.* (internal quotations and citation omitted).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Matthew* 6:24 (New American Bible).

⁷³ ALLEGRETTI, *supra* note 2, at 19 (using the term "moral schizophrenia" to describe the lives of those people who practice Christian values in their private lives, but "leave their religious values at the door" when they go to work).

⁷⁴ *Id.*

⁷⁵ See Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 140–44 (1995) (stating that "[g]enerally we all view ourselves as 'smart, nice people' " and the "[i]nformation which conflicts with our perception of ourselves as smart and nice 'tends to be ignored, rejected, or accommodated by changes in other beliefs' " (quoting ELLIOT ARONSON, *THE SOCIAL ANIMAL* 148 (3d ed. 1979))).

⁷⁶ See *id.* This theory of cognitive dissonance teaches that one cannot maintain two opposing views in his or her conscious thought at the same time. Furthermore, [t]he theory . . . is based upon three fundamental premises: (1) when faced

second model, which acknowledges no conflict between faith and law practice.⁷⁷ The model embraces a morality of convenience.

D. *Christ Transforming the Code*

The final model identified by Allegretti is "Christ Transforming the Code."⁷⁸ In this model, the underlying presumption is that Christ is at work in every corner of our world and our culture, including the legal system.⁷⁹ Richard Niebuhr sees this concept "exemplified most clearly" in the thinking of John Calvin and St. Augustine.⁸⁰ Niebuhr writes of Augustine:

Christ is the transformer of culture for Augustine in the sense that he redirects, reinvigorates, and regenerates that life of man, expressed in all human works, which in present actuality is the perverted and corrupted exercise of a fundamentally good nature.⁸¹

This model rejects any "artificial separation" between

with a particular set of circumstances or presented with particular information, a person is able to manipulate or modify his beliefs regarding the circumstances or information so that those beliefs are compatible with the person's personal preferences; (2) people will seek out information that will confirm or augment desired beliefs; and (3) once beliefs are formed in the context of cognitive dissonance reactions, they persist over time.

Id. at 141. "The theory . . . views people not as rational beings, but as 'rationalizing beings.'" *Id.* at 142 (quoting ELLIOT ARONSON, *THE SOCIAL ANIMAL* 148 (3d ed. 1979)). According to the theory, "[p]eople are not motivated to be right, but rather we are motivated to *believe* that we are right." *Id.*; see also Örn B. Bodvarsson, *The Welfare Effects of Disclosure Under Cognitive Dissonance*, 19 *ATLANTIC ECON. J.* 33 (1991) (stating that "people who experience cognitive dissonance reactions engage in efficient *rationalization* and may even deliberately choose to believe something other than the truth, if believing the truth is an unpreferred state").

⁷⁷ See ALLEGRETTI, *supra* note 2, at 19 (stating that the "Christ in Tension with the Code" model "slides slowly and imperceptibly, into [the 'Christ in Harmony with the Code' model]"). A good example of this "dualism" is seen in Attorney General John D. Ashcroft. Ashcroft is a devout Christian, a Pentacostal. The tenets of his faith, as well as his own personal belief system, are, on several critical issues, completely contrary to existing law. Most observers have worried whether Ashcroft can put his beliefs aside and enforce the law as it exists. The more appropriate question, however, is what kind of man is willing to separate his religious beliefs from his daily work. Ultimately, he cannot be true to both. See John F. Kavanaugh, S.J., *The Costs of Commitment*, 184 *AMERICA* 28 (Feb. 5, 2001).

⁷⁸ ALLEGRETTI, *supra* note 2, at 20-23.

⁷⁹ See *id.* at 20-21.

⁸⁰ *Id.* at 20.

⁸¹ *Id.* at 20 (quoting H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 209 (1956)).

private and public worlds, in which faith commitment is relegated to the private world alone.⁸² For a lawyer who embraces the fourth model, the Code "cannot be the sole guide to the moral life. The lawyer is not an amoral technician or a hired gun. He cannot avoid moral responsibility for his actions by appealing to the Code or to his professional role."⁸³ Such a lawyer cannot seek resolution by merely exclaiming, "I was only doing my job."⁸⁴ Rather, the lawyer is "a moral agent whose actions have consequences for which he is accountable, not just to himself and to others, but ultimately to God."⁸⁵

It is this fourth and final model to which Professor Allegretti expresses commitment,⁸⁶ a commitment which I share. It is, I believe, the model that must be embraced by any law school that embraces the Christian tradition and I suspect, by those of other religious traditions as well. Christ was not crucified to allow greedy lawyers to expand litigation, to maximize fees, or to wear out less financially blessed opponents. Christ did not die so lawyers could engage in legalistic and myopic maneuvers to gain advantage for their clients. Indeed, it is that legalism which He abhorred. Rather, Christ calls us to stretch and reach to be the persons God created us to be. For those of us who have chosen the law as our profession, that challenge is a call to revolutionize both the way we practice law and the way we develop and interpret substantive law.

It would be an unrealistic burden to place the onus for change solely on practicing lawyers, who are scrambling to meet the time demands of clients, partners, judges, and others. We in academia have the luxury of being paid to think about how the world ought to be and to work toward positive change. The impetus for change must begin in law schools, so that our students may seek to realize a new image of themselves to carry with them into their law practices. Another reason why law schools are the proper place to initiate change is because through our pens, or perhaps more precisely our word processors, we can

⁸² ALLEGRETTI, *supra* note 2, at 21.

⁸³ *Id.* at 21.

⁸⁴ *Id.* (internal quotations omitted).

⁸⁵ *Id.*

⁸⁶ See *id.* at 22 (stating that the "Christ Transforming the Code" model "best speaks to the crisis afflicting the legal profession today").

promulgate new ideas, and seek to move the substantive law to reflect the gospel message of love, forgiveness, reconciliation, and responsibility for our human companions along life's journey.

God calls all of His people to care for one another and to journey toward wholeness and reconciliation with Him. Unfortunately, our legal system does not always lead to such holistic or healing results. A relatively new theory known as therapeutic jurisprudence, however, provides a lens through which we may examine the law from a perspective of faith, healing, and reconciliation.⁸⁷ It provides a vehicle through which to begin change within the law and the profession.

II. TOWARD A JURISPRUDENCE OF FAITH

A. *Law as an Adversarial Culture*

Respect for the legal profession appears to be at an all time low.⁸⁸ “[O]ur spirits are corroded’ by a *culture* of critique that ‘urges us to approach the world—and the people in it—in an adversarial frame of mind.’”⁸⁹ We encourage debate rather than dialogue and assume that every issue has but two sides.⁹⁰ Our American legal system “both ‘reflects and reinforces our assumption that truth emerges when two polarized, warring extremes are set against each other.’”⁹¹

We characterize litigation as “war,”⁹² and we judge lawyers by military-like standards, assessing how tough they are in cross-examination or other strategies.⁹³ This adversarial culture has a significant negative impact on the lives of many lawyers. It requires them to “put aside their consciences and natural

⁸⁷ See DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* at ix (defining therapeutic jurisprudence as “the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences”).

⁸⁸ See ALLEGRETTI, *supra* note 2, at 2 (stating that “[p]ublic esteem for lawyers has hit rock-bottom”).

⁸⁹ David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 264 (1999) (quoting DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE*, 3–4 (1988)).

⁹⁰ See *id.* at 264 (stating our “culture of critique” leads us to believe every issue has two, and only two, sides).

⁹¹ *Id.* at 266 (quoting TANNEN, *supra* note 89, at 131).

⁹² *Id.* (quoting TANNEN, *supra* note 89, at 131) (internal quotations omitted).

⁹³ See *id.*

inclination toward human compassion"⁹⁴ and when they do so the results are disturbing. For example, drivers who have caused an accident are discouraged from apologizing to the injured party, criminals are dissuaded from admitting wrongdoing and accepting responsibility for their acts, and people who have suffered wrongs or harm are prevented from getting on with their lives for many months while they wait for litigation to be resolved.⁹⁵ The ultimate price paid for this war-like, adversarial system is the personal suffering of human beings.⁹⁶ Lawyers themselves are included among the sufferers as evidenced by the rise of lawyer stress and distress, the number of lawyers suffering from substance abuse and other conditions, and the continuous rise of the number of lawyers leaving the profession.⁹⁷

But what if the underlying philosophy of critique and conflict were changed, and the law and the legal system focused on the healing of all parties rather than exacting revenge or retribution? What if we weighed the emotional, psychological, and spiritual impact of our rules, laws, dispute-resolution mechanisms, and modes of practice? What if we could bring an ethic of care into law practice and humanize the practice for both lawyers and clients?⁹⁸ Therapeutic jurisprudence offers a vehicle for achieving such change.

B. *Therapeutic Jurisprudence*

Beginning in the early 1990s, Professor David Wexler of the University of Arizona, and Professor Bruce Winick of the University of Miami began to write about the concept of "therapeutic jurisprudence."⁹⁹ Therapeutic jurisprudence is the

⁹⁴ *Id.* (quoting TANNEN, *supra* note 89, at 146) (internal quotations omitted).

⁹⁵ *See id.* (listing these examples as illustrations of the "corrosive effect" the "litigation as war" mentality has on the legal practice).

⁹⁶ *See id.* (quoting TANNEN, note 89, at 155). For example, lawyers are four times more likely to be depressed than the regular population. *See ALLEGRETTI, supra* note 2, at 2.

⁹⁷ *See ALLEGRETTI, supra* note 2, at 2-3.

⁹⁸ *See generally* Wexler, *supra* note 89, at 276 (stating that "bringing an explicit ethic of care into law practice will better serve clients, humanize law practice for clients and lawyers, contribute to lawyer satisfaction and decrease lawyer distress").

⁹⁹ *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991); DAVID B. WEXLER & BRUCE J. WINICK, LAW

study of "the law as a therapeutic agent."¹⁰⁰ It is an interdisciplinary approach that recognizes that legal rules and procedures and the roles of lawyers, judges, and other legal actors constitute "social forces"¹⁰¹ that have "inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects."¹⁰² Therapeutic jurisprudence fosters the exploration of ways in which the "knowledge, theories, and insights of the mental health and related disciplines"¹⁰³ can contribute to the development of law, in a manner that is consistent with principles of justice and constitutional values,¹⁰⁴ as well as other relevant normative values.¹⁰⁵ Law itself may act as a therapist or "therapeutic agent."¹⁰⁶ It is a "consequentialist" jurisprudence,¹⁰⁷ which examines the "law's impact on the mental and physical health of the people it affects,"¹⁰⁸ in much the same way as law and economics measures the economic consequences of the law.¹⁰⁹ Therapeutic jurisprudence calls for the study of these positive and negative consequences of the law using the resources of the behavioral sciences, to determine whether the "law's antitherapeutic effects can be reduced and its therapeutic effects enhanced,"¹¹⁰ without compromising principles of due process and other values of justice.¹¹¹ Once it is determined that substantive rules of law and legal procedures, and the roles of judges, lawyers, and other actors in the legal system have an effect on the physical and mental health of the people with whom

IN A THERAPEUTIC KEY (1996) [hereinafter LAW IN A THERAPEUTIC KEY]; Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 53 & n.124 (1991) (citing Bruce J. Winick, *Therapeutic Jurisprudence Applied* (June 25, 1988) (unpublished paper, on file with the International Academy of Law and Mental Health, Montreal, Canada)).

¹⁰⁰ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

¹⁰¹ *Id.*

¹⁰² Stolle, *supra* note 10, at 17.

¹⁰³ Winick, *supra* note 100, at 185.

¹⁰⁴ *See id.*

¹⁰⁵ *See* Stolle, *supra* note 10, at 17.

¹⁰⁶ Winick, *supra* note 100, at 185.

¹⁰⁷ *See id.* at 187-88.

¹⁰⁸ *Id.* at 187; *see also id.* at 189.

¹⁰⁹ *See id.* at 190.

¹¹⁰ *Id.* at 185.

¹¹¹ *See id.*

they deal, the therapeutic consequences must not be ignored.¹¹²

Law is "part of a rich tapestry of human interactions."¹¹³ It both affects and governs the maze of human relationships within our society. Consequently, it is reasonable to look at psychology and other mental health disciplines, i.e., the social sciences, which study human relationships, in shaping the law. "Unlike law and psychology and social science in law, which are empirically-based ways of looking at law that often purport to have no normative agenda, therapeutic jurisprudence is normative in its orientation."¹¹⁴ Furthermore, "[t]herapeutic jurisprudence suggests that, other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized."¹¹⁵ This normative aspect of therapeutic jurisprudence makes it similar to law and economics,¹¹⁶ critical legal studies,¹¹⁷ feminist jurisprudence,¹¹⁸ and critical race theory¹¹⁹—schools of jurisprudence with a specific normative orientation.¹²⁰ Each of these theories of jurisprudence seeks to advance the well-being of a particular group of people.¹²¹ Therapeutic jurisprudence, however, seeks to advance the psychological, emotional, and physical well-being of all people.¹²² One may, however, embrace therapeutic jurisprudence while also accepting the normative goals of other theories.¹²³ In fact, the goals often overlap.¹²⁴

¹¹² See *id.* at 188.

¹¹³ *Id.* at 186.

¹¹⁴ *Id.* at 188.

¹¹⁵ *Id.* (footnote omitted).

¹¹⁶ See *id.* at 189 & n.18 (citing A. MICHAEL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986)).

¹¹⁷ See *id.* at 189 & n.19 (citing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1987)).

¹¹⁸ See *id.* at 189 & n.20 (citing CATHERINE A. MCKINNON, FEMINISM UNBOUNDED: DISCOURSE ON LIFE AND LAW (1987); DEBORAH L. RHODE, JUSTICE AND GENDER (1989)).

¹¹⁹ See *id.* at 188–89 & n.20 (citing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); CRITICAL RACE THEORY (Kimberle Crenshaw et al. eds., 1996)).

¹²⁰ See *id.* at 189.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

Professors Wexler and Winick began their exploration in the context of mental health law,¹²⁵ looking at the law governing civil commitments and similar matters. In recent years, however, authors have applied the theory to numerous other areas of the law,¹²⁶ including family law,¹²⁷ criminal law,¹²⁸ labor arbitration,¹²⁹ contracts,¹³⁰ personal injury and tort law,¹³¹ and even workers' compensation.¹³² Therapeutic jurisprudence leads to numerous inquiries. "[I]ts principal power is to generate questions that otherwise might well go unasked."¹³³

¹²⁴ See *id.* Winick uses the examples of women in the workplace and racial equality to display how these goals can overlap. See *id.* He illustrates how treating women in the workplace with complete equality is consistent with the goals of both feminist jurisprudence and therapeutic jurisprudence. See *id.* Similarly achieving full equality for persons of color would have a therapeutic effect for such persons, thereby embracing the norms of both critical race theory and therapeutic jurisprudence. See *id.*

¹²⁵ See Thomas L. Hafemeister, *End-of-Life Decision Making, Therapeutic Jurisprudence, and Preventive Law: Hierarchical v. Consensus-Based Decision-Making Model*, 41 ARIZ. L. REV. 329 (1999).

¹²⁶ See generally David B. Wexler, *Applying the Law Therapeutically*, in LAW IN A THERAPEUTIC KEY, *supra* note 99, at 831.

¹²⁷ See, e.g., Leonore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCH. PUBLIC POLICY AND LAW 43 (1995), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 99, at 243.

¹²⁸ See LAW IN A THERAPEUTIC KEY, *supra* note 97, at 149-212.

¹²⁹ See Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 99, at 499-524.

¹³⁰ See Jeffrey L. Harrison, *Class, Personality, Contracts, and Unconscionability*, 35 WM. & MARY L. REV. 445 (1994), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 99, at 525-64.

¹³¹ See LAW IN A THERAPEUTIC KEY, *supra* note 99, at 385-466.

¹³² See William E. Wilkinson, *Therapeutic Jurisprudence and Workers' Compensation*, 30 ARIZ. ATTORNEY 28 (1994); see generally LAW IN A THERAPEUTIC KEY, *supra* note 99 (discussing other substantive areas addressed by therapeutic jurisprudence scholars).

¹³³ Winick, *supra* note 100, at 189. Winick lists the following five questions, in addition to several others, as examples of the types of issues raised by therapeutic jurisprudence:

Can a judge's colloquy with a criminal defendant at a plea hearing influence the defendant's acceptance of responsibility? Can a judge conduct a sentencing hearing in a manner likely to increase a criminal defendant's compliance with conditions of probation? . . . Can "teen courts" increase empathy in delinquent youths by having those youths serve as attorneys for victims in teen court proceedings? Might a fault-based tort system promote recovery better than a no-fault system? Would expansion of the unconscionability doctrine under the Uniform Commercial Code increase the self-esteem of economically disadvantaged consumers by empowering them to fight back against merchants with greater economic power?

In religiously affiliated law schools, our challenge is to bring our faith tradition to our task of educating lawyers and, through our scholarship, teaching, and other work, shaping the law for tomorrow. We cannot simply accept the status quo, rather, we must be zealous advocates for a jurisprudence which is consistent with the essential principles of our faith tradition.

C. *The Limits of Therapeutic Jurisprudence*

Despite the fact that there may generally be consensus within our society that therapeutic results are good and antitherapeutic results are undesirable, the research agenda of therapeutic jurisprudence—identifying the law's therapeutic and antitherapeutic effects—does not necessarily mandate a change in the substance or practice of law.¹³⁴

Therapeutic jurisprudence scholars have sought to avoid the pitfalls encountered by the law and economics movement, which measures the economic consequences of the law.¹³⁵ The law and economics movement sometimes went beyond merely criticizing legal rules as economically inefficient and “treated efficiency and wealth maximization as a transcending norm.”¹³⁶ Scholars of therapeutic jurisprudence have sought to avoid treating the higher valuation of therapeutic versus antitherapeutic results as such a norm.¹³⁷ As Professor Bruce Winick has explained:

There is an essential difference between descriptive and normative propositions. While descriptive statements can be verified empirically, normative statements cannot be. Normative statements are not true or false. We either agree or disagree with them depending on our value preferences. Within any particular society there may, of course, be consensus concerning certain values. Although there may be generally accepted conventions that allow us to argue about conflicts concerning normative matters, unless there is agreement about norms or about principles identifying a hierarchy of values, such disputes cannot be resolved by argument alone or by empirical research.

Id. at 189–90 (footnotes omitted).

¹³⁴ *See id.* at 190.

¹³⁵ *See id.*

¹³⁶ *Id.* (warning against “equating a description of a rule’s consequences with a normative conclusion about the rule’s value”).

¹³⁷ *See id.*

Once we understand this essential difference between descriptive and normative propositions, we must recognize that empirical verification of the truth concerning a particular set of facts cannot justify a normative conclusion concerning, for example, how a rule of law should be changed. One cannot reason from the "is" to the "ought" without explicitly or implicitly adopting a particular normative viewpoint¹³⁸

Professor Bruce Winick further describes the potential pitfalls of "consequentialist" jurisprudence, noting that when analyzing law from a law and economics perspective, one may recognize that while economic efficiency is an important value, it is not the only operative value.¹³⁹ Thus, one may criticize the economic efficiency of a legal rule, but cannot ignore values other than efficiency. As Professor Winick suggests, law and economics critics might criticize the legal rule requiring that welfare recipients be provided a hearing before their benefits are terminated because it imposes high fiscal and administrative costs.¹⁴⁰ Winick, however, points out that even though these hearings are arguably economically inefficient, such hearings serve other normative values such as achieving accuracy and providing satisfaction to litigants.¹⁴¹ In addition, the proceedings support values related to due process, the right of the welfare recipients to participate in the proceedings, and the upholding of the recipient's dignity.¹⁴² Consequently, the rule is defensible even though it may be contrary to the goal and value of economic efficiency.¹⁴³

In the same way, therapeutic jurisprudence scholars have reasoned that although therapeutic consequences should be embraced and antitherapeutic consequences avoided, other consequences must also be considered. Sometimes the other consequences or related values will hold a higher priority than the achievement of therapeutic results. Such consequences "may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental, or other

¹³⁸ *Id.* (footnote omitted).

¹³⁹ *See id.* at 190-91.

¹⁴⁰ *See id.* at 191.

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

normative goals."¹⁴⁴ For example, in *Ford v. Wainwright*,¹⁴⁵ the United States Supreme Court barred execution of death row prisoners who had become mentally incompetent.¹⁴⁶ The rule is arguably justified by such normative goals as upholding the Constitution or doing what seems morally right.¹⁴⁷ Yet the rule may "produce mental illness or malingering," and is therefore antitherapeutic.¹⁴⁸

Thus, therapeutic jurisprudence does not hold that therapeutic considerations should be valued over other "normative values that law may properly seek to further."¹⁴⁹ Rather, therapeutic jurisprudence calls for an awareness of the therapeutic and antitherapeutic consequences of the law and "enables a more precise weighing of sometimes competing values."¹⁵⁰

D. Holistic Jurisprudence: The Next Step?

The approach of the therapeutic jurisprudential scholars—to balance the normative values of therapeutic jurisprudence against the existing normative values of the law, law practice, and the legal system—is certainly a reasonable one. One criticism of law and economics theorists has been their disregard for any values other than efficiency, which yields rather unrealistic results.¹⁵¹

I submit, however, that Christians must question those other normative values. For Christians there is but one gospel. Although there are myriad disagreements among Christians

¹⁴⁴ *Id.*

¹⁴⁵ 477 U.S. 399 (1986).

¹⁴⁶ See Winick, *supra* note 100, at 191 (discussing *Ford v. Wainwright*, 477 U.S. 399 (1986)).

¹⁴⁷ See *id.*

¹⁴⁸ *Id.* (stating that the rule is "justified on moral and constitutional grounds even though it may produce mental illness or malingering").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Compare Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (supporting the employment-at-will doctrine on the basis of law and economics) with Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988) (arguing that "[a] wondrous Oz-like air of unreality pervades much of the Epstein thesis. His analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgement, on the one hand, or who suffer the psychological as well as the economic devastation of losing a job, on the other").

about the details of the norms of these faith traditions, there are some fundamental principles upon which most Christians, I believe, agree.

First and foremost, Christians are accountable to God. As Professor Allegretti has written, "no argument, no matter how weighty or sophisticated, can absolve the Christian lawyer from accountability for his actions before himself and his God."¹⁵² Christians live out that accountability relying on two great principles: that one should love one's neighbor as oneself and that one should love God with all one's being.¹⁵³ Those fundamental principles set the standard by which law, law practice, legal ethics, and the legal system itself should be measured.

I have named this concept "holistic jurisprudence." Although it may not be commonly known by this name, the concept of a holistic approach to law is not new.¹⁵⁴ Holistic jurisprudence is an idea in progress, and my hope is to stimulate thinking and invite ongoing dialogue on this developing viewpoint. There are difficult questions to answer in developing a jurisprudence based upon the Christian gospel and Judeo-Christian heritage. For example, there are conflicts to be resolved, for there are times when doing what is right, moral, and just for one person will necessarily have an antitherapeutic and negative impact on another. But just as we cannot abandon our faith because it is sometimes hard to live up to, we cannot abandon the quest for a more moral, humane, and caring

¹⁵² ALLEGRETTI, *supra* note 2, at 10.

¹⁵³ See Mark 12:29-33 (New American Bible) (stating that "[y]ou shall love the Lord your God with all your heart . . . You shall love your neighbor as yourself. There is no other commandment greater than these").

¹⁵⁴ See James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 314 & n.78 (1998) (noting the dearth of scholarship regarding holistic lawyering); William T. Pizzi, *A Holistic Approach to Criminal Justice Scholarship*, 79 JUDICATURE 58 (1995); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 320 & n.14 (1998) (discussing "holistic" lawyers who see themselves "first and foremost as counselors" and noting the existence of a "Holistic Justice Center and an International Alliance of Holistic Lawyers"); William Van Zyverden, *Lessons from Marley, Esq.'s Ghost: Adapted from Dickens' A Christmas Carol (1843)* 43 FED. LAW. 39 (1996) (noting that Van Zyverden is the founder of the Holistic Justice Center in Middlebury, Vt., and the founder of the International Alliance of Holistic Lawyers, which began "with a search for other lawyers who also questioned the role of lawyers and the current view of 'justice'").

practice of law and a body of law consistent with the gospel's message.

There are three principles from which I think one can begin the development of a holistic jurisprudence. They are that law and its practice (1) must preserve human dignity, (2) must show concern for the common good, and (3) are about morality. These principles, I hope, will transcend the boundaries of the Christian tradition and resonate to other persons of faith and conscience.

1. Preservation of Human Dignity

The law should preserve the dignity of all persons involved with or affected by it. If one professes that all of humankind is part of God's creation,¹⁵⁵ and that we must love one another, patterning ourselves upon God's love for us, then we must exalt human dignity as a normative value.¹⁵⁶ As the Catholic Catechism states, "The dignity of the human person is rooted in his creation in the image and likeness of God."¹⁵⁷

2. Concern for the Common Good

We must work for the common good, which is "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."¹⁵⁸ The common good requires a careful examination of our adversarial system in which there must be a winner and a loser. We should strive for a model which encourages the self-actualization of all persons, whether plaintiffs or defendants, lawyers or judges, criminals or victims. In short, the law must be holistic.

3. Law and Morality

Contrary to the assertion of the prosecutor in *The Practice*,¹⁵⁹ the law is and must be about morality. Christian lawyers cannot be among those who discredit witnesses they

¹⁵⁵ See generally CATECHISM OF THE CATHOLIC CHURCH pt. 3, § 1, ch. 1, ¶ 1701 (1995) [hereinafter CATECHISM] (observing that man was created in the image of God).

¹⁵⁶ See generally *id.* ¶ 1700.

¹⁵⁷ *Id.*

¹⁵⁸ CATECHISM, *supra* note 155, art. 2, ¶ 1906 (internal quotations and citation omitted).

¹⁵⁹ See *supra* notes 63–67 and accompanying text.

know are telling the truth. We cannot represent clients as "hired guns"¹⁶⁰ when the resulting impact on other human beings will be contrary to the gospel message. Some things that the Code allows are simply wrong. Christian lawyers are accountable to God first. There are times when what the Code deems ethical and acceptable is immoral, and must be eschewed in a holistic jurisprudence.

III. HOLISTIC JURISPRUDENCE APPLIED

A. *Holistic Jurisprudence in Law Practice*

Professor Allegretti and others have called for an "ethic of care"¹⁶¹ in the practice of law. Lawyers should function as counselors seeking to work with their clients in a holistic manner. For example, if a client is seeking a simple will, the lawyer needs to explore the emotions and dynamics of the family to determine whether a simple will is all that is needed.¹⁶² If a client is seeking a divorce and wants to "get" his or her spouse, the lawyer must see beyond the call for revenge and understand that property battles and custody battles are battles between two wounded children occupying adult bodies.¹⁶³ Winning the property battle will not heal the hurt. Getting counseling or bringing closure to the marriage, on the other hand, might.

Some lawyers will complain that it is not their task to direct clients and inquire beyond the agenda the client brings to the office. No doctor, however, would simply do what the patient asked without assessing and evaluating all factors using his or

¹⁶⁰ See *supra* note 51 and accompanying text (explaining the "hired gun" model). See generally THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, LAW FOR THE INNOCENT 3-12 (1992) (asserting that lawyers need to morally account for their actions, but describing how some justify the "hired gun" model by likening it to a physician who treats a patient regardless of the fact that the patient may have an immoral character).

¹⁶¹ See SHAFFER, *supra* note 160, at 21-33 (stating that one of three ethical orientations that govern the conversation between lawyer and client is "an aspiration to care for client").

¹⁶² See *id.* at 3-5 (using the example of the lawyer's role in making a will to illustrate some of the ethical questions arising in the everyday practice of law).

¹⁶³ See Kenneth A. Sprang, *Therapeutic Justice in the Workplace: The Use of Image Relationship Therapy in Employment Disputes*, 1 J. ALTERNATIVE DISP. RESOL. IN EMP. 53, 55-57 (1999) (demonstrating some of the difficult ethical questions that arise in divorce cases, particularly when children are involved).

her professional expertise. Lawyers must view clients holistically as human beings as well, and wear the counselor hat when needed.¹⁶⁴

B. *Holistic Jurisprudence in Litigation*

We must strive to find ways to make plaintiffs whole. In many instances, money, the standard means of trying to make them whole, is a woefully inadequate remedy.

A few years ago, I attended a conference in which the plaintiffs' and defendants' lawyers from the Woburn, Massachusetts environmental case made famous by the book *A Civil Action*,¹⁶⁵ spoke on the issue of whether mediation might have been helpful in the case. In the course of the discussion, the plaintiffs' lawyer, Jan Schlichtmann, indicated that the plaintiffs were never after money. They wanted to right a wrong. That message is echoed in the motion picture as well. Yet the demand was tens of millions of dollars. In the end, eight million dollars was the sum paid.¹⁶⁶ But the plaintiffs were no better off.

These men and women had buried their children. They needed to make sense of that tragedy. They needed to bring closure. They needed to know that their children had not died in vain. What if the goal had been to build a memorial to the children, perhaps in the form of a foundation to seek a cure for leukemia? What if there had been an apology from the defendants? What if the rules of evidence were changed so that such an apology would not carry the fear that it would constitute a damning admission should the matter go to trial?

Similarly in sexual harassment and other employment disputes, human dignity has been compromised. Applying therapeutic/holistic jurisprudence could stimulate re-examination of how we deal with such matters. Today, an aggrieved employee must file a charge with state and federal agencies and in many cases, ultimately litigate.¹⁶⁷ The reward

¹⁶⁴ See SHAFFER, *supra* note 160, at 3-12 (describing the view of those lawyers who see their job as simply to give clients what they want).

¹⁶⁵ JONATHAN HARR, *A CIVIL ACTION* (1995).

¹⁶⁶ See Robert F. Blomquist, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law*, CORNELL L. REV. 953, 968 & n.84 (1996) (reviewing JONATHAN HARR, *A CIVIL ACTION* (1995)).

¹⁶⁷ See Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights,*

for successful litigation is damages.¹⁶⁸ Yet such a scheme may have an antitherapeutic effect. True, the aggrieved employee has been vindicated, but at great cost. The employee has been forced to relive his or her experience through the trials of litigation. Yet at the end, the psychological harm—that assault on the employee's dignity—has not been addressed, for harassment is a dignitary harm, not simply an economic one.¹⁶⁹ It assaults the victim's very identity. A therapeutic approach might mandate mediation and embrace the concept of genuine apologies¹⁷⁰ or similar vehicles for restoring the victim's dignity.

In addition, contrary to our current scheme, a holistic approach would seek to "rehabilitate" rather than simply castigate the harasser.¹⁷¹ Current law simply penalizes the employer for the harassing conduct of an employee by imposing money damages.¹⁷² A victim of harassment may also be granted equitable relief in the form of reinstatement. The harasser, however, is ignored. He is neither punished under the law (although the employer may, of course, choose to take some action), nor "rehabilitated."

A therapeutic/holistic jurisprudence approach would consider that in order to achieve the national goal of eradicating discrimination, we must understand why the harasser engaged

Theories, and Realities, 46 ALA. L. REV. 375, 456–59 (1995) (describing that after a charge is filed, an investigation, lasting an average of 280 days, takes place).

¹⁶⁸ See *id.* at 464–65 (observing that Title VII of the 1964 Civil Rights Act "provides for compensatory and punitive damages," which serve as an incentive for lawyers to take on more Title VII cases).

¹⁶⁹ See generally Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO L.J. 1, 16–19 (1999) (stating that a dignitary harm is an insult to the "dignity, autonomy and personhood of each victim" and that "such harassment violates each individual's right to be treated with the respect and concern that is due to her as a full and equally valuable human being").

¹⁷⁰ See, e.g., Carrie A. Bond, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2517 (1997) (discussing the benefits of mediation in harassment cases and stating that a personal apology can help relieve some of the feelings of self-doubt the victim may experience).

¹⁷¹ See generally Pizzi, *supra* note 154, at 102 (discussing the need for reform and rehabilitation of defendants in the criminal justice system context and stating that universities are not turning out lawyers "equipped to lead . . . [such] reform").

¹⁷² See Turner, *supra* note 167, at 465 (noting that a plaintiff may seek punitive and compensatory damages from an employer who has engaged in intentional discrimination).

in harassing behavior, and we must seek to change that behavior. Recognition that the harasser has acted out of some subconscious need for power, misreading of the victim's intentions, or perhaps even innocently as a result of the accepted standards in his culture of origin, provides a means to achieve modification of the harasser's behavior in the future. Moreover, such recognition opens the door for communication between victim and harasser and the restoration of equilibrium in the workplace. Such communication may reduce disruption in the workplace and cost to the employer, by allowing both harasser and victim to continue working for the employer without disruptive tension.

C. *Holistic Jurisprudence in Law*

Holistic jurisprudence calls for the re-examination of substantive law as well. For example, few things in the world are as important to most of us as our jobs. We spend a great deal of our lives at work. Our employment is essential to our "existence and dignity."¹⁷³ The research clearly demonstrates that losing a job can have devastating consequences.¹⁷⁴ Many employees suffer severe emotional trauma when they are discharged.¹⁷⁵ This frequently affects relationships with families

¹⁷³ William B. Gould, IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892. Professor Gould further observed:

One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status.

Id.; see also William B. Gould IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28, 30 (1988); PAUL C. WEILER, GOVERNING THE WORKPLACE 3 (1990) (stating "the plants and offices in which we work are the places where we spend much of our adult lives, where we develop important aspects of our personalities and our relationships, and where we may be exposed to a variety of physical or psychological traumas").

¹⁷⁴ See Theodore J. St. Antoine, *The Model Employment Termination Act: Fairness for Employees and Employers Alike*, 1992 LAB. L.J. 495, 496 (1992) (stating that "[n]umerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, spouse and child abuse, and impaired social relations that follow in the wake of job loss").

¹⁷⁵ It has been noted, for example, that "white collar employees... are

and friends and causes permanent harm within those support networks. At its worst, the trauma can result in permanent incapacity or even death.¹⁷⁶ Despite these consequences of terminating one's employment, the United States continues to slavishly adhere to the historic "employment-at-will" doctrine, which provides that an employee may be discharged for a good reason, a bad reason, or even no reason at all.¹⁷⁷

Approaching law from a therapeutic/holistic jurisprudence perspective would compel a radically different result. Clearly, allowing employers to terminate an employee even for a "morally reprehensible" reason is not therapeutic, but rather antitherapeutic. A holistic approach would require attention to fairness and justice in employment relationships, more akin to the approach of the European Union and other nations of the world, which typically prohibit discharge without just cause and require substantial notice to the employee even when discharge is necessitated by such circumstances as financial exigencies.¹⁷⁸

CONCLUSION

This therapeutic/holistic approach reflects the essence of the Christian gospel. We are called to love our neighbors as ourselves and to do good works. In our Catholic tradition, we speak often of conversion, a continuous life journey of encountering God and seeking to grow and to be reconciled and united with Him. The same ethic is reflected in Jewish tradition and other great religions of the world as well. Legal principles that cause harm to the dignity and personhood of human beings are in conflict with the essence of our faith traditions. The

psychologically unprepared for the loss of security and status following on unemployment" Andrew Hacker, *Introduction: Corporate America in THE CORPORATION TAKE-OVER* 9 (Andrew Hacker ed. 1964); see also Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967).

¹⁷⁶ See, e.g., St. Antoine, *supra* note 174, at 496 (stating that, among other things, job loss can result in cardiovascular deaths, suicides, and mental breakdowns).

¹⁷⁷ See, e.g., *Witkowski v. Thomas J. Lipton, Inc.*, 643 A.2d 546, 552-53 (N.J. 1994) (stating employment is terminable at will unless an agreement provides otherwise and holding that "employment-at-will" is a valid doctrine in New Jersey, subject to discrimination and other public policy concerns).

¹⁷⁸ See *The Importance of Long-Term Job Attachment in OECD Countries*, OECD EMPLOYMENT OUTLOOK, Sept. 1994.

current practice of law, which causes distress and devastation to lawyers and leads them to compromise or abandon morality, is unacceptable. Holistic jurisprudence is a lens through which Christian lawyers may examine and evaluate our current law consistent with our faith, and a tool with which we can develop and shape the law of the future.

*Let us then pursue what leads to peace and to building up one another.*¹⁷⁹

¹⁷⁹ *Romans 14:19* (New American Bible).

