

Theology and Law Partners or Protagonists?

Christine Parker & Gordon Preece (eds).

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In the introductory Editorial of *Theology and Law: Partners or Protagonists?*, Gordon Preece writes that theology and law are ‘...two of the currently least popular and least esteemed disciplines and professions in western societies (p. 1).’ Lack of esteem, however, does not equate to lack of interest in the relationship between these two disciplines. The American legal academy has produced research in this area for at least twenty-five years (See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard, 1983); Robert E. Rodes, Jr., *Pilgrim Law* (Notre Dame, 1998), the depth and breadth of which demonstrates that exploring the relationship between the two may not be irrelevant to a deeper understanding of the world in which we live. There is no question, though, that Preece is correct when discussing the Australian academy. On these shores, academic lawyers and theologians have shown little interest in the relationship between theology (as opposed to religion, of which more in a moment) and law. For this reason, the collection of essays in *Theology and Law* is an important book which fills a gap in the Australian legal and theological literature. It needs to be read by academic lawyers and theologians.

Preece outlines five possible methodological approaches to the question ‘are theology and law protagonists or partners?’: (i) synthesis, at a highly theoretical level, of the two disciplines, (ii) a search for essential themes which, at a less theoretical level, find resonance with the other discipline, (iii) integration of the two disciplines, (iv) ‘...examin[ing] a range of contentious issues where law adjudicates the contested boundary between an allegedly secular society and public religion[] (p. 3)’, and (v) asking questions about character formation of professionals in the light of theological and experiential narratives which sustain Christian and ethical character.

Two difficulties with the volume emerge, however, although neither is fatal. First, while the title implies that the volume explores the relationship between theology and law, neither Preece’s Editorial nor the essays themselves are clear on this issue. For those in the legal academy, the difference between theology and religion has methodological implications. There is a well-established tradition within the legal academy, falling largely within Preece’s fourth approach, which explores the way in which law adjudicates the boundary between the public sphere and religious institutions. In using this approach, law is not concerned with the nature of God, with theology. Rather, it is concerned with an institution constituted by dogmatic teachings which have coalesced around a way of understanding God—in other words, religious institutions. It would have been helpful, then, had Preece made it clear in the Editorial whether the volume seeks to address theology, religion, or both. As it happens, taken as whole, *Theology and Law* addresses the relationship of law to both religion and theology.

The second difficulty is Preece's rejection of approaches (i) and (iii), the former due to space limitations and because the '...current abilities of each group to engage fruitfully with each other's deep structures and highly technical language[] (p. 1)', and the latter because it is '...still in its methodological infancy, despite many great theologians such as Tertullian and Calvin being lawyers by training (pp. 2-3).' Avoiding these two approaches is disappointing. Recent research from the American legal academy demonstrates how beneficial synthesis and engagement can be. To take but two such examples, Robert E. Rodes, Jr, of the American Notre Dame Law School, demonstrates how liberation theology may be implemented in domestic law (*Pilgrim Law* (Notre Dame, 1998), while Joseph William Singer, of the Harvard Law School, argues that the legal-political understanding of private property may benefit from insights gained from theology, leading to practical benefits for western legal systems (*The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000). Still, Preece is right—these techniques do require a great deal of development, and few Australians have taken the necessary time. Thus, even if space had been made, there would have been very little to fill it.

Neither of these difficulties, however, diminishes the importance of the volume for the Australian academy. And having dealt with them, we can turn to the essays. The remainder of the review is organised according to Preece's remaining three methodological approaches.

Christopher D. Marshall, in 'Satisfying Justice: Victims, Justice and the Grain of the Universe', uses the second approach. This essay is very much an exploration of the relationship between theology and law. Working from the social responsibility imposed by Christian scripture to care for victims of injustice, Marshall argues for 'restorative justice' as a legal framework which offers a 'third way' between the dominant retributive and rehabilitative models of penal philosophy. This model, anchored in a 'community of value' which prioritises '...mutual care and accountability, honesty and compassion, confession and forgiveness and peacemaking[] (p. 43)', attempts to satisfy victims, offenders, and the needs of the wider society. Marshall argues that this is no human construct; rather, restorative justice has an objective, metaphysical basis which, while difficult for those who hold to secular humanism to accept, is an inescapable conclusion '...for those who believe that the Christian story is objectively true...(p. 44).' According to the Christian worldview '...restoring love is the ground of the universe (p. 46)[]' and as such, as a model, restorative justice works because it accords with the way God made people and with God's plan for the universe. For Marshall, justice grounded in theology is historically paradigmatic; indeed, the whole sweep of human history shows that justice is grounded in the natural law tradition, which itself has origins in '...Judeo-Christian values, virtues and beliefs about the nature of ultimate reality (p. 47).' This '...should not be confused for fuzzy sentiments or romantic ideals. The[se] are costly commitments, fashioned in the furnace of human suffering and attested in full face of the ambiguities and contradictions of human life and of the sheer tenacity of evil (pp 50-51).'

Reid Mortensen, Nicky Jones, Frank Brennan, and Garth Blake take Preece's fourth approach. Because the first three address the same underlying issue—the separation of church and state—this review considers only those that explore that issue in the Australian context (Mortensen and Brennan). In 'Judicial (In)Activism in Australia's

Secular Commonwealth’, Mortensen argues that in the Australian polity, integration, as opposed to the separation of churches (religions) and state, is the norm. Integration finds expression in ‘...an anti-discrimination principle by which citizens have equal rights to bring their religious beliefs into the public square and government’s only role is to deal even-handedly between them (p. 53).’ Such ‘soft secular government’, as Mortensen calls it, is troubling because through it the Australian courts have effectively cancelled themselves out of any ability to police the ‘...arrangements, which governments and religious groups were prepared to strike themselves, to ensure that government remained impartial in its dealings with different religious and non-religious groups (p. 69).’ This ensures that for Australia, a future ‘wall of separation’ of church and state—especially in the case of hospitals, welfare, and private schooling—has poor prospects. Thus, ‘...in the deepening political debate about the role of religion in Australian public life, any appeal to ‘separation’ as a tradition of the Australian *polis* itself lacks persuasive power (p. 69).’

Brennan’s essay, ‘Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples their Due’, asks whether ‘...the civil institution of marriage...[should] be expanded to include a same sex union in which two persons voluntarily commit themselves exclusively to each other for life (p. 83).’ Brennan considers what is known as a ‘twin track’ strategy, by which is meant that advocates for change take their demands to both legislatures and courts; examples are cited from Australia, Canada and the United States. Arguing that only legislatures should make such fundamental changes to social institutions, Brennan’s view is that for Australia, a same sex union should not be called ‘marriage’ because that term has a popular and religious meaning which reflects people’s lived experience in families headed by a mother and a father. For Brennan, ‘[t]he legal definition of marriage should continue to follow the contours of that meaning and experience (p. 84).’

In ‘Child Protection and the Anglican Church of Australia’, Garth Blake reports on the Anglican response to clergy and church worker sexual abuse of children and adults. Having canvassed the ‘catalogue of failures’ of the Anglican Church—criminal convictions, civil litigation, inquiries, church discipline, and resignations—Blake examines the initial responses of the church: the establishment of a child protection committee, a sexual abuse working group, and a national abuse protocol working group. The essay concludes with an outline of the resolutions passed and the canons promulgated by the Anglican General Synod in 2004.

Adrian Evans and Christine Parker take Preece’s fifth approach. The former, in ‘Encouraging Lawyer’s Values in a Faith Conscious World’, argues that ‘...because lawyers...are incredibly powerful mediators of justice and injustice...(p. 9)[]’ legal educators need to talk to law students about the ‘big picture’ issues of life, death, God and community. Given that law is so very secular in Australia, the way to do this is through the surrogate concept of ‘values’, a modern euphemism for faith-related reflection. Yet while such values manifest themselves in legal ethics—the language of values for lawyers—the quality of discourse in this area has suffered because lawyers’ underlying values are so little acknowledged or understood. To learn more about these values, Evans conducted an empirical study of lawyers which examined issues of conflicting loyalties within a context of self-interest and lawyers’ perceived obligations to various stakeholders, such as those that might arise in pro bono work,

reporting a client's husband for child abuse, and rounding up hours on a bill. Evans argues for the use of the results of that study, or similar studies, in legal education.

Building upon Evans' theme, in 'Christian Ethics in Legal Practice: Connecting Faith and Practice', Parker writes that '...Christian lawyers face the challenge of not only being faithful at a personal and individual level (eg working with integrity and honesty), but also engaging with 'structural' tensions between the kingdom of God and aspects of our professional lives... (pp. 26-27).' Not surprisingly, Parker reports that different people handle these tensions and connections in different ways at different times in their lives: some keep the secular and Christian spheres mostly separate and focus mostly on the individual level of faith and work, others try to lead an exemplary ethical life, others become 'social reformers', while still others use legal practice as a Christian ministry. To substantiate this, Parker convened a series of workshops with lawyers to discuss these issues. Four themes emerged: (i) justice creates ongoing creative tension for the Christian lawyer, stemming from the difference in meaning between 'secular' and Christian justice; (ii) some Christian lawyers seek 'kingdom justice', by which is meant using their legal skills and insights to assist the church to express the distinctive vision of justice framed by the gospel; (iii) some Christian lawyers proclaim the gospel in their words and actions in legal practice; and (iv) some Christian lawyers attempt to avoid idolatry, by which Parker means having all of their time, energy and desire subsumed by work and the practice of law. As with Evans' contribution, Parker's essay is very valuable as an exploration of the way in which Christian theology plays a role in the formation of values for practising Christian lawyers.

One wishes that the contributors to *Theology and Law* had been clearer about whether this volume related to the relationship of law to theology, religion, or both. Similarly, given its methodological implications within the legal academy, one wishes that the contributors had attempted to distinguish between religion and theology. Yet, while one might point to these as difficulties, this volume nonetheless makes a valuable contribution to the Australian literature. It explores the relationship of law to both religion and theology. In doing so, *Theology and Law* extends the existing dialogue between law and religion already established in the Australian legal academy, and opens a new and valuable dialogue between law and theology, which, while familiar in the American context, is as yet undeveloped in Australia.

In making this contribution, the essays in *Theology and Law* tell us that rather than being partners **or** protagonists, theology and law are **both** protagonist **and** partner engaged in an ongoing dialogue—at one moment protagonists, continually urging and prodding the other to advance, re-structure, and develop, while at the next, and as a result of their protagonism, partners in the common pursuit of morality and justice. Perhaps a better title would have been *Religion and Law: Protagonists and Partners*. Whatever the title, though, this volume is a must read for Australia's academic lawyers and theologians. More importantly, it demands that we respond to and continue the dialogue which it opens.