

ESSAY ROUNDTABLE

WHAT COULD CHRISTIAN THEOLOGY OFFER TO THE DISCIPLINES OF THE LAW?

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Does the attempt of Christian theology to have an impact on disciplines of the law not provoke a single response, namely “Run for your lives!”? For such an attempt immediately evokes the stereotype of religious fundamentalism, which craves to have a normative impact on legal communication and, through this, on political and general moral norms and forms of life. Or, even worse, does such an attempt not imply that clear-minded legal thought is plunged into a religious whirlpool, a whirlpool that at the same time excites and calms down confused pious souls and that both appeases and ignites nervous moral moods and bewilders and alienates the rest of the world?

A meaningful approach to the task, one that avoids such traps, must unfold its understanding of the term *Christian theology*. And unless we envision an academically embedded and controlled theology, pursued by well-educated professionals, a theology invigorated by the ethos, the pathos, and the agreed practices of truth-seeking communities, I would warn against theology having an impact on law. To be sure, in predominantly Christian environments, all kinds of spiritual, intellectual, and moral impulses rooted in Christian faith traditions will have a variety of—mostly indirect—influences on human beings and thus also on persons involved in legal communication processes. One could call this influence the fluid and soft moral impact of dominant traditions of faith on the cultural and social life of a society. It requires of the practitioners of the disciplines of the law to discern the spirits—that is, to see in which situations the religious traditions and their value systems provide life-furthering impulses that are compatible with the law, and in which situations their followers seem to be driven by a personal, tribal, or ideological lust for power and control.

One can, of course, argue that these fluid religious impulses, often latently set, are not yet impulses of Christian theology. One could moreover argue that the strict idea that disciplines of the law can be expected to learn only from a theology based in the academy does not yet give an interesting and illuminating answer to the initial question, namely what it is that Christian theology can offer to the disciplines of the law. For would not all kinds of interactions among colleagues from theology and the law within universities and institutions of higher learning be considered as soft and emergent impacts on each other? Thus we have to take a deeper look and

search for a qualified understanding of Christian theology, an understanding that in any case includes the academic dimension with its quality control, but actually is more demanding.

For this deeper look I first ask, what kind of theology should be of interest to the disciplines of the law. Next, I speak about God's power and God's close connection to justice and righteousness. Finally, I address the topic of theological and legal realism and the immense creative and normative weight of God in a frail and finite natural world.

WHAT KIND OF THEOLOGY SHOULD BE OF INTEREST TO THE DISCIPLINES OF THE LAW?

Many good Protestants love the statement attributed to Luther at the Diet of Worms in 1521, made before the emperor and the whole empire: "Here I stand. I can do no other. God help me. Amen." It is fairly uncertain whether Luther said these words at all. What *is* documented is his statement, "Unless I am convinced by the testimony of the Scriptures or by clear reason (for I do not trust either in the pope or in councils alone, since it is well known that they have often erred and contradicted themselves), I am bound by the Scriptures I have quoted and my conscience is captive to the Word of God. I cannot and will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen."¹ This statement connects the search for certainty and the search for rational, consistent, and scripturally bound theological insight. In an exemplary way, it marks the theological search for truth based on the canon and the challenge that theology should be practiced in *truth-seeking communities*.

The thus defined minimum level of utterances is a very high one. It brings together the academy, the canon, and truth-seeking communities. Moreover, it requires substantial self-criticism and self-distancing from spiritual and intellectual endeavors that come in the guise of theology but fail to meet the requirements. An example at this basic level of such a failed theology would be what has been termed negative theology, that is, the claim that we cannot know God and speak of God at all, that we can only acknowledge God's apophatic and mysterious being, that God is plain transcendence. This is a false form of theology, a theology that, in my understanding of it, has nothing to offer to the disciplines of the law.

To be sure, this does not mean that there are not elements of hiddenness and mystery in the Divine. Theological utterances do not have to reach the levels of a well-formulated confession or a proclamation. They can be fragmentary, rudimentary, and even distanced. But they have to unite at least a minimum of consistency of conviction and a minimum of consistency of subject matter and they have to be articulated and, if challenged, be defended by arguments in search of truth. Truth is often confused with mere certainty, particularly in religious matters. It is also often reduced to consistency and correctness, particularly in the academy. Theology, however, requires both of these dimensions, subjective certainty and objective content and coherence. The mutual challenge exercised by these two sides makes theology go out in search of truth.

The theological search for truth is not only a conceptual enterprise. To be sure, much theological thought is concerned with the identification of integrating ideas, concepts, or narratives of God or of the divine. Even on this basic level, the spectrum of opinions is extremely broad. Some theologians propagate integrating concepts of God, such as "God is the ultimate point of reference,"² or

1 Martin Brecht, *Martin Luther*, vol. 1, *His Road to Reformation, 1483–1521*, trans. James L. Schaaf (Philadelphia: Fortress Press, 1985), 460.

2 Gordon Kaufman, *In Face of Mystery: A Constructive Theology* (Cambridge, MA: Harvard University Press, 1993), part 4; see generally Gordon Kaufman, *The Theological Imagination: Constructing the Concept of Ground* (Philadelphia: Westminster Press, 1981).

“God is the ground of being.”³ Others prefer religious ciphers—“the transcendent,” or “the numinous,” “the absolute, the infinite”⁴—and demand respect for the apophatic and the unknown. Even in the group that searches for theological content and clarity there is a vast difference between those who insist, for example, on a Trinitarian theological basis or on other concepts of God that are compatible with revelation and Christology, and those who are quite satisfied with a “prima causa”⁵ or with the idea of an “all-determining reality.”⁶

Recently the contribution of a philosopher at the Heidelberg Academy⁷ who tried to argue for a strong “theological” interest of all serious philosophy opened our eyes to the danger implied here. We saw that theology should insist on a clear differentiation of theology on the one hand and, on the other, a totalitarian metaphysics which works with all kinds of concepts of “the absolute.” It should insist on the insight that a serious concept of God cannot remain soteriologically empty. When I asked the philosopher for any saving and ennobling powers of his god or rather god-thoughts, and when a colleague from the law school asked for any concerns for justice and righteousness of this god, there was no answer. An important contribution of Christian theology to the sphere of law should come in the critical insight that a first cause or a ground of being without any saving, elevating, and ennobling powers cannot be regarded as God, and the best reflections on it do not make a theology.

Once we have perceived this, it is clear that the mere search for an ultimate thought is not at all sufficient to make theology. One cannot pray to an “ultimate thought,” and one cannot expect salvation from an “ultimate thought.” A mere idea of God, a mere concept of God, even God as a regulative moral idea is not enough to ground theology and to offer fruitful impulses to disciplines of the law. Rather, the question of ultimate realism, even the realism of spiritual realities, has to be dealt with. God has to be conceived as a living eternal reality, without any escape into the abstractions of timelessness and infinity. This reality has to be approached in thoughts and ideas, when a theology is to be cultivated, but this reality is not just a product of thinking. This majestic living reality has power over death and sin, although it does not constantly exercise this power everywhere in our finite, often brutal, and always death-bound world. Primitive theistic notions of an “all-determining reality” and wishful thinking about our frail and finite world do not prove helpful.

THE POWER OF GOD’S SPIRIT, GOD’S JUSTICE AND RIGHTEOUSNESS

The best way to conceive of the reality of the divine power is by focusing on God’s spirit or on God the Spirit. The biblical notion of the Spirit, however, should not be confused with the general understanding of the spirit that goes back to Aristotle and is, basically, an intellectual and mental power. This philosophical spirit has been conceived of in dual and triadic structures. It is perceived as the

3 Paul Tillich, *Systematic Theology*, vol. 1, *Reason and Revelation, Being and God* (Chicago: University of Chicago Press, 1951), part 2, 2B.

4 Nicolaus Cusanus, *De visione Dei*, in *Philosophisch-theologische Schriften*, ed. Leo Gabriel, trans. D. Dupré and W. Dupré, 3 vols. (Vienna: Herder, 1967), 3:93–219; Bernard McGinn, *The Harvest of Mysticism in Medieval Germany, 1300 to 1500*, vol. 4, *The Presence of God* (New York: Crossroad, 2005), chapter 10.

5 On Dionysios Areopagita, Thomas Aquinas, and others, see Paul Rorem, *Pseudo-Dionysius: A Commentary on the Texts and an Introduction to their Influence* (Oxford: Oxford University Press, 1993).

6 See, for example, Rudolf Bultmann, *Glauben und Verstehen*, vol. 1 (Tübingen: Mohr Siebeck, 1933), 26–37; Wolfhart Pannenberg, *Wissenschaftstheorie und Theologie* (Frankfurt: Suhrkamp, 1973), 304–55.

7 Jens Halfwassen, “Gott im Denken: Warum die Philosophie auf die Frage nach Gott nicht verzichten kann,” in *Gott – Götter – Götzen*, ed. Christoph Schwöbel (Leipzig: EVA, 2013), 187–96.

power of the self to relate to the world, to capture the world in thought, and to reach cognition and insight—not only of the world, but also of the perceiving and thinking subject. The deeper knowledge of the self allows for an enhanced approach towards the world. Knowledge of the self and knowledge of the world intensify each other and grow simultaneously. The perfect knowledge is reached by the divine. This is the message of the Aristotelian metaphysics.⁸

Many biblical witnesses to the Spirit, however, speak of the “pouring of the Spirit,” and they envision a polyphony of impulses in complex relations, in one-on-many and many-on-many relations. In an almost revolutionary and subversive way, the prophet Joel (Joel 3) envisions the pouring of the Spirit on male and female (in patriarchal societies); on old and young (in gerontocratic societies); and on male and female slaves (in slaveholder societies). The Pentecost account (Acts 2) takes this up: it quotes Joel at length and adds the insight that God’s and Christ’s Spirit is poured on many nations with their different languages and different traditions, thus challenging all ethnocentric, chauvinistic, and tribal ideologies.⁹

However, this overwhelming dimension of the spiritual powers of the divine “from on high” is not sufficient to fully explain the power of God. Christian theology also witnesses to the revelation of God in the humbleness of the life and work of Jesus Christ, whose earthly presence stretches from the icon of the child in a manger to the suffering and dying Christ on the cross. His pre-Resurrection life witnesses to the life-furthering diaconal, prophetic, and priestly powers here on earth—powers that are universally extended in the work of his Spirit after the Resurrection. This power of the Spirit is present in an abundance of diaconal, prophetic, and priestly activities performed by human persons, be it consciously or unconsciously. It is in this way that God’s power becomes effective in this frail and self-endangering world. In this incarnational, kenotic, and spiritual presence, God wants his majesty and his might to be revealed.¹⁰ Here we can witness God’s justice, mercy, and love exercised in his creation. Here we are also confronted with the message that God’s agency is not limited to frail and finite life in nature and cosmos. Creation itself is more than nature and cosmos: it includes an abundance of spiritual, cultural, and social powers, and the powers of the Spirit even point beyond finite creation into new creation.

The notions of justice and righteousness, mercy and love are crucial concepts for an understanding of divine creativity. Although justice and righteousness are not the *only* features that characterize God in the three Abrahamic religions, they are nonetheless two of the *central* features. Without justice and righteousness, God would not be God. God is not interested in keeping his justice and righteousness to himself in some transcendent glory. Instead, that righteousness is intended for humanity itself, and this bestowal should prompt humans in their own turn to be grateful to God and to practice justice and righteousness among themselves. Even secularized and secularly inclined approaches associate God and righteousness, albeit with a different accentuation. In his history of justice, *Una storia della giustizia*, the Italian historian Paolo Prodi cites an anonymous adviser in the Republic of Florence in 1431: “Deus est iustitia, et qui facit iustitiam, facit Deum” (God is righteousness, and whoever produces righteousness also produces God).¹¹

8 See Aristotle, *Metaphysics*, trans. Hugh Tredennick, Loeb Classical Library 287 (Cambridge, MA: Harvard University Press, 1935), vol. 1, book 12, 1072b, especially pp. 19–32; see Michael Welker, *God the Spirit*, new edition (Eugene: Wipf & Stock, 2013), 283–302.

9 Welker, *God the Spirit*, 147–58 and 228–39.

10 See Michael Welker, *God the Revealed: Christology*, trans. Douglas W. Stott (Grand Rapids: Wm. B. Eerdmans, 2013).

11 Paolo Prodi, *Eine Geschichte der Gerechtigkeit: Vom Recht Gottes zum modernen Rechtsstaat*, trans. Annette Seeman (Munich: Beck, 2003), 14 (German translation) (author’s English translation).

To be sure, a look at the world in which we live renders such theologically alleged connections between justice and righteousness as a characterizing feature of God highly questionable, and that holds true for righteousness in the relationship between God and humanity, and interpersonal righteousness. How exactly are we to understand God's justice and righteousness when experience so clearly shows us that suffering, distress, and death rule in this world and that pain and suffering are apportioned in an extremely unequal and unbalanced fashion?

An even more dramatic view emerges when we acknowledge, as we must, that innumerable conditions in this world that are utterly inimical to a good life have in fact not only been created but are also created ever anew, without interruption, by humans themselves. Finally, all hope in the integrity of God's justice and righteousness seems to disappear entirely when we are confronted by the realization which most people prefer to ignore, namely that all life lives at the cost of other life.

The mathematician and philosopher Alfred North Whitehead repeatedly addressed this theme, articulating it, moreover, quite succinctly in the assertion that "whether or not it be for the general good, life is robbery."¹² How can we speak about the justice and righteousness of God, of the creator of all things, if at the same time we see that the world in which we live is utterly permeated by sequential hierarchies of nourishment? Nature does, it is true, exhibit a high degree of beneficial organization, fruitfulness, and beauty. At the same time, however, natural earthly life also exhibits the ineluctable cruelty that characterizes life at the cost of other life. Even vegetarians must destroy infinitely much life to feed themselves. Hence any unqualified references to nature and life as salvific concepts, or certainly any equating of God and nature, is naive and careless. This sober realistic insight should have a dramatic impact on all natural-law rhetoric.¹³

The differentiated union of justice and mercy, or of righteousness and the systematic protection of the weak, is of key importance for discerning God's justice and righteousness and their normative and liberating potential, for here the biblical law and the biblical teaching about God establish a value system that in fact runs counter to the natural tendency of life, namely, counter to the tendency to preserve oneself at the cost of other life. This close connection between righteousness and mercy prompts humans to practice free and creative self-withdrawal on behalf of others, that is, to withdraw oneself so that another person or other people might have access to their full scope of development and life.¹⁴ In family life and in love relationships involving one's partner or parents, this free and creative self-withdrawal on behalf of others does indeed seem "natural," that is, as deriving from or given by nature itself. What, however, prompts people to exercise mercy and loving care and concern *beyond* the obvious circle of children, sick family members, or aging parents and grandparents?

In the midst of the fundamentally predatory disposition of natural life, forces are thus at work that warrant our closer attention. Biblical traditions as well as the Qur'an repeatedly associate God's justice and righteousness with God's mercy. The Jewish Kabbalah speaks of the two hands of God, righteousness and mercy, emphasizing that without God's mercy the world would suffer grievously from God's righteousness.¹⁵ The association of righteousness with mercy lends

12 Alfred North Whitehead, *Process and Reality: An Essay in Cosmology*, ed. David Ray Griffin and Donald W. Sherburne (Free Press: New York, 1978), 105.

13 I unfold this in my Heidelberg farewell lecture, "Gottes Gerechtigkeit," *Neue Zeitschrift für Systematische Theologie und Religionsphilosophie* 56, no. 4 (2014): 409–21.

14 See Michael Welker, "The Power of Mercy in Biblical Law," *Journal of Law and Religion* 29, no. 2 (2014): 225–35.

15 See, in this regard, Michael Fishbane, *Sacred Attunement: A Jewish Theology* (Chicago: University of Chicago Press, 2008); see especially the epilogue, 206–9.

sensitivity, humanity, and universal charisma to the striving for justice and righteousness. The association of mercy with justice in God's law aims at expanding the protection of the weak *beyond* the context of family, cordial relations in daily life, and tribal thinking.

Despite the inconspicuous nature of countless individual actions and experiences of free, creative self-withdrawal on behalf of our fellow human beings, they are nonetheless a gigantic force, a power that changes and shapes life itself and that as such runs counter to the melancholy which accompanies the perpetual transience of natural life. Religious faith generally views this force and power as a gift, a present that distinguishes human persons in a special way. On the one hand, their natural life is wretched and frail; as Qoheleth says, all human beings, like other animals, "are from the dust, and all turn to dust again" (Ecclesiastes 3:20). On the other hand, God has assured human beings that they have been made but "a little lower than God" (Psalm 8:6). In all their life possibilities, human beings are created in the image of God and as such as witnesses to God's justice and righteousness, and it is through the divine Spirit that this power is bestowed upon them.

An appeal to divine justice and righteousness is a message of the power of empathy and critical vigilance. In the midst of a creation that is radically different from God, a creation that despite certain features that do indeed attest to order and beauty is nonetheless incontrovertibly predatory, frail, and transient—in the midst of all this, extraordinary and remarkable counterforces are nonetheless at work: forces of compassion, mercy, and love; forces accompanying the search for truth and justice; forces that despite their distinctly inconspicuous nature nonetheless possess enormous creative charisma; forces that direct us toward a life beyond the natural inclination for self-preservation.

This whole package of insights does not only generate a theological realism, it also invites an intimate partnership between religion and law, theological and legal thinking, and their common radiation into everyday religious, legal, and moral orientation.¹⁶ And this should not only be seen as a person-on-person challenge in many good individual examples, but as a call for the systemic radiating, educating, and orienting power of theology and legal thinking in civil societies and their contribution to character formation and moral education.

The enhancement of life in free, creative self-withdrawal of human beings on behalf of their fellow creatures is the secret of divine justice and righteousness in this world. A decidedly non-illusory, realistic element of hope accompanies this justice. The power of free, creative self-withdrawal that surrounds us transformationally in an infinite variety of forms and figures is a constant source of ultimate trust and hope.

So to sum up, we return to the question: What could Christian theology offer to the disciplines of the law?

1. The critical and self-critical power of a theology, schooled and observed in the academy, based on the biblical canon and consciously practiced in truth-seeking communities.
2. The clear differentiation from what I would term fake theologies that shy away from articulate and rational witness on the one side, and offer only a metaphysical propagation of the absolute

¹⁶ See Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012). For a global challenge in general education for an ethos of human rights see John Witte, Jr. and Frank Alexander, *Christianity and Human Rights: An Introduction* (Cambridge: Cambridge University Press, 2010); see also the contributions on Rechtsethik, Politische Ethik, Ethik des Sozialen, und Ethik der Kultur in Wolfgang Huber, et al., eds., *Handbuch der Evangelischen Ethik* (Munich: Beck, 2015).

and other ultimate thoughts without any soteriological weight and intrinsic connection to justice and righteousness, mercy, and love.

3. The differentiation between the Aristotelian intellectual and mental spirit and the biblical witnesses to the Spirit as a power of God poured “from on high” and the gifts of this Spirit bestowed on human beings.
4. The unfolding of the diaconal, prophetic, and priestly gifts of the Spirit and the insight that these divine gifts give clarity to the correlation of justice and mercy, of righteousness and love.
5. The honest and sobering insight that these powers are at work in a world which is not only frail and finite, but basically endowed with a natural life that lives at the expense of other life and is ultimately predatory.
6. The equally realistic insight that God and God’s Spirit endow the world with the sustaining, saving, and ennobling counterforces of free and creative self-withdrawal in favor of others, thus establishing a complex value system that runs counter to the natural tendencies of life and that can equally orient theological and legal thought and action.
7. Christian theology can unfold the deep foundations of a cousinly relationship between law and religion, theological and legal thinking that can work for the benefit of all truth- and justice-seeking communities and individuals in the contemporary world.