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Joan Lockwood O'Donovan

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Law and Redemption: Political Judgment and the Church's Proclamation

Joan Lockwood O'Donovan*

To situate the human enterprise of giving law or political judgment within a theological understanding of “the higher law” is to situate the *political reality* of human freedom within a theological understanding of the total reality of human freedom. I suspect that every practitioner of law views the legal enterprise both as expressing human freedom and as serving human freedom, “serving” in the sense of securing, protecting, and promoting it, despite the constraints placed on human conduct by the practice of political judgment in its adjudicative, executive, and legislative forms. I also suspect that, if asked to define or describe the freedom which the enterprise of law serves, most practitioners would light on a structural understanding of human freedom as the individual's power of choosing among alternatives, whether alternative things, actions, or courses of action. Or perhaps, with a little more philosophical sophistication, they might expand this definition of freedom into the individual's power of determining or realising themselves through acts of choice.

Theologically considered, such a conception scarcely advances an understanding of how the legal enterprise both expresses and serves human freedom. To advance further (or perhaps, at all) is to understand human freedom as the dynamic reality of human beings *responding obediently* to God's communication of His will. In the longer theological tradition, the value, the worth, and the significance of human freedom lie entirely in its dynamic reality as an ongoing positive human response to God's manifold revelation of His will—His law—to His human creatures. There is no free human action that is not a receiving of what God has already done and given.

* Joan Lockwood O'Donovan has published extensively in the history of Christian social and political thought and currently holds the position of Honorary Fellow of New College, University of Edinburgh. Her latest book is *BONDS OF IMPERFECTION: CHRISTIAN POLITICS, PAST AND PRESENT*, a joint book of essays with Oliver O'Donovan (2003).

God's first and foundational revelation of His will to human beings is in and through the intelligible structures of their creaturely reality, including those of the moral life. These comprise an order of universal human goods—physical, intellectual, and spiritual—and the patterns of right relationships of persons to God, to one another, and to the non-human creation that they entail.¹ The unity of love with right and law in every created good means that it is only through free obedience that human beings partake of them, obtaining the objects of their deepest needs and desires. Finally, these goods are irreducibly social, in that the unity of love and law creates a communion of desire and obedience among persons.

The reality of human sin is that disjunction between love and law, desire and obedience, characterising the human failure to respond to what God has done and given. The result of this refusal of the God-given restraints inhering in the fulfillment of every rational desire is the diminution of common human freedom and the ascendancy of personal isolation. As individuals seek and obtain self-centered, self-serving, and ephemeral “goods” in their disordered relationships, the stronger invariably perpetrate injuries on the weaker in their disordered pursuit of such “goods.”

To human beings whose lives together are disrupted and distorted by sin, and whose freedom is severely diminished, God has given the commands of His law that restrain their self-destructive waywardness. By convicting them of their sin, God moves them toward repentance. Most importantly, He has brought about the restoration and perfecting of human freedom in the saving work of Jesus Christ, and summons all human beings to receive from Christ the gift of their restored and perfected freedom.² While this reception will only be fully accomplished in Christ's coming kingdom, it has already begun in those who have become His disciples, being baptized into His earthly body, according to God's revealed law of our salvation.³ To understand human freedom theologically is to understand the equality of human beings in freedom and their standing with respect to one

1. The first two chapters of *Genesis* offer an initial window on these universal human goods and rights. Here we are told that humankind is given lordship (or stewardship) over the rest of creation and that in its stewardship of caring for and using non-human creatures, human beings satisfy spiritual as well as physical needs: needs to know the natural order (Adam names the non-human creatures, discerning their “kinds”) and to admire its beauty as well as to derive material benefits from it through labour and technology (work and contemplation being wedded in the image of Adam and Eve tending the garden). See *Genesis* 1:29–30 (New Int'l Version). We are told that humankind is created, male and female, for the exclusive sexual communion and partnership that begets children. See *id.* at 1:27–28. Finally, we are told that human beings are created for *Sabbath Rest* in which they participate in the perfection of God's work by desisting from their own labour in order to offer Him praise and thanksgiving. See *id.* at 2:2–3.

2. See *Romans* 3:21–26.

3. See *id.* at 6:2–7.

another as objects of, and respondents to, God's gifts in His creation, preservation, and renovation of the common life of persons.

It is by situating the human enterprise of coercive political judgment within this complex dynamic of divine law and human freedom that Christian theologians have understood its purpose, form, and limitations. The longer theological tradition of the West firmly situates the human legal enterprise within the *saeculum*, i.e., within the reality of disordered human life, struggling under the destructive propensities to sin and subject to the restraining and condemning force of God's law.⁴ Called forth by the restraining commands of God's law on human waywardness, the communal freedom of giving binding judgment concerning matters of right and wrong, for the punishment and correction of wrongdoing and vindication of well-doing, does not represent the fullness of God's law, but only His providential condemnation of human wrongdoing which mercifully preserves the common life of sinful human beings against the assault of human evil.

In presupposing both actual wrongdoing and the universal human disposition to wrongdoing, coercive political judgment belongs neither to the order of human freedom as God created it nor to its renewing and perfecting in the community of the resurrected and ascended Christ. The freedom that Christ promises and imparts to His faithful people is the fulfillment of God's righteous commands that has overcome both the rule of sin over human life and the law's condemnation of sin.⁵ Nevertheless, coercive judgment cannot be wholly understood apart from these realities, for it is dependent on, and ordered to, them both. From a theological viewpoint, it is not just that the practices of public law are not fully intelligible except in the light of these two transcending realities, but that the proper practice of public law requires faithful knowledge of them. Without faithful knowledge, the human legal enterprise is bound to succumb to dangerous distortion and corruption, failing to achieve its purpose, and becoming, in one or another respect, an assault on human freedom rather than a service to it. Among theology's contributions to the practice of law is the depth and scope of its critical perspective.

Today, we seem to be witnessing a revival of "natural law" in legal, philosophical, and theological circles.⁶ Theologically understood, this

4. See *id.* at 7:21–25, 8:1–4.

5. See *id.* at 8:3.

6. See, e.g., J. DARYL CHARLES, *RETRIEVING THE NATURAL LAW: A RETURN TO MORAL FIRST THINGS* (2008) (arguing that a revival in natural-law thinking is of the highest priority for the Christian community, especially in the field of bioethics); STEPHEN J. GRABILL, *REDISCOVERING*

draws attention to the relationship between coercive political judgment and the intelligible structures and principles of order in our world as created by God, as well as to the restraining commands of God's law. While this revival is indispensable to combating those contemporary distortions of legal theory and practice that are undermining human moral agency and action in liberal democratic societies, it is not sufficient. Drawing attention to the relation of coercive political judgment to God's saving judgment of all humanity is equally indispensable as it promises a future for human community beyond the tragedy of coercive human judgment: a future of common human obedience to Christ's rule of love.

This latter relation is not only operative in the bearing of the Christian faith of individual legal practitioners and academics on their professional practice and theoretical reflection, but pre-eminently, in the bearing of the church's universal practice of proclaiming God's word of judgment in Jesus Christ on the "secular" practice of jurisdiction. It is only as we perceive the role of the church's core practice of proclamation, common worship, in the eschatological renewal of human freedom, that we can also appreciate the indispensable, yet comparatively peripheral, service of jurisdiction to human freedom. The longer tradition of western legal thought sets the church's practice of proclamation and the practice of political judgment in dialectical tension, recognizing on the one hand, the great distance (from the perspective of sinful humanity) between God's saving and His preserving word of judgment, but on the other, the encompassing of God's preserving word to humanity by His saving word, so that the undertaking of coercive human judgment is ultimately (remotely) ordered to God's elective word of salvation in Jesus Christ.⁷

Next consider briefly the form and scope of the practice of political judgment in relation to the promised renewal of created human freedom through the church's practice of proclamation.

As the restraining response of the sinful human community to the disordered action within it, the practice of political judgment responds both to actual misdeeds and to threatened misdeeds by anticipating them. In the courts, political judgment is always a reaction to past wrongdoing, determining who has committed what offence, the degree of culpability, and the appropriate punishment to be imposed and/or compensation to be

THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS (2006) (attempting to reintegrate Reformed Protestant theology with natural law in Christian ethical thought); ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION: CONTEMPORARY PERSPECTIVES (John Goyette, Mark S. Latkovic & Richard S. Myers eds., 2004) (evaluating the current revival of interest in natural law across a range of disciplines including: philosophical, theological, legal, and political); COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW (Edward B. McLean ed., 2000) (exploring the application of the natural law theory to contemporary law and practice).

7. See *Romans* 14:10 ("But why does thou judge thy brother? Or why dost thou set at nought thy brother? For we shall all stand before the judgment seat of Christ.")

required (not denying the prospective aspect of punishment). Of course, lawyers are also involved in practices of establishing legal obligation—preparing contracts, personal wills, property deeds, etc.—but these too anticipate and seek to prevent the non-fulfilment of duties inhering in different kinds of social relationships. The anticipatory element is greatest in the work of legislators who, while responding to past misdeeds of a particular type, have a primary aim to deter further commission of misdeeds of that type. The main point, however, is that political judgment, whether in legislation or in the courts, takes the form (or should take the form) of defining specific deprivations of goods, violations of rights, harm and injury to individual and collective subjects, and degrees of culpability.

Thus, the English tradition of criminal law has typically proceeded by defining particular crimes as derelictions of specific duties or obligations binding on all within a jurisdiction, and has included derelictions of duties that persons (acting alone or together) owe to God, to one another, to themselves, and to the non-human creation: duties of husbands and wives, parents and children, buyers and sellers, lenders and borrowers, employers and employees, proprietors to neighbouring proprietors and to the innocent stranger, duties of each person to every other, and to the whole community, and so on. The legal tradition has not attempted to give a positive moral account of these various sets of relationships, arranging and detailing the obligations inhering in them. Still less has it sought to provide a manual for attaining the social goods they embody. Rather, it has conformed to the longstanding theological conviction that political judgment should not attempt to prescribe, nor aspire to effect, godly, righteous, virtuous, and just conduct, but to proscribe only those graver violations of the moral law that threaten the precarious society of sinful human beings.⁸ This is the first plank of western Christian liberalism.

The theological tradition has regarded any secular tendency to legal perfectionism as encroaching, not only upon the impaired and fragmentary freedom still available to sinful human beings in their natural moral relationships, but even more, upon the renewed freedom of repentance and faith made available to sinful humanity in and through the church's *faithful ministry* of gospel proclamation.⁹ An excessive and misdirected public legal

8. See Patrick Devlin, *Morals and the Criminal Law*, in 2 LAW AND MORALITY 308, 309–10 (David Dyzenhaus & Arthur Ripstein eds., 2001) available at <http://books.google.com/books> (search "Morals and the Criminal Law"; then follow "Law and Morality" hyperlink). ("It is not . . . the function of law . . . to seek to enforce any particular pattern of behavior.")

9. See Matthew A Ritter, *Constitutional Jurisprudence of Law & Religion: Privacy v. Piety—Has the Supreme Court Petered Out?*, 40 CATH. LAW. 323, 364–67 (2001).

pedagogy would assault the freedom of the divine Spirit of Christ to reveal to repentant and believing human beings the fuller meaning and form of the natural obligations of love within the wholly reconciled human community, which God's atoning and vindicating judgment of humankind in Christ has inaugurated.

This wholly reconciled community is anticipated above all in the *truly worshipping* church (always presuming the sinful human tendency to idolatry), where God's creative and saving word of judgment in Jesus Christ is proclaimed in its totality, in public reading of the Scriptures, preaching, praising, prayer, and sacramental celebration, and where, by the power of the Holy Spirit, God's judgment is heard so as to bear spiritual and practical fruit among His people.¹⁰ The church's faithful worship makes present Christ's promise of a communion of persons in obedient knowing, desiring, and judging, in the common possession of the eternal Good, the Triune God, and of all creaturely goods in their relations of dependence on Him, which alone is the total communication of divine and human right.

In the light cast by the church's faithful proclamation of wholly reconciled community, political judgment is revealed to be a shadowy mimesis in un-reconciled community of truly reconciling action, a mimesis infected with the disunity that it seeks to overcome. This disunity is visible both in the acts of judgment and in their effects. Acts of legislating and of adjudicating cannot achieve, nor should they aim at, total consistency with preceding acts, because the sequence of legal judgments necessarily reflects the shifting patterns of wrongdoing in sinful society, as well as the shifting conflicts in social opinion about what constitutes grave wrongdoing worthy of public condemnation. Theologically speaking, every act of public legal judgment exhibits not only the natural limitations of human practical judgment subject to temporal contingencies, but also the characteristic deficiencies of particular societies arising from sinful human blindness to and rebellion against God's revealed judgments.

Neither should political acts of judgment seek, through the punishments and satisfactions they assign, to bring about the spiritual reconciliation of formerly antagonistic wills which comes through the offender's true contrition and the injured party's forgiveness of the offence. No matter how wise, discerning, and compassionate their judgments may be, secular judges are not empowered to pronounce the judgment of Christ's suffering and triumphant love that justifies and regenerates the repentant sinner and makes possible a community of forgiveness. This must come from the church's

10. See Joan O'Donovan, *A Reformation Ethics: Proclamation and Jurisprudence as Determinants of Moral Agency and Action*, 71:1 *PHILOSOPHIA REFORMATATA* 58–78 (2006) (This is my discussion of the church's common worship as the "first obedience" of faith and the paradigm of renewed moral agency and action.).

ministry to the offender. Rather, secular judges should be content with achieving peace as external order, the visible rectification of wrongdoing, and the outward resolution of conflict.

In the absence of an honest and remorseful corporate or professional recognition of the moral deficiencies of political judgment, judges' practices are bound to succumb to the vices of cynicism, greed, and a lust for power, concealed by a theoretical self-deception that endows the ongoing practice of judgment with more integrity than they actually have. Legislators and judges deceptively construe their judgments as representing a unified social judgment that does not actually exist, thereby suppressing the deep moral divisions within their society. At the same time, legislators increasingly pass laws and judges increasingly interpret them with the intention of creating a unified social judgment. Today, this enterprise of ideological reconstruction aims at a uniformly understood and universally accepted set of attitudes, principles, and practices, which may be collectively described as "egalitarian rights pluralism": a moral, social, and legal affirmation of the equal rights of the plurality of individuals and groups within a polity, both the rights and the groups being, apparently, indeterminate in number.¹¹ From the viewpoint of the longer theological tradition, this programme is one of illiberal tyranny, being driven by an understanding of human freedom that can set no effective constraints on the destructive power of an enterprise that is as vitiated as it is indispensable to sinful human society.

11. See Jonathan Edward Mare, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 134 (1995).

