1994

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The Church and the Law

Thomas L. Shaffer

The image I want to use to talk about the church in the state, from a Christian lawyer's point of view, is in two of the novels of the late theological storyteller Walker Percy. We Percy readers first saw the image in Love in the Ruins. Percy's sub-title for that novel was "The Adventures of a Bad Catholic at a Time Near the End of the World." His setting is the not-too-distant future in North America. Social climate and civil discourse are even worse than they are now. Percy's central figure, Dr. Thomas More, the bad Catholic, and a few others remain in the old Roman Catholic church, but the old Roman Catholic Church has been changed. As Flannery O'Connor might have put it, the truth has made them odd.

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The vast majority of Roman Catholics have left the old Catholic church and have become American Catholics. American Catholics are not odd. They have accepted that the mission of Christianity in America is to make America successful. They fit in, as Catholics have always wanted to do in America. They have abandoned fealty toward and respect for the Vatican, and have established a headquarters for their American church in Cicero, Illinois. They retain the Mass in their worship; they play "The Star Spangled Banner" at the Elevation. American Catholics loyally urge their children to kill whomever the dominant group in Washington, D.C., wants killed, as their ancestors in the American Roman Catholic Church almost always did. Theirs is a nationalistic theology, but it is a theology. The God Who will bless America is the God of Abraham and Jesus. American Catholics are thus to be distinguished from a third Catholic group, called the Dutch Schismatics, who, Dr. More says, believe in relevance, but not in God.

The odd, old Roman Catholics also believe in God, but they are not likely to kill anybody. They are a fragile and fragilely put together, gathered church. They have been exiled by the American Catholics, but not eradicated. They are a diffuse people, "scattered and demoralized"; they wander around at the edges of the forest in Louisiana. The only thing they still gather for is the Eucharist, presided over by a reclusive, eccentric cleric named Father Rinaldo Smith, "an obscure curate, who remained faithful to Rome, could not support himself and had to hire out as a fire-watcher. It is his job to climb the fire tower by night and watch for brushfires below and for signs and portents in the skies." Except when he presides over the Eucharist, Father Smith has "fallen into silence." The Eucharist is all the odd old church meets for in the time Percy first describes; he speaks of the church as "a tiny scattered
flock with no place to go.” Dr. More contemplates his church and expects the world to end soon.

Toward the end of the later novel, *The Thanatos Syndrome*—the world having not ended—Father Smith is still watching at the top of the fire tower, but he has begun to do some other things. He now presides over an AIDS hospice at the foot of the fire tower. He has reclaimed his power of speech. He is “in his right mind and very much in charge. Very much his old wiry, vigorous self, he jokes with the children, listens to the endless stories of the senile, talks at great length with the dying.” Father Smith sends for help from Dr. More, who drinks too much and is still a bad Catholic, “when the depression and terrors of [the hospice’s] AIDS patients are more than [Father Smith] can handle.”

The priest and the psychiatrist, both professionals, acting professionally, both officially discredited, do not think of what they do as providing professional service. They think of what they do as done in the church, there in the hospice, by the fire tower, among the ruins of their society. The church is the AIDS hospice: “We . . . visit . . . listen, speak openly, we to them, they to us, and we to each other in front of them, about them and about our own troubles, we being two old drunks and addled besides. They advise us about alcohol [and] diet. . . .” The world has not come to an end; it does not come to an end in these stories. Percy’s bad Catholic only thought he knew when the world would come to an end.

The church as AIDS hospice is finally ready, I think, to talk about what the church should do and be, so long as the world and the church in the world last. I suppose that is what they are talking about, in fact, when they talk about dying, about hope, about waiting, because, as Father Smith says it, it is not up to us in the church to say...
whether the world will end. "But it is for us to say . . . whether hope and faith will come back into the world."

I hope I respect Walker Percy’s mood when I imagine a young woman at the AIDS hospice, which is the church, speaking up in one of these conversations in the church, and saying, “I am thinking of going to law school and becoming a lawyer.” I hope I respect Percy when I imagine further that the church, as constituted, there at the foot of the fire tower, its pastor employed to keep an eye out for signs and portents, can talk about whether this young woman should do what she is thinking of doing. And, finally, I hope I respect Percy’s understanding of membership in the church when I imagine that this young woman will submit her decision to the consensus of the church, to what John Howard Yoder calls “the communal quality of belief.” Then, when she goes out to practice law, if she ever does, she will go out from the church and the church will say to her, “Keep in touch.”

It is odd to begin consideration of a lawyer’s theology of church and state with this shifting image from Walker Percy’s theology, but it is important to do it this way because law and lawyer professionalism in North America are profoundly untruthful about the way church and state (or, if you like, the church and the law) fit together. Lawyers in Canada and the United States are trained to regard religious congregations as intruders on the liberal democratic political experiment, as if we had crafted our political and legal dispositions, drafted and haggled over our constitutions, and come to a Hobbesian modus vivendi—all of that—and then the church came along to complicate and frustrate our workable arrangement. And we, in our political wisdom, found no way to deal with the church—no way at all. We deal with the church—we lawyers—by treating it as a consequence of individual, autonomous choice. Instead of contemplating the church
in the law as legally significant, we deal with legal theories of individual religious liberty that regard each free citizen as his own tyrant. We permit each citizen to join whatever private clubs he wants to join, including, when he really must, a religious club.

This legal disposition, this North American jurisprudence of the church and the law, studied in our professional schools as part of constitutional law, sub-titled "the law of church and state," is profoundly untruthful. It assumes an ugly, false, and corrupted anthropology. It denies its citizens the refuge of mediating associations between itself and each of them. It describes the human person as fundamentally alone. But it is a powerful influence in the law and among lawyers. And it has behind it, as occasion demands, the lethal power of the state. People come to law school and adopt it as their working account of the way the church and the state fit together, and, before you know it, it becomes not only an anthropology and a jurisprudence but a theology as well: Lawyers talk about the church in these liberal-democratic terms even as they continue to maintain faithful membership in their religious communities—serve in the vestry, sing in the choir, lead the minyan in prayer, read the scriptures aloud during services.

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The inquiry I propose to make here, in respect, I hope, for Walker Percy, for whom the church was all that was left, is an inquiry about a theological jurisprudence in which the church comes first. It is not an easy inquiry; it is not an inquiry at all, really, so much as it is the description of an argument, an argument in the church, about the law.²

One heresy—the heresy Percy describes as the theology of the American Catholic Church—should be excluded
quickly. Its argument is that the church must be subservient to the law. The roots of the heresy are ancient and biblical; the reason it is heresy has to do not with power but with worship. What the Lord said to Moses and the children of Israel when they camped on the borders of Canaan was a civic agenda, since Israel did not attempt to separate church and state, but it had to do with worship, with what this nation of priests was not allowed to worship as they settled into life among the Canaanites: “You shall not worship their gods” (Deuteronomy 7:5). To allow the law to govern the church would be to put the law alongside God. “We,” in the church, “must obey God rather than men” (Acts 5:29). Almost all of the original Jewish followers of Jesus said that to the government, and the government killed almost all of them, along with thousands of other Jews.

That leaves two possibilities: (1) A theology in which the church is a group of resident aliens, like Percy’s old, odd Catholic Church, and (2) a theology that speaks from a culture that includes the church but is broader than the church—a theology of Christendom.³ The first, the theology of resident aliens, sees the church as a distinct culture, and it understands the culture of the church to be morally and legally primary. It claims that the church is the chosen people—“a people consecrated to the Lord your God; of all the peoples on earth the Lord your God chose you,” it says to itself, “to be the treasured people” (Deuteronomy 7:6). A literal and physical people, as Israel was, there in the desert with Moses, “a gathered, closed, and concentrated people,” in Karl Barth’s phrase.

In the first theology, the church is separated—“gathered, closed, and concentrated,” an embattled colony—not because its members need to be exclusive, as if they were a country club, but because they understand that they have to be distinct in order to be obedient. Barth said the
church is "not a centrifugal people disintegrating in all kinds of peculiarities." The church's being gathered, closed, concentrated, and, if need be, embattled, is not primarily a moral restriction, though. Its purpose is not purity. The restriction is imposed so that God's chosen people can be priests. Israel and then this gathered church—this first possibility for a lawyer's theology of church and state, of the church and the law—is separate for the sake of those who are not its members. It is separate, for the sake of others, in obedience to two priestly mandates from its Lord:

(A) The church preserves its identity in order to tell truth, so that there will be a visible place, in the society of strangers that is the world, where the truth is told. The Hebrew notion here is the notion of the prophetic, not as telling the future, but as telling the truth. The church speaks to the law, tells the truth in the law, in order to influence the exercise of coercive state power that is the fundamental business of the law: Its "apparent inclusiveness . . . [is] only the reverse side of the comprehensiveness with which it regards the manifestation of the glorious freedom of the children of God as the hope of all humanity and indeed of the whole of sighing creation," Barth said.

(B) The church is separate because it is evangelical. It understands that its proper business is to serve the spiritual destinies of every person who is outside it: "Only this narrow place can offer a vista of the wider sphere which includes those who are still outside, who are not yet the children of God . . . but who one day may become and be so," Barth said.

That is the way a lawyer might describe the first theology, the resident-alien theology of the church and the law. It is a theological ethic of the church as normatively primary. The state is not the church's partner in moral action. The state is rather one of those "authorities and potentates of this dark world" of which St. Paul speaks
The law is not evil; it is even, in some mysterious way, sustained by God (Romans 1:1-7). But, still, the law is not normative. It is no more determinative for action in and from the church than a hurricane would be. The law is not necessarily an idol, either—and therefore, usually, by and large, the church can speak to the law—but it can become an idol, and therefore the stern injunction at the borders of Canaan applies to the law: “You shall consign the images of their gods to the fire; you shall not covet the silver and gold on them and keep it for yourselves... for that is abhorrent to the Lord your God” (Deuteronomy 7:5).

The modern ecclesiastical history of this theology—the memory of the church that this understanding consults—is clearest in the Radical Reformation; its denominational descendants are the Anabaptists and many other kinds of Baptists; its memory reaches through the martyrs of the sixteenth century free church back to a primitive church that believed it could not admit government officials to membership. It is because this gathered church is radically free that it can remember to adopt narrow criteria for membership: It can define membership in terms of adherence to practices such as the refusal to kill people—so that obeying Jesus is not consistent with being a soldier or a police officer or a judge. Individuals who disagree are invited to agree, but they are not invited to join up so long as they disagree (not killing, for example, has often been definitional for this tradition in the church). Groups who agree in their disagreement are free to form their own congregations—and they do, as is evident in the proliferation of organizations and movements, from Southern Baptists to Pentecostals to Old Order Amish, that trace their theological inspiration to the sixteenth century Anabaptists.
Its organizational witness to the more "civilized" mainline church is a church that respects the state and in many, perhaps most, ways subordinates itself in civil society, but is distinct in civil society. This church says that the mainline church and most of Western Judaism—from the bishops who made peace with the Roman Emperor Constantine, through the burghers who protected and compromised the congregational churches of the Reformation, to organized religion in twentieth century North America—gave up their prophetic and evangelical possibility when they handed the church over to the authorities and the potentates. The Latin American Roman Catholic Bishops, at their conference in Medellin in 1986, seem to have wanted the church back. They said, "The church . . . should be manifested, in an increasingly clear manner, as truly poor, missionary, and paschal, separate from all temporal power. . . ." Their non-Baptist, modern manifesto shows perhaps, as the church by the fire tower does, what is left from nationalistic Catholicism, described by Gustavo Gutierrez as a church "that has hitherto existed in a situation that might be described as 'Christendom'."

All Jews and Christians are influenced by these notions, if only because all of us believers realize down deep there cannot be a theology based in the law. All of us worry from time to time about the heresy and the idolatry of statism, and, when we do, we turn to an alternative that seems not to compromise with the state. We turn in that direction, and listen. We think we might learn something, and we do. We realize then that we are influenced too much by the law.

We listen to the resident-alien theologians. We get defensive about our statism, for a while, until the benefits of the law cause us to forget that we are meant to be resident aliens. Then we go back to listening to the law, in the law, and come to speak of the gathered church as an intruder on
The Second Vatican Council began its pastoral constitution on the church in the modern world: "The joys and the hopes, the griefs and the anxieties of . . . this age . . . these are the joys and hopes, the griefs and anxieties of the followers of Christ." Not only is it hard to tell the difference between these two sets of joys, hopes, griefs, and anxieties; there isn't any difference.

The church does not meet and formulate a prophetic agenda to be announced within earshot of the courthouse; its active adherents, rather, go over to the courthouse to find out what is going on over there, before they speak from the memory of the church to what is going on over there. "The community of faith . . . gives itself to the service of all," as Gustavo Gutierrez puts it. "The definitive reality is built on what is transitory."

The practical processes consequent on this second theology of church and state are processes of entanglement in the business of the modern democratic-liberal nation-state. No one in the mainline church would deny, I think, that the church, in following such an ecclesiology, runs the risk of being corrupted by worldly entanglements. The church of Christendom runs the risk, in its theology, of losing sight of what it is and what it is for. It often comes to be, in Malcolm Boyd's phrase, chaplain for the status quo. It has, in the view of many Christians, come to stand for not much of anything that sounds prophetic. There is no more disturbing example of this than the fact that the church of Christendom has almost always been enthusiastic about its princes' warfare, has almost always been willing to urge its sons to kill for the state, and to bid its women to be like the mothers of Sparta: mothers who urge their sons to come home with their shields or on them.

What keeps this vulnerable mainline theology nonetheless plausible is its concern for the possibilities of justice and peace. It is an optimistic theology, one in which the
Christian lawyer's understanding of church and state offers the church as available for almost any kind of theoretical or material service to the community—from rolling bandages for the army to voter registration, from education in civic virtue to nuclear research. But it is often difficult to see in what way service to war or nationalistic interests or trendy notions about social justice is priestly or prophetic. Certainly the churches who offer such services pay a pastoral price for what they do. They so dissipate their energy that they become less and less able to devote themselves in particular, practical ways to their closest adherents. When they are most visibly contentious, their members seem to be mostly concerned with social movements, with political causes that rarely if ever are formed among Jews and Christians. Witness on the one hand popular American disregard for religious leaders' prophetic statements on war, capital punishment, and the welfare system, and, on the other, the disappearance of ordinary pastoral visits to the homes of members of local congregations.

These compromises and costs affect theological social ethics. Those who devote their principal energy to economic and political reform want to be effective. They want results—if only because their causes obscure their understanding that the purposes of the church are eschatological. Success in bending the government's will is how you know that what you are doing is worthwhile. But concern for effectiveness entails a certain entropy in the moral witness which gave rise to the need to be effective. One thinks of Mother Teresa of Calcutta, who said the Christian task is not to be successful; it is to be faithful. There is also the persistent danger that the theological ethic of the mainline church will become an ethic of necessary evil. The mainline American church's principal theologian in this century has been Reinhold Niebuhr, but I suspect
Niebuhr's success, if not his thought, was more an effect than a cause of the mainline believers' impulse to make America work.

My friend and colleague Robert E. Rodes expresses this influence as a tension. In his recently completed three-volume history of the Anglican establishment, he names what I have been talking about as mainline church theology after a sixteenth century Swiss physician named Erastus. Erastianism is the theology that sees the church as having, first, a responsibility to offer an agenda to the "wider society" and, second, a responsibility for the spiritual welfare of all people in the civil society in which it finds itself. In the Erastian account, the "wider society" learns to be open to Christian (and Jewish) moral witness; that is its habit, because it remains, in some sense, Christendom. The prince is a Christian who invites his pastors to speak to him about being a prince. Believers assume they can hold and discharge public offices of most kinds without violence to conscience; and, Rodes says, most people in the civil society in some way entertain the possibility of closer adherence to traditional religious practice.

Erastianism is, though, thin theological stuff. It takes its historical force among us American lawyers (Anglophiles all) from the fact that Britain has been able to sustain such a civil disposition with relatively little bloodshed and without losing its state church. But it is thin stuff when compared with the radicalism of the Gospel and of the Hebrew Prophets. Rodes shows how Erastianism survives in Britain because it is in tension with what he calls high churchmanship, as a counterforce and, I think, religious witness. My reflection on Rodes's account is that high-church argument within Anglicanism has had a force in Britain rather like that I have suggested to be the effect of modern socially-conscious Anabaptism and evangelicalism in North America.
All of this is an academic lawyer's theology. It is an intellectual construct. It does not describe the way we in the university are preparing those who will act as leaders in the government and in the church of Christendom. If I had described what we do, we academic lawyers who are also believers might be content not to argue further, at least not at present. The theology of the resident aliens would be somewhere in our consciousness, reminding us believers to obey God and not men. The Erastian church would be telling us believers not to take ourselves too seriously as we slog along trying to be nationalistic Christians and Jews. The awareness of our students would be opened in a coherent way to the possibility that a believer can use civil power without being corrupted by it.

But the students who come to us now—almost all of them, and almost without regard to what their earlier training has been—are not interested in the Erastian-sectarian tension. They have a different agenda: They are convinced that religion is private. To the extent that they attend to church-state issues as public, they let the law define (that is, ignore) the church. They do not perceive enough of the remnants of Christendom around them to feel its significance. The question is what we have to say to them about the church and the law, when we know we have nothing to say for the morals and jurisprudence that would make a god of the state, or to claim that the civil community can function with no god at all.

Looking at this in terms of the vocation I pursue, a lawyer who trains lawyers, and looking at our students as the sometimes curious customers to whom we offer our theologies, I have come to feel that the theology of the resident aliens is the only theology of church and state that has enough potential clarity to make any difference as education. This is circumstantial; only God knows what students will be like in twenty years. But circum-
stances shape theology, which is, as Bonhoeffer said, the memory of the church—only that, but no less than that. And the evident circumstance is that the church in the twenty-first century in the Christian West will not be able to use lawyers’ ambiguity any more. It will need the simplicity of the primitive church. It may well produce martyrs, as the primitive church did, and as sixteenth century Anabaptism did.

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My fancy played on Walker Percy’s description to imagine a young woman raising a question, in the church, about what we Catholics used to refer to as her apostolate. I suppose the church might decide against her being a lawyer. Maybe a Christian cannot be a lawyer, at least not at the time and in the place where the church finds itself when the question is put to it. That conclusion would end my imaginary story, though, and so I imagine that the church advises her that she should go ahead and enroll in law school.

Maybe the church would decide to advise her to go ahead because it would hear her say that she planned to serve her neighbors and to tell them—her clients mostly—what she knows from the Gospel about how to live with the law. She would also plan to use her power as a lawyer in reference to what she has perceived about the world as she looks at the world from the church, in the law. She will take professional and official life as she finds it, and she will do what she can within its limited vision of its destiny; but she will not surrender or forget what she has seen of this world when she has looked at it from the church, nor will she now look at the world in any other way. She will not leave the church to be a lawyer. The awakened, gathered church will not allow her to leave it. In Karl Barth’s model, it will meet in order to separate and
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separate in order to meet; but in its meeting and in its separating the church will not let go of this young lawyer. She will be a peculiar lawyer. Her lawyer's theology of church and state, like all of her theology, will be primarily formed from the memory she has awakened to among the resident aliens—a memory that reaches back to the Acts of the Apostles, to Francis of Assisi, to the, alas, only occasional Catholic martyr to pacifism, but also to the church that has been shattered and severed on the anvil of statism in the twentieth century and to what I imagine as a consequent and revived sense of connection to the Radical Reformation.

She will keep in touch. She will come back to join her life, her belief, and her prayer, to the communal quality of belief, and ponder in that communal belief what she should do as an actor in the law and an agent of state power in America.

NOTES

1 The essay here is a condensed version of a chapter in a festschrift in memory of the late William Stringfellow, edited by Andrew W. McThenia, Jr., forthcoming from Eerdmans and used here with permission.

2 It is embarrassing to use "church" in this way, but I don't know how to avoid it. I mean, almost always, to speak as much of Jews, and of Jewish congregational life, as of Christians and of the church. Jews of course have these arguments within their congregations, and across them, and with God, and they sometimes join in discussions with Christians, bounded by our shared tradition, which are, in the sense I try to write about here, discussions in the church.

3 I borrow the metaphor and much else from Stanley Hauerwas and William H. Willimon, Resident Aliens (Nashville, Abingdon Press, 1989); I borrow some of the much else from Walter Brueggemann, "The Transformative Agenda of the Pastoral Office," Interpretation and Obedience: From Faithful Reading to Faithful Living (Minneapolis: Fortress Press, 1991).