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RESPONSE TO JOSEPH ALLEGRETTI: THE RELEVANCE OF RELIGION TO A LAWYER'S WORK

Lawrence A. Hoffman

INTRODUCTION

PROFESSOR Allegretti's paper divides into three parts: (1) Background: his survey of religion's shrinking impact on the professions, along with his call for the reassertion of the kind of holism that a religious perspective provides; (2) Problem: his claim that current legal practice is governed by a minimalist model of contract; and (3) Solution: his proposal of an alternative paradigm, covenant. He writes all three sections as a Christian, and I have been invited to respond from my own faith perspective: Judaism.

In my own division of the topic, in part I, I differentiate *substantive* from *consensual* value statements, the former being specific religious positions on ethical issues, and the latter being general metaphoric models for thinking about those issues. I argue that law, like other professions, is an *institutionalized public good*, properly secularized in a pluralistic society, unlikely to be swayed by conflicting *substantive* claims of the various religions, but especially in need of *consensual* values, such as what Allegretti offers.

Next, I address Allegretti's parts (II) and (III) together, suggesting that his dismissal of the contract paradigm may be too sweeping. Though Judaism would accept a covenant model, it would view covenant as more akin to contract than opposed to it, and would see in contract many of the values that Allegretti sees in covenant. Judaism attaches a specifically legal model to society at its best, locating God's love in the provision of the institution of law. Contracts are central, therefore, and are appropriately rooted in a transcendent consensual value. It is such a value that is lacking.

In part III, I offer as a transcendent consensual value the Talmudic mandate never to allow society to imagine that "There is no justice and no judge" (*leit din v'leit dayyan*).¹ The Rabbis identify the sin which brought about the flood in the time of Noah as being just this antinomian notion. Lawyers should see themselves as upholding society by underscoring the existence of justice, and can address ethical dilemmas by a calculus measuring justice gained against justice denied.

1. The *Fordham Law Review* relies on the author's expertise in Hebrew translations throughout this article.

I. BACKGROUND: LAW AS AN INSTITUTIONALIZED PUBLIC GOOD:
CONSENSUAL VS. SUBSTANTIVE VALUE CLAIMS

Allegretti's introductory use of bioethics as a point of comparison is particularly instructive, because it helps us focus on the sort of religious intervention that would be appropriate in the professions, generally, and, therefore, in law particularly. Recollecting Callahan's first stage of religious engagement in bioethics (the 1960s), he recalls that "the only [bioethical] resources were theological or those drawn from within the tradition of medicine, themselves heavily shaped by religion."² Callahan bemoans the usurpation of religion's place by secular theory (in the 1970s) and hopes to see religion return as a partner with medicine in "the great debates about the meaning of life and death."³

The problem with such a sweeping aspiration is that one wonders just what such a partnership would look like. For one thing, it is not altogether clear to me that medicine was more humanely, more religiously, or more ethically practiced in Stage One. For another, it is not self-evident that American pluralism will (or should) encourage religious intervention of certain kinds. The problem is that however positively we may think of religion in general, everyone can readily think of instances where "someone else's religious opinion" is exactly what we consider bad advice for American public policy. Increasingly, moreover, the "someone else" may even be speaking in the name of our own religion! That is because the greatest change on the religious landscape since the 1960s has been the polarization of religious bodies into conservative and liberal wings. Whereas once upon a time it could be said that there was a distinctive ethos that was, say, Lutheran or Jewish or Roman Catholic, it is now unclear that any single position on any single issue reflects the totality of any given religion or confession.⁴ Some churches, like Roman Catholicism, are centrally organized enough that they seem to speak with a single official voice, but even there, "on the ground" (as it were), where real people live their lives, the church is fractured into right and left wings.

Speaking from my own situation, for instance, I ask what guidance Judaism would have for such weighty biomedical issues as abortion, organ transplants, and the like, and the truth is, it depends on who you ask: the Social Action Commission of my own liberal Reform Movement or the Chasidic community of Williamsburg, Monsey, and Crown Heights. Pluralistic societies like America have secularized

2. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *Fordham L. Rev.* 1101, 1102 (1998) (quoting Daniel Callahan, *Religion and the Secularization of Bioethics*, 20 *Hastings Center Report Special Supp.* 2 (July/Aug. 1990)).

3. *Id.* at 1103.

4. See Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II* (1988).

their professions precisely to avoid the kind of religious involvement that would prove chaotic, contentious, and unresolvable in the end. If we are to empower religion, we will have to be clear about where its proper role resides.

That role emerges from our understanding of at least some of the professions as *institutionalized public goods*. The key word here is "public," in the economic sense of a good that is owned by all members of society. Thus, we have the American assumption that everyone is entitled to an education, medical care, and the law. It is the very nature of modern society, where religion is separate from the state, and where, therefore, no single religious wisdom can be expected to prevail, that institutionalized public goods are secular. Religion might conceivably say two sorts of things to such institutions. I will label them *substantive* and *consensual*.⁵

Substantive statements are specific religious positions on equally specific ethical problems. For example: "It is right/wrong to allow abortions" (medicine); "to hand out condoms to 8th graders" (education); or "to limit legal fees in class action suits" (law). Religions have a right to offer substantive guidance, but they should understand that the more specific they get, the more likely it will be that they represent only a fraction of the entire religious opinion in the country. Moreover, it is likely they will represent not even the totality of what their own church membership (or even its clergy) believe, given the polarization process I mentioned earlier. They can expect, therefore, that to the public (and secular) institution in question, their combined voices will sound less like 3000 years of religious sagacity, and more like the Tower of Babel. Substantive pronouncements are still in order in the pluralistic marketplace of ideas where they may sway individuals; however, they are apt to get nowhere in terms of influencing public policy because there will be no religious consensus for the public institution to hear and to adopt.

Consensual value statements, on the other hand, are pronouncements so general that they may be shared across religious lines, even by people who do not share substantive solutions. Religions tend to trade heavily in such formulas of general value, often to the point of sounding sappy and truistic, by repeating the saccharine certainties that no one ever doubted anyway. Consensual values, however, need not be so self-evident. Often they are religious models for thinking differently about a problem, though they are not a specific position on the problem itself. *It is helpful to see religion as an institutionalized set*

5. Cf. Lawrence A. Hoffman, *Liturgical Basis for Social Policy: A Jewish View*, in *Liturgical Foundations of Social Policy in the Catholic and Jewish Traditions* 151, 151-68 (Daniel F. Polish & Eugene J. Fisher eds., 1983) (dividing statements into consensual and substantive, and observing, in the first instance, that consensual statements are non-controversial and poor sources of policy, while substantive statements are products of debate resulting in policy choices).

of alternative metaphorical models for life's most puzzling issues. Religion's proper function is to help secular institutions rethink their basic paradigms.

Now Allegretti's contribution to our topic becomes clear. He has questioned the prevailing metaphorical model of practicing law by issuing an alternative consensual value statement. Law is covenant, he says, not contract. In a pluralistic milieu, one useful characteristic of consensual value statements is that they are not all or nothing, not zero-sum games. By contrast, substantive value statements cannot co-exist together. It is either right or wrong to assist a suicide by an Alzheimer patient, right or wrong to advertise legal advice at cut-throat prices. These are substantive issues and even though there may be two sides to them (indeed, real moral dilemmas always have many aspects to weigh), in the end, you have to take a stand and act according to one side or the other. But consensual statements do their work more subtly; they shape theory, which is to say, they give us a structure to imagine who we think we are and what we think we are doing. Several consensual statements can co-exist together, as, for instance, in our case, where we are invited to think about how law might be contract-based, covenant-based, or both.

II. THE PROBLEM AND SOLUTION: LAW AS CONTRACT OR AS COVENANT

Allegretti faults the contract paradigm for being minimal and for aiding and abetting domination of one partner by the other. It fosters, he says, the mutual suspicion typical of "wary strangers" in which parties deal with each other as utilitarian objects, offering money (for the lawyer) or services (for the client).⁶ He prefers a holistic wedding of person to person, all encompassing, caring, lasting, and unlimited by the specific issue that brings the two together. The covenant model engenders trusting openness by each party, the promise of mutual growth, a kind of "friendship" in fact, and the option to explore matters beyond their legal parameters, such as challenging a father whose petulance has led him to the attorney to draw up a will disinheriting his son.⁷ This activity is based in need, not contractual commitment.⁸ It is answerable for consequences beyond the last day in court.⁹ It establishes lawyer and client as members of a moral community, puzzling together on the right thing to do.¹⁰

Clearly, there is a lot here that I find satisfying. Moreover, Allegretti argues not just from his Christian perspective. He cites Christian scripture as well as Hebrew Scripture, and I suspect we might find

6. Allegretti, *supra* note 2, at 1116.

7. *Id.* at 1125.

8. *Id.* at 1123.

9. *Id.* at 1123-24.

10. *Id.* at 1121.

supportive evidence in other sacred writings, such as the Koran, as well.¹¹ Allegretti depends largely on Martin Buber. At the moment of meeting, lawyer and client are very much in what Buber called an "I-Thou" moment governed by the mutuality of the covenant, not the legal niceties of the contract. They inhabit the unique and rewarding social relationship that anthropologist Victor Turner called "communitas," a place where strict rules do not control the relationship, and where instead, the relationship and the mutual needs of the people who comprise it determine the rules. This, he says, is where all true growth occurs. It is the stuff of which human satisfaction is made.

Jewish sources do indeed have positive things to say about covenants. I think, however, that Jewish wisdom would be less likely to contrast covenant and contract and would, in fact, be more sympathetic to seeing contracts as equally moral and even spiritual undertakings. I believe Allegretti and I are not poles apart here; he too returns at the end to say, "The choice, then, is not between contract or covenant. Covenant builds upon and enlarges contract."¹² We probably, however, do have somewhat different perspectives that are worth investigating. Let me explore some problems I have with covenant, as Allegretti describes it, trying instead to rescue contract as a valid religious option. Then I will return to my Jewish tradition for yet a third model, that I think is in keeping with my alternative notion of contract as potentially a kind of covenant in itself.

I find Allegretti's dichotomy too absolute. Judaism would not dismiss contract as minimalist. The Jewish social canvas is painted precisely with many overlapping contracts. God's covenant is itself esteemed as a contract, so that Judaism values contracts as the very essence of human existence. Even parenting is a contract. Take the case of recovered memory: a woman in therapy recalls being an incest victim and asks now how she can go on honoring her mother and father, as the Ten Commandments demand.¹³ A Jewish answer, arguably, would be that strictly speaking she is commanded only to honor them, not necessarily to love them. Love cannot be commanded except toward God ("You shall love the Lord your God"),¹⁴ who is held by definition to be so all-just and all-beneficent as to automatically attract such love anyway; and neighbor ("Love your neighbor as yourself"),¹⁵ which is not so much about love as it is about self-aggrandizement at a neighbor's expense. True, if all parents lived up to the standard of God, we would automatically love parents too, but to the

11. *Id.* at 1118.

12. *Id.* at 1128.

13. *Exodus* 20:12; *Deuteronomy* 5:16 (New Revised Standard 1989). All Biblical citations and quotations are from the New Revised Standard Bible unless otherwise denoted.

14. *Deuteronomy* 6:5.

15. *Leviticus* 19:18.

extent that parents fall short of that ideal, it is natural that our love will ebb also; and in this case, it is natural for the victim to feel anger, not love. She is commanded, nonetheless, to honor her father, that being a contractual matter. Honor is now defined in terms of specific duties: she must care for him in his old age, clothe him if she has the means and he does not, feed him lest he starve, and so forth. In a parallel case, society, generally, has to "honor" even criminals: that is, they are human beings made in God's image, and though I may not love them, I do "honor" them, by providing for their basic needs, even in prison.

I raise this particular issue because it highlights a frequently cited difference of perspective between Judaism and Christianity. I do not want to make too much of it, but there is, I think, still some sense in which Christian ethics has split off love from law in a way that Jews have not. It was common once upon a time to accuse Jews of being legalistic—like Shakespeare's Shylock, where a contract is a contract come what may.¹⁶ The Jewish covenant was said to be pure law, as opposed to the Christian covenant in Christ which was a covenant of love. Only in religiously antediluvian circles do people still preach that, to be sure; both Judaism and Christianity have a healthy appreciation for both love and law. But, it is true that Jewish literature remains, above all, legal literature. Thus, when the Rabbis speak about the covenant, they do so with the rhetoric of contract, embracing the contractual aspect of law as an exemplification of the highest form of love. The giving of the law is God's most loving act, celebrated with a daily blessing, "Blessed art Thou who loves your people Israel."

As I have explained, Allegretti does not utterly dismiss contract, however, and I do not utterly dismiss covenant. He is absolutely right to hold out the biblical model of faithfulness through time, abiding friendship, concern beyond the details of the contractual obligation, and so on. Hosea reminds Israel that God will not give up on her. Knowing that this covenant can sustain contractual default from time to time, Isaiah announces comfort to the exiles. Moreover, Rabbi Levi of Berdichev insists he will continue worshiping God, even when it is God who falls down on the deal by letting Jews suffer though they have done nothing to warrant it. I certainly agree with Allegretti's thoughtful admonition that we avoid the minimalist extremes to which contract alone is liable. My point is that contract as a kind of covenant need not be minimal; and, likewise, that covenant split off from contract has its own problems.

16. William Shakespeare, *The Merchant of Venice* act 4, sc. 1 (W.G. Clark & W. Aldis Wright eds., n.d.): "Portia: The quality of mercy is not strain'd . . . Therefore, Jew, Though justice be thy plea, consider this, That, in the course of justice, none of us Should see salvation: we do pray for mercy . . . Shylock: . . . I crave the law, The penalty and forfeit of my bond." *Id.* at 376.

Allegretti knows them, but they deserve discussion to prevent loading the demands of covenant with more weight than it will bear. In the American system of law, even scoundrels deserve legal representation. But does the lawyer have the obligation to establish a covenant through time with every scoundrel? Is it not enough, at times, to do what is right without establishing enduring commitment beyond what is ethically owed the client? For that matter, does a client have to be open to friendly advice from every lawyer? What if I have such a relationship with my own lawyer, but find myself dealing with a specialist called in by him for consultation? She is there purely contracted for her expertise in a fine point of law. She hardly knows me. Need I be open to her questions about whether I really want to disinherit my son? Especially if I have just been through that question with the first lawyer, with whom I may indeed have a covenant such as Allegretti describes? In my own profession, I teach in a university classroom, and establish contracts with all my students. With luck, some of them become relationships that are indeed covenantal in Allegretti's sense; but, some of them are not. Also, from the students' perspective, some may see me as the problem, not the solution, but they and I are thrown together in a classroom, and we have a contract that we honor. On such things society is based.

In other words, contract and covenant are not oppositional. Even marriage, clearly a covenant, is at least implicitly contractual, though hardly minimalist. After thirty years of marriage, husband and wife hardly need to write down what is owed on a day to day basis, but they know if they have broken faith. When Martin Buber posited his notion of I-Thou relationship, including within it the Jewish covenant with God, he was taken to task by Franz Rosenzweig for imagining that any covenant could exist without contractual items at its center. I value contract more than I think Allegretti does.

III. A JEWISH CONSENSUAL VALUE: "THINK NOT, 'THERE IS NO JUSTICE AND NO JUDGE'"

All of this leads me to a consensual value that might arise more readily from Jewish sources. It is, as you will expect, more closely allied to contract, more firmly entrenched in a view of law as paramount for human existence. It is best represented by the oft-cited dictum *leit din v'leit dayyan*: "[Let no one ever imagine] there is no justice and no judge [of the universe.]"

Allegretti is absolutely correct when he urges us to think in broad terms of the good we do in society. His view of law sees it as more than a secular profession which we enter for reasons that even we may forget or fail to fathom, as if it is only for our own interests, and we have no broader responsibility beyond what the most meager code of professional ethics has to say. Professions generally are in need of his

cautionary note,¹⁷ and not just from the perspective of what they owe others. Considering that Americans of the 1990s have spent two decades being conditioned to denounce professionals, almost as much as their parents in the 1950s were conditioned to worship them, is it any wonder that professionals themselves need some transcendent value to uphold their own self-esteem?¹⁸ The question is what overriding image, or consensual metaphor (as I have called it) we wish to posit. Seeing contract at the opposite pole from covenant, Allegretti posits covenant. I like covenant also, at times. I like contract also, for other times. I see covenant as a contract through time, but a contract nonetheless. The issue is not whether law is one or the other, but how it can in different circumstances be either one or a little of both, and whether we can find a third consensual conceptualization that does justice to both ends of the spectrum.

When I was a rabbinic student, my Talmud professor, Samuel Atlas, may he rest in peace, held class for just three of us in his crowded dusty office, equipped with exactly four chairs, a desk, several weighty tomes of Talmud, and a telephone. One day he informed us that he was engaged in a long-term suit over something relatively petty, a case hardly worth his or his lawyer's time. He made it a point, however, to bother his lawyer about it on occasion, just to keep the case going. I suspect you all know the type: first degree nuisances whose case you took and wish you had not.

"But Dr. Atlas," I asked him, "if you yourself know it is not worth your time, and if your lawyer concurs, why do you not quit?" "Because," he said, "I am right, and I have a religious obligation to do nothing that would cast doubt on the ultimate justice of the universe." With that, he made his obligatory call to the lawyer, whose secretary was no doubt armed with instructions never to let the old man's call go through. She would take a message, however. "Tell him," said my teacher, "that Professor Atlas wants to know if there is justice in the world."

I do not know what the poor overworked lawyer made of that message, but I know what Dr. Atlas was thinking. He opened a volume from memory, handed it across the desk to us, and commanded, "Read!" And this is what I read:

The evil generation of Noah's flood said, "God will not judge me."
Rabbi Akiba cited Scripture: "[T]he wicked say in their hearts, You

17. See, e.g., Laura S. Brown, *The Private Practice of Subversion: Psychology as Tikkun Olam*, 52 *Am. Psychologist* 449 (1997) (addressing "the harmful effects of . . . the timeworn notion that psychologists can be objective observers").

18. Negative discussion of professions began already in the 1970s. See, e.g., Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (1977) (exploring the link between the professional market and social class and structure). On the limits of professional ethics, see Paul F. Camenisch, *Clergy Ethics and the Professional Ethics Model*, in *Clergy Ethics in a Changing Society: Mapping the Terrain* 114-33 (James P. Wind et al. eds., 1991).

[God] will not call us to account" (Ps. 10:13) meaning, "There is no judge and there is no justice." In truth, there is a judge and there is justice.¹⁹

I can think of nothing that will help lawyers more than to keep forever before them the Jewish horror that society might sink once again to the level of the generation of the flood because it concludes *leit din v'leit dayyan*, "There is neither judge nor justice." Lawyers should see themselves as keepers of society's faith that "[i]n truth, there is a judge and there is justice." As contracts mature into covenants, or even at the moment of deciding if they should, the overriding moral imperative is that the lawyer never act in such a way as to let someone think otherwise.

As Allegretti says, lawyers do, therefore, raise questions about dis-inheriting a son, but the reason is not that they stand in covenant rather than mere contract, but that in the grand scheme of things, overzealousness may be unjust. They represent scoundrels because not to do so would add to the injustice of the entire system. They reject some clients, however, because what the clients demand, cannot in good conscience be done—it is always a calculus of justice gained versus justice lost, and the hard cases are a little bit of both.²⁰

CONCLUSION

My model even works for the cases which Allegretti cites as being beyond his covenant ideal—lawyers with mammoth corporations or prosecutors and government lawyers where "there are no clients at all in the conventional sense." They too can consistently make decisions that counteract the notion that there may be no justice and no judge.

Contracts are sacred things, I assert, because they are the essence of justice and of judging. They need not be minimal. When appropriate, I freely commend their growth into covenants just as Allegretti urges. When not, it is enough for me to go home each night having convinced myself and others, just a bit, that we need not abandon the human search for a judge and for justice.

19. Midrash Rabbah, *Genesis* 26:6. The lesson is popularly known from Milton Steinberg's novel, *As a Driven Leaf*, where it is applied to the case of second-century heretic, Elisha ben Abuyah, who is said to have lost his faith when he saw one man obey the laws of Deuteronomy, and die as a result, and another defy the same law and escape without injury. On Elisha, cf. *Midrash Rabbah*, *Ruth* 6:4; *Midrash Rabbah*, *Ecc.* 7:8.

20. A specific issue worth developing at another time is whether a lawyer may use the legal system for a client's benefit, when the aspect of the system being used is the application of a legal loophole which itself is not intended by the system, and therefore itself not just. I argue that all legal systems are impure mixtures of justice and injustice, but generally, as long as the law is applied fairly to one and all, the Talmud rules that we work within it because "[t]he law of the land is the law." Having decided to work within it, we may indeed be justified in using even a loophole in it, if we calculate that the injustice that will accrue to the benefit of our client is less than the injustice that our failure to use it would add to the system as a whole.

Notes & Observations