

HAUERWAS ON “HAUERWAS AND THE LAW”: TRYING TO HAVE SOMETHING TO SAY

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I responded positively, even with enthusiasm, when John Inazu asked me if I would be open to a symposium on my work and the law. I am seventy-one. I need all the attention I can get before I die. That may not be put quite right. It may be that the attention I receive gives me the impression, an impression that may or may not be accurate, that I am not yet dead. So let me begin by thanking John for thinking of me and for the extraordinary symposium he has put together.

I confess, however, that, at the time John first broached the idea of having such a symposium on my work and the law, I did not know what a challenge it would be for me. John makes the challenge clear in the subtitle of his foreword: that is, “Is There Anything to Say?”¹ That subtitle expresses perfectly my reaction when I began to realize that I would not know what to say if I had to write a paper on “Hauerwas and the Law.” I am, therefore, particularly grateful to those who have written these substantive papers; what they have to say is more interesting than what I would have been able to say if I had been left to my own devices.

Indeed, they have raised so many questions about how my work may or may not have implications for the law there is no way I can do justice—a concept that has the ring of the law about it—to their papers. I suspect, in particular, there are interconnections between their papers that I should be able to articulate but that I may well have missed. I will simply have to trust—a word that I think extremely important for the subject before us—readers to make the connections in a more constructive way than I am able to do in this response.

Before trying to respond to the individual papers, however, I thought it might be useful to say why and how I began to think about the law. By doing so, I hope my response to the individual papers might be more coherent. That the law has always been important for me may seem odd. After all, I am usually associated with those who began to emphasize the importance of the virtues as an alternative to ethics, which is more determined by analogy to the law. Of course I have never been happy with the assumption that an ethic of the virtues

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1. John D. Inazu, *Stanley Hauerwas and the Law: Is There Anything to Say?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at i.

is somehow antithetical to, or exclusive of, law-like accounts of our moral lives. I have associated the idea that you must choose among a deontological, teleological, or virtue ethic with minds who think that typologies can be identified with thinking.

It may seem odd, but I think my interest in the law began with my training to be a theologian. I was fortunate to begin my theological studies at Yale when the law–gospel dualism so characteristic of Protestant theology and ethics was beginning to be called into question. Being taught the Old Testament by Brevard Childs meant you learned to understand the law as a gift to the people of Israel so that God’s holiness might be manifest to the world. In a similar fashion, I learned that the law played a much more positive role in Paul than the polemics of the Reformation would lead one to believe. These developments, moreover, had everything to do with a reconsideration of the significance of the continuing existence of the Jews, who allegedly were a people of the law, for the intelligibility of Christianity.

Not unrelated to the reconsideration of the law in scriptural scholarship was the recognition by Protestants, or at least by me, that Roman Catholicism existed. Protestants had often made Catholics the Jews of Christianity; namely, they were thought to be hopeless legalists. With the advent of Vatican II, however, Protestants who worked in that strange field called Christian ethics began to pay attention to work done in Catholic moral theology. Aquinas’s *Treatise on Law*²—and it is important to note that it is the “*Treatise on Law*,” not the “*Treatise on Natural Law*”—in the *Summa Theologicae* was read with fresh eyes. Some of us began to think that casuistry, when compared with vague Protestant suggestions about how we ought to love one another made by those enamored by situation ethics, was a very good thing.

At the same time there were philosophical developments that made the law increasingly interesting for those of us who were pursuing graduate work in Christian ethics. Anscombe’s work on modern moral philosophy, her criticisms of consequentialism, and her account of intentionality³ meant that questions of practical rationality were put back on the agenda for work in ethics.⁴ Rawls’ two concepts of rules also served to make us attend to the significance of the law for understanding human action as rule governed.⁵ We were, moreover, reading the debates occasioned by the work of H.L.A. Hart.⁶ At the very least, questions of the relation of law and morality seemed crucial as one place where the rubber hit the road, so to speak, to illumine as well as test ethical theory. I remember I spent a semester reading everything that Lon Fuller wrote, even his textbook on

2. The *Treatise on Law* includes Questions 90–97 of the *Summa Theologicae*. See THOMAS AQUINAS, *THE TREATISE ON LAW* (R.J. Henle ed. & trans., Univ. of Notre Dame Press 1993).

3. See G.E.M. ANSCOMBE, *INTENTION* (1957).

4. For the significance of Anscombe’s work for how I think, see MARK RYAN, *THE POLITICS OF PRACTICAL REASON: WHY THEOLOGICAL ETHICS MUST CHANGE YOUR LIFE* 99–146 (2011).

5. See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

6. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

contracts,⁷ for a course taught by Mr. Little. I seem to recall I was not convinced that Fuller had made his case for an ethic internal to the law.

These theological and philosophical developments may seem quite foreign for any consideration of how my work relates to the law, particularly if the “law” is identified with what is studied in most law schools or enacted by the government. But a sense of how the law can manifest the deepest theological and moral commitments of a people is partly the reason I have always thought the law to be important for the kind of work I have tried to do.

I dare not forget, however, the effect that reading Alexis de Tocqueville had on me. I found his account of the role of the law and lawyers in American society extremely persuasive.⁸ I was convinced he was right to suggest that lawyers in America were as close as America would come to having an aristocracy or privileged class.⁹ For, according to Tocqueville, the law was not just the expression of the basic moral convictions of the American people, but the law in fact served as our most basic morality.¹⁰ The law, therefore, became the only means we had to resolve moral disputes.¹¹ As a result, lawyers, because of their knowledge of the details of “the law,” would act as a superior class in a society that cannot acknowledge it has a superior class.¹²

From Tocqueville’s perspective, the practice of the law in America served a conservative function.¹³ He observed that American lawyers love an ordered life above all things because they are more afraid of arbitrariness than tyranny.¹⁴ Tocqueville developed his understanding of the role of American lawyers by contrasting how lawyers in America appeal to the past when asked about a point of the law whereas French lawyers look for some more fundamental rationale.¹⁵ American lawyers, therefore, appeal to and quote opinions of others while French lawyers bring in their whole system in an effort to carry their arguments back to constitutive principles.¹⁶ Tocqueville argued that the way American lawyers reason reflects their presumption that the law must act as a restraint on a people who can become intoxicated by their democratic passions.¹⁷

No doubt given developments in the American legal system since Tocqueville’s day, his characterizations of American law and lawyers would need qualification. But I was attracted to Tocqueville’s understanding of

7. LON L. FULLER, *BASIC CONTRACT LAW* (1947).

8. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263–70 (George Lawrence trans., Harper Perennial 1988) (1835).

9. See *id.* at 268.

10. *Id.* at 270.

11. *Id.* at 268.

12. See *id.* at 264.

13. See *id.* at 268–69.

14. *Id.* at 266.

15. *Id.* at 267.

16. *Id.*

17. *Id.* at 268–69.

American lawyers because I thought he made clear why, if you were interested in “ethics,” the law was and is a crucial resource for locating matters of significance in American society. The conflicts and arguments surrounding the law, therefore, can be illuminating for understanding how the moral convictions of Americans work. Thus Tocqueville’s observation, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹⁸ But it turns out that most political questions are moral questions in disguise. So I was attracted to the law because I thought the law exemplified how moral convictions entail a politics and how politics and the law manifest our most significant moral commitments.

Put as directly as I can, I was and continue to be fascinated by the law because it is just so damned interesting. One of the reasons the law is interesting is that its processes manifest a rationality that does not need a ground. For, if Tocqueville is right, American law is a law without a bottom. That is, it is a law without a bottom unless you think the Supreme Court is a bottom.¹⁹ So American law remains one of the paradigmatic places you can go to see the moral convictions of the American people displayed. Those convictions may not be my convictions, but the convictions that make me a Christian mean I cannot afford to ignore my neighbor.

It is appropriate that a number of the papers in this symposium attend to my (mis)understanding of liberalism, given the attention I have given to liberalism in my work. But the relation of liberalism to the work of the law is complex. To put the matter no doubt too simply, I worry that one of the dangers of liberalism as an ideology is how it can work to undermine the common law tradition. I do not mean to suggest that the common law tradition does not have problems of its own, but I do think that the tradition at its best exemplifies how moral and legal reasoning best works, that is, by the analogical reflection on cases. I think I thought that to be the case even before Alasdair MacIntyre had developed his account of tradition-constituted reason.²⁰

Stephen Macedo may be right to criticize me for failing to provide a more complex account of “liberalism.”²¹ In my defense, I think liberals often fail to provide an appropriate account of liberalism. For example, liberal political theory and ethics often fail to account for the rule and practice of the law.²² I suspect this failure is due not to liberal convictions but to the presumption that

18. *Id.* at 270.

19. John Inazu reminds me that there are two problems with my reference to the Supreme Court: (1) the Court is not the last word because often the decisions made by the Court are not respected and (2) much of the practice of the law has little to do with the Supreme Court. He rightly notes, moreover, that much of the work of the law is not bounded by texts but by dollars or by the social status of criminal defendants. I concede that to be the case. My reference to the Court was meant to be ironic but I forgot that irony is a speech act.

20. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

21. See Stephen Macedo, *Hauerwas, Liberalism, and Public Reason: Terms of Engagement?*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at 161.

22. For example, there is no extensive account of the role of the law in JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Dworkin is an obvious exception. See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

liberalism is best articulated as a theory. I have often thought that liberals have not shown appropriate gratitude to MacIntyre for his presentation of liberalism as a tradition in *Whose Justice? Which Rationality?*²³

Macedo's appeal to Louis Hartz's *The Liberal Tradition in America*²⁴ I think to be very important.²⁵ Hartz's book left a lasting influence on me. No doubt Macedo is right that Hartz complicates the story of liberalism in American life,²⁶ but I read Hartz partly as a way to explain why various forms of liberal theory seemed to be the only way we had, as Americans, to account for our social and political practices. For just to the extent America had no feudal past, as Hartz suggested,²⁷ we could presume America provided the opportunity to begin with a clean slate. The absence of that past also helps explain, if I remember Hartz correctly, why America has never had a determinative socialist tradition.²⁸

There is another reason the law has always fascinated me, which may surprise some given my commitment to Christian nonviolence. The law is so interesting because it is about power and manifests power. That power may at times be violent, but power can also often be an alternative to violence. These are not theoretical issues but everyday realities entailed by the work of the law.

Of course it is important to remember that "the work of the law" is no "one thing." John Howard Yoder, in a letter to Tom Shaffer in which he wondered how meaningful it is to ask whether a Christian can be a lawyer, observed that the work of the lawyer is too various to provide a simple answer to that question.²⁹ Yoder observed that lawyers write wills and contracts, defend the poor against housing authority, defend people against capital punishment, prosecute, judge, postpone environmental rules, structure corporate mergers leveraged with junk bonds, and so on.³⁰ The "so on" makes clear that the many things done in the name of "the law" are not morally the same.³¹

Yoder, therefore, suggests that the more appropriate question for Christians

23. MACINTYRE, *supra* note 20. MacIntyre observes,

The starting points of liberal theorizing are never neutral as between conceptions of the human good; they are always liberal starting points. And the inconclusiveness of the debates within liberalism as to the fundamental principles of liberal justice . . . reinforces the view that liberal theory is best understood, not at all as an attempt to find a rationality independent of tradition, but as itself the articulation of an historically developed and developing set of social institutions and forms of activity, that is, as the voice of tradition.

Id. at 345.

24. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

25. See Macedo, *supra* note 21, at 161 n.1.

26. *Id.*

27. HARTZ, *supra* note 24, at 6.

28. Hartz observes, "It is not accidental that America which has uniquely lacked a feudal tradition has uniquely lacked also a socialist tradition." *Id.*

29. THOMAS L. SHAFFER, *MORAL MEMORANDA FROM JOHN HOWARD YODER: CONVERSATIONS ON LAW, ETHICS AND THE CHURCH BETWEEN A MENNONITE THEOLOGIAN AND A HOOSIER LAWYER* 34 (2002).

30. *Id.*

31. *Id.*

is not “Am I as a Christian called to be a lawyer?” but rather “Which of the things that lawyers do is a follower of Jesus called to do?”³² I assume that this question is open-ended, meaning it must be asked every day by a Christian who practices the law.³³ To ask that question every day requires, however, that those who ask the question have a community of friends who can help them discern when the answers they give may be an exercise in self-deception. Such a community, as Richard Church has argued, must be one that has found ways to resolve disputes in a manner that avoids manipulative behaviors that too often hide the violence inherent in our relations with one another.³⁴

The final, and probably most important, reason the law has always been important for me is that I have been unable to avoid the law because I have been befriended by lawyers like Tom Shaffer and Rich Church. At Notre Dame, Tom Shaffer was kind enough to let me teach with him. I cannot remember how it happened, but through my involvement with Tom I became a reader of textbooks and cases that were not available in brail for a blind law student. As we read through his first-year law courses, I learned that to learn to be a lawyer is to learn a language. I also learned that the work of the law requires people of judgment and wisdom. Needless to say, torts was my favorite course.

My education in the law was enhanced by my coming to Duke. The name of that enhancement was Jefferson Powell. It was Jeff who introduced me to the work of Robert Cover. John Inazu observes in his foreword that I have never discussed Cover’s work,³⁵ but I can assure you his account of the relation of *Nomos and Narrative* left a lasting impression.³⁶ I saw, moreover, in Cover’s account of the law as a form of practical wisdom an exemplification of my attempt to show the relation of act descriptions and a community’s narrative. Even closer to home was Cover’s claim that martyrdom is a proper starting place for understanding the nature of legal interpretation because “[l]egal interpretation takes place on a field of pain and death.”³⁷ Those are the kind of claims that cannot help but attract the attention of the theologian.

In an interesting way, at least interesting to me, Cover’s suggestion about

32. *Id.* at 35 (internal quotation marks omitted).

33. Tom Shaffer is a lawyer who does ask that question every day and, having done so, has produced a remarkable body of work. *See, e.g.*, THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981).

34. *See* RICHARD P. CHURCH, FIRST BE RECONCILED: CHALLENGING CHRISTIANS IN THE COURTS (2008).

35. Inazu, *supra* note 1, at vii n.45.

36. *See* ROBERT COVER, *Nomos and Narrative*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95–172 (Martha Minow et al. eds., 1992) [hereinafter COVER].

37. *Id.* at 203–07. In particular Cover would have been of great interest to an Augustine. It has occurred to me that we need a study of the relation of Cover’s work to that of Paul Kahn. Kahn occasionally refers to Cover’s account of narrative as necessary to give intelligibility to the law, but it would be extremely instructive to compare and contrast their understanding of the law’s violence. For Kahn’s reference to Cover, *see* PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 97 (2008).

how the Jewish legal system worked brought me back to my beginning reflections on the work of the law through the study of the Old Testament with Childs. I thought Cover's observation that the Jewish legal tradition worked for 1900 years without a state and with little coercive powers was extremely suggestive.³⁸ At the very least, Cover's observation should make Christians consider the importance of the development of canon law and how the law of the Church provides an alternative as well as a resistance to state law. I think that my response to Cover might be an interesting way to locate how Catholicism has greater continuity with my alleged "sectarian" position than many assume.

In many ways, Jeff Powell's dissertation and subsequent book were an exploration of how someone could take MacIntyre and Yoder seriously in order to provide an account of developments in the law in the American context.³⁹ I directed Jeff's dissertation, but I did so as one being taught by my student. So it was from Jeff that I learned to think of American constitutionalism as "the product of the Enlightenment's parallel attempts to control irrational and violent action through the institution of the nation-state, and to replace irrational, tradition-dependent moralities with universal norms of reason."⁴⁰

Like Yoder, I think there is no reason to think that a commitment to Christian nonviolence means we must deny what Yoder identifies as "the facticity of the punitive drives."⁴¹ It does no good to tell those who exact punishment that they are bad people because they think it a good thing to have wrongdoers punished. The task is to understand the many roots and functions of punishment in the hope of finding less painful and lethal ways to punish. Yoder observes, "[T]o a Christian lawyer, the law is like the weather. There are better and worse ways to survive and help the victims of storms."⁴²

That is more or less the stance I have come to take toward the world and, in particular, the world of the law. I am not trying to be "in control," but rather I try to understand better the world in which we find ourselves as Christians. I should like to think that because Christians are no longer in control or desire to be in control of the world in which we find ourselves we have a better chance of being of service to our neighbor who would like to be in control. Such a stance may seem irresponsible to those who would rule, but few are less in control than those who think the power to rule puts them in control of the world.

This observation may seem a counsel of despair when confronted by the reality that James Logan has put before us concerning the horror of our prison system as well as how criminal law is exercised unjustly toward minorities.⁴³ I

38. COVER, *supra* note 36, at 242–48.

39. See H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993).

40. *Id.* at 14.

41. SHAFFER, *supra* note 29, at 44.

42. *Id.*

43. See James Logan, *Healing Memory, Ontological Intimacy, and U.S. Imprisonment: Toward a Christian Politics of "Good Punishment" in Civil Society*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at

wish I had some constructive suggestions to make in response to Logan's indictment, but I confess I am not sure how to even begin thinking about reform of the current penal system. I am not even sure there should be "a penal system," but I am sure that punishment is a necessary moral reality.

I have tried, as Logan notes, to describe how Christians should go about punishment internal to the life of the church.⁴⁴ Excommunication is a gesture not of exclusion but rather a call for the one excommunicated to come home. But excommunication "works" because the penitent does not have to be a Christian. Those who face the punishment enacted by the state face a quite different reality. I nonetheless think that the analogy of excommunication might be a fruitful way to begin to think about an alternative to the retributive punishment done in the name of the state.

I hope Logan is wrong that I believe Christians have no obligation to be practical,⁴⁵ but I have no ready alternatives that would address the inequities in the law and the torture we enact in the prison system. I should like to think that Christians can provide within our communities some exemplification of punishment with purpose, not the least being reconciliation, but I do not pretend that such an example would make that much difference for reform of the prison systems that are currently so destructive.

The United States has conducted two wars over the last ten years without the civilian population bearing any great costs. In an odd way, I think the police and law-related institutions are also isolated from the people in whose interest they are said to serve. As long as the work of the police and prisons does not impinge on the lives of most Americans, people in law enforcement can do pretty much whatever they think they have to do. I need to be clear. I do not blame the military or the police for this development; rather, I think something has gone wrong in our politics that has produced this result. Though the suggestion may seem quite odd for someone committed to nonviolence, I think it is crucial for the health of this society that the work of the police be morally better understood and supported.

By making such a suggestion, Bradley Wendel may well think I have abandoned my Anabaptist convictions, taken on the Lutheran understanding of the orders of creation, and become a "modest Constantinian."⁴⁶ I hope, however, that this is not the case. Rather, I think Christians can and should care about the work of the police as but one expression of our concern to live in a less violent world. For Christians, as Wendel suggests, how we serve our neighbor is determined by the story that shapes and is shaped by our worship of Jesus Christ.⁴⁷ That story, however, is one Christians believe is assessable to

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44. *Id.* at 80–81.

45. *See id.* at 84–85.

46. *See* W. Bradley Wendel, *Lawyering in the Christian Colony: Some Hauerwasian Themes, Reflections, and Questions*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at 1, 4.

47. *See id.* at 9.

anyone, but we cannot pretend that costs are not entailed by becoming a God-fearer.

But the very content of the story obligates those whose lives are determined by the Christian story to be witnesses. So the story cannot be self-validating. Witness, however, does not mean that those who witness must make the story available in some neutral language. That strategy, as Charlton Copeland suggests, was the strategy of Protestant liberalism.⁴⁸ But the failure of that attempt to make intelligible why Christians say and do what they say and do does not mean that Christians do not have the obligation to learn “second first-languages” in an attempt to be more adequate witnesses.

I am indebted to Michael Moreland for calling attention to Anscombe’s work in this respect.⁴⁹ It was Anscombe, and of course Wittgenstein, who taught me that descriptions are everything.⁵⁰ Thus my oft-made claim that we can only act in the world that we see and we can only see the world we can say. If we are to acquire the habits necessary for living a life of virtue, what we do and how we describe what we do must be commensurate. That is the reason I worry that some accounts of liberalism entail a moral psychology that suggests that if an agent is to be free she must always be capable of “standing back” from her own action so that she will not be fated by her past.

A Lutheran perspective may seem quite congenial for lawyers who represent the mining companies that want to use fracking technologies to get the natural gas in the Marcellus Shale to justify what they do.⁵¹ Like Stanley Fish, I too think it good that our society is “law governed.”⁵² So I see no reason that lawyers with integrity cannot serve the many conflicting interests associated with this technology for mining natural gas. But, as Wendel suggests, that does not give a blank check for lawyers to think there are no questions to be raised about whom they represent or how they represent certain clients.⁵³ Bad people should be represented, but they should be represented by people good enough to recognize that such representation entails moral commitments not sufficiently described as “doing my job.”

I have little to say about Elizabeth Schiltz’s paper.⁵⁴ With an eloquence missing from my reflections on the intellectually disabled she has faithfully presented what I think. I am in her debt not only for her reading of my work,

48. See Charlton C. Copeland, *Creation Stories: Stanley Hauerwas, Same-Sex Marriage, and Narrative in Law and Theology*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 87, 97.

49. See Michael P. Moreland, *Mistakes about Intention in the Law of Bioethics*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 53, 55–58.

50. See ANSCOMBE, *supra* note 3.

51. See Wendel, *supra* note 46, at 14–16 (discussing the debate over fracking in the Marcellus Shale).

52. For Fish’s most developed account of the law, see STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING TOO* 141–79 (1994).

53. See Wendel, *supra* note 46, at 1–3.

54. Elizabeth R. Schiltz, *Hauerwas and Disability Law: Exposing the Cracks in the Foundations of Disability Law*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 23.

but also for introducing the work of Samuel Bagenstos. I simply did not know about his account of disability law.⁵⁵ The tensions Schiltz reports and Bagenstos identifies do, I think, reflect tensions in the disability movement and law.⁵⁶ I have no reason to doubt Schiltz's suggestion that Bagenstos ironically does not recognize that he represents and reproduces the same humanism he identifies as leading to the incoherence in the law surrounding disability.⁵⁷

These are difficult and painful matters. We are suffering creatures whose suffering tempts us to be more than we are, which ensures that we will be less than we were created to be. But neither can we be less than we were created to be. What it means for us not to be less was named for me recently by a friend who is the godfather to an autistic child. He expressed the joy he has learned to receive from his godson, not in spite of his autism, but because he cannot distinguish his godson from his autism. Yet he says he cannot repress the thought that he wishes his godson were not autistic.

We rightly wish that those we love do not have to suffer conditions like that of autism or intellectual disability. The challenge is how to hold that desire without thinking it would be better that they not exist at all. Compassion threatens to become a killer in a culture committed to creating a world free of suffering and death. We should not be surprised that the law reflects that development.

The kinds of issues Schiltz raises are not unrelated to those raised in the papers that have addressed assisted suicide and abortion.⁵⁸ For if, as I suggested above, the law is an ongoing exercise in the kind of analogical reasoning identified as practical wisdom, then questions of assisted suicide and abortion are unavoidable topics for the law. They are, moreover, topics that make clear that it is impossible to make a strong distinction between the law and morality. That the law reflects as well as reproduces a morality, however, does not mean that the relation is not a complex one.

I am against abortion and assisted suicide, but my reasons for being against both are quite different from the rhetoric of "pro life" and "pro choice" that shapes the public debate. As a result, I find it difficult to enter the controversies about how the law should be determined in relation to matters such as abortion or assisted suicide. I do not believe anyone has a right to her body or to privacy in and of itself. Rather, I ask a question I should like to think relevant not only to Christians: "What kind of people do we need to be to have lives ready to welcome new life even when it is conceived in harsh circumstances?" That is a question that is not meant to be answered only by the woman carrying the child,

55. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

56. See Schiltz, *supra* note 54, at 39–51.

57. See *id.* at 43.

58. See John D. Inazu, *The Limits of Integrity*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at 181; Moreland, *supra* note 49; David A. Skeel, Jr., *Hauerwasian Christian Legal Theory*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at 115.

but by the wider community.

My formulation of that question is designed, as Inazu quite rightly observes, to make problematic claims about when a fetus can be considered a person.⁵⁹ Although I think there are good biological grounds for recognizing a conceptus as a human being, I argue that for Christians it is not a question of whether a conceptus can be so regarded. Given our understanding of God's care for all of God's creation, we hope that this is a human life. Such a hope makes the questions of when human life begins or when human life becomes a person much less pressing. I understand the description "abortion" to be a reminder term for Christians about our hospitality to new life. That does not mean that hard cases do not exist for Christians, but those cases work against a very different set of practices and narratives from those determining the current abortion debate in America.

The question of assisted suicide involves the same kind of reasoning. Again, it is not a question of whether someone has a "right" to take his life or to have someone help him end his life. Christians believe we have an obligation to be present to one another in our living and in our dying that makes suicide unthinkable. For such a people, the description "suicide," a description that is of little use to characterize those who take their lives, names a boundary we refuse to cross, determined as we are to be present to one another in our suffering and dying. Some may suggest that such arguments fail to acknowledge that most people do not live in that kind of community, but to the extent the medical community embodies the commitment to "do no harm" we can sense that this understanding of life has not been lost.

Of course it is quite possible to argue that the kind of moral arguments I am trying to make are too "particularistic." A nice way, I suspect, to say they are too Christian. That may well be, but then the challenge becomes whether we have a sufficient ethos to sustain abortion or suicide as moral descriptions. Abortion can be described as the exercise of autonomy by the use of a medical procedure. Suicide can be understood as an instance of "self life-taking," if it is understood that to take one's life is the ultimate expression of our autonomy.

These are alternatives I think possible and even likely. I believe arguments can be mounted against these ways to think about suicide and abortion as well as how they are expressed in the law, but I do not assume they are knock-down arguments. But then I do not believe in knock-down arguments. In his paper comparing Dworkin's and my work, Inazu observes that I have not developed any policy suggestions about how abortion might be expressed in the law.⁶⁰ He is right that I have refused to line up for or against *Roe v. Wade*.⁶¹ Because I do not see how abortion can be isolated from questions of parenting, I think a more constructive policy would be a provision for a child allowance.

A child allowance given to every woman who finds herself pregnant would

59. Inazu, *supra* note 58, at 196.

60. *Id.* at 195 n.92, 197–199.

61. 410 U.S. 113 (1973).

at least suggest that we are a people who understand that the willingness to bring new life into our world is a common good. Such an allowance would also prevent abortion from being an economic necessity. Every abortion no doubt involves quite different motives, but I cannot help but wonder if the practice of abortion in American society does not reflect a people who are profoundly unsure that they lead lives sufficiently worthy to be passed on to future generations.

These are complex matters but I may be able to make my understanding of the relation of morality and the law clearer by turning to the subject of marriage. It is not at all clear to me that there is a sufficient practice or understanding of marriage in our society to sustain marital law.⁶² I have been struck by the demand for gay marriage because such a demand strikes me as such a conservative social policy. If marriage is a joint venture for the mutual satisfaction of a couple—and I see no reason why it should be restricted to two—then why assume such a venture should be the subject of an area of the law identified as “marriage and family law.” Would it not be more efficient to understand the commitments made by people who want to form some lasting relationship to be covered under business law, where there is vast experience in limited contracts?

Some might find it strange for a Christian to make such a suggestion, but I should like to think it is the kind of suggestion Christians should make. For it is surely time that Christians cease asking the state to maintain through the law commitments that Christians have found increasingly difficult to sustain in our own communities. I do not think such a stance means I am failing to act responsibly in the world as I find it. I would like to live in a world in which abortion is not thought to be an alternative, but that is not the world I live in. I live, again as Inazu’s paper makes clear, in Ronald Dworkin’s world.⁶³

The law’s autonomy, dare we say empire, is an attempt to free the law from the kind of moral and political judgments present in the above discussion. I am quite sympathetic with Langdell and many others who have tried to save the law from politics. Some may think, with reason, that calls for the autonomy of the law may be an attempt to secure the privileges of the legal profession, but I think the appeal to the law’s integrity can express a deep regard for the continuing moral intelligibility of the law in what many regard as a morally unintelligible society if not universe. There is only one problem—it is politics all the way down.⁶⁴

62. In a first draft of this paper I had written “martial law” rather than “marital law.” Inazu pointed out that either way it makes for a good laugh.

63. See Inazu, *supra* note 58.

64. It should be clear that this makes me sympathetic with Fish’s argument, “Why the Law Wishes to Have a Formal Existence.” See FISH, *supra* note 52. Paul Kahn observes that liberal ideology and practice has had the ironic effect of depoliticizing our ordinary politics. PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 253 (2005). Kahn thinks the work of Ronald Dworkin exemplifies the attempt to free constitutional interpretation from politics just to the extent he identifies the Constitution with a set of moral principles. *Id.* at 254–55.

I am aware it may seem quite odd, but at least one reason for my disease with liberalism, at least my disease with liberal political theory, is the way in which that tradition can involve an attempt to avoid politics. Put in even more contested terms, liberal appeals to “fairness” can serve to legitimate power arrangements for the established. Why, for example, is the vast difference of incomes in America not a political issue? Our alleged politics of conflict turns out to be about conflicts between elites.

That kind of remark has earned me the description, “prophetic.” I have no ambition to play the prophet. By definition no one who is a full professor at Duke University can claim to be prophetic. I am not disposed, therefore, to accept David Skeel’s distinction between prophetic and participatory engagement.⁶⁵ The prophets are only intelligible if we remember they were not “outsiders” but those called by God to demand that Israel trust God and God’s law for her very existence. The prophets were, therefore, the ultimate participants.

Though I distrust the distinction between prophetic and participatory engagement in the abstract, it may be helpful as a way to make clearer my disease with some forms of liberalism. I share MacIntyre’s worry that to the extent we are committed to understanding ourselves as autonomous moral agents we are unable to imagine any alternative to understanding our relation to one another that does not require manipulative strategies.⁶⁶ So there is a sense that my criticisms of the world as I find it draw on traditions that the world does not recognize as internal to its life. That may make me prophetic if by prophecy we mean to designate those who stand external to the practices they criticize.

I am not sure how these matters entail Skeel’s understanding of the role the Sermon on the Mount plays in Niebuhr’s, Rauschenbusch’s, and my work. In my commentary on the Gospel of Matthew I have tried to show that the Sermon must be read Christologically; that is, the life, death, and resurrection of Jesus determines how the Sermon is to be read.⁶⁷ By doing so I have tried to counter Protestant readings of the Sermon that assume Jesus did not mean what he said. But to read the Sermon Christologically means that the question of how the practices of the church can inform how Christians negotiate the worlds in which they find themselves is a never-ending challenge.

I assume, however, that Christian practices shaped by the Sermon should provide Christians with resources to make a contribution to societies in which they find themselves. I am, therefore, grateful that Skeel calls attention to the issue of debt forgiveness because I think he is right to suggest that how Christians practice debt forgiveness can be drawn on by others to provide alternatives that would otherwise not exist.⁶⁸

65. Skeel, *supra* note 58, at 116.

66. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 68 (3d ed. 2007).

67. See STANLEY HAUERWAS, *MATTHEW* 74–104 (2006).

68. Skeel, *supra* note 58, at 131–132.

My worries concerning the limited character of the moral resources liberal theory and practice provide for addressing fundamental problems such as abortion and assisted suicide is one of the reasons I find the law so important. The law is a morally rich tradition that offers a language otherwise unavailable for the conflicts we need to have as a society. That is a tradition in which I should like to count myself a participant.

That is why I find Cathleen Kaveny's calling our attention to the significance of contract law so helpful.⁶⁹ I think it not accidental that promising is a crucial practice, particularly in societies shaped by capitalist markets. The significance of promises is often not reflected in our moral and political theories.⁷⁰ The trust that is necessary for human life ironically is seldom acknowledged in theory or practice.⁷¹

I am sure Kaveny is right that a focus on contracts can help us recognize our interconnections that we might otherwise miss.⁷² That said, I need to confess I have never trusted Calvinists, other than Barth, when they talk about contracts being a form of covenant. When Calvinists talk that way about contracts, it usually indicates they are representatives of a rapacious business practice and they would eat you alive if they were able.⁷³

I am extremely grateful to Kaveny for her reading of *With the Grain of the Universe*.⁷⁴ In particular, I hope she is right that the position I develop in that book provides the resource for a more constructive account of the law than my anti-Constantinian stance might suggest.⁷⁵ Drawing on Yoder's work, I have for some time tried to suggest that the critique of Constantinianism does not mean that Christians have to reject the world. I understand that Yoder's and my rhetoric can sometimes give that impression.⁷⁶ But it is surely the case that the

69. See Cathleen Kaveny, *Hauerwas and the Law: Framing a Productive Conversation*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 135.

70. For an extraordinary account of promising, see GUY MANSINI, PROMISING AND THE GOOD (2005). Mansini notes that Hobbes assumed the reason promises are kept derives from fear of some evil otherwise occurring. *Id.* at 43. In contrast, Aquinas thinks we keep our obligations occasioned by our promises because they are the manifestation of our love. *Id.*

71. That Knud Logstrup's account of trust, KNUD E. LOGSTRUP, THE ETHICAL DEMAND (H. Richard Niebuhr & Alasdair MacIntyre eds., Univ. of Notre Dame Press 1997), has attracted so little attention indicates, I think, the dominance of liberal theory. H. Richard Niebuhr and Alasdair MacIntyre are seldom associated in the same sentence, but they, and James Gustafson, are admirers of Logstrup's work. See Hans Fink & Alasdair MacIntyre, *Introduction* to THE ETHICAL DEMAND, *supra*, at xv–xxxviii.

72. Kaveny, *supra* note 69, at 159.

73. Paul Kahn observes that “[t]he contemporary emphasis on contract expresses the stabilizing quality of will in a mobile world of interests. A market order is distinguishable from a system of theft just to the extent that it moderates immediate desires by a will formed in and through contracts and property.” KAHN, *supra* note 64, at 171.

74. STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH'S WITNESS AND NATURAL THEOLOGY (2001).

75. See Kaveny, *supra* note 69.

76. See, e.g., STANLEY HAUERWAS, THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD 58–75 (2007); STANLEY HAUERWAS & ROMAND COLES, CHRISTIANITY, DEMOCRACY, AND THE RADICAL ORDINARY: CONVERSATIONS BETWEEN A

Constantinian temptation, a temptation that is intrinsic to the Christian commitment to witness to God's kingdom, can elide the necessary dualism between church and world.

Kaveny quite rightly asks why in *With the Grain of the Universe* I did not exploit Barth's understanding of the relation of God's external covenant to the internal covenants that constitute our lives as God's good creatures.⁷⁷ I suspect it did not occur to me to do so because I was so intent on trying to give an account of natural theology from a Barthian perspective. But the more I have thought about Kaveny's question, I think I have avoided that move because I suspect that the appeals to covenant can be an attempt to develop a disguised form of natural theology in Calvinist drag. I am not against the theological illumination of our "natural covenants," but I worry that those who follow that "method" often lose the necessary tension between church and world.

The worry about the loss of duality between church and world is why I also avoid the language of the orders of creation. Too often the "givens" identified as orders or mandates are assumed to be self-validating. I am, for good or ill, a historicist all the way down. The church-world duality is not a given, but rather a discovery made possible by discernment by Christians across time concerning how they must live to be faithful to the Gospel. Moreover, although the boundaries between church and world are permeable in both directions, there are nonetheless still boundaries.

Kaveny quite rightly identifies my attraction to the common law tradition as the exemplification of the kind of practical reason I think necessary for the discovery of the goods a people have in common.⁷⁸ I am particularly grateful that she has reminded us of Paul Ramsey's account of the law in *Nine Modern Moralists*.⁷⁹ I hope it is true that I learned much from Ramsey's account of Edmond Cahn and Jacques Maritain on how the positive law can and does express the natural law.

Promises, as Kaveny suggests, are constitutive of traditions of practical rationality embodied in various legal traditions.⁸⁰ The promises we make to one another, promises which are often implicit, take time. Christians are a people who believe God has given us all the time we need to be a people capable of resolving conflict short of violence.⁸¹

I am not sure if that understanding of the church makes me an ecclesiological "functionalist." The distinction between essentialist and

RADICAL DEMOCRAT AND A CHRISTIAN (2008).

77. See Kaveny, *supra* note 69, at 150–51.

78. See *id.* at 149.

79. PAUL RAMSEY, *NINE MODERN MORALISTS* (1962).

80. See Kaveny, *supra* note 69, at 158–59.

81. Mansini stresses the connection between promising and time, suggesting that life promises engage and presuppose a capacity, not just to look ahead, but to look ahead to the end, and to conceive of life as a whole. We cannot shape our origins, but we can, within limits, give shape to our end. The transcendence of time—from within time—that such promises bespeak reveals the whole complexity of man, metaphysical and moral. MANSINI, *supra* note 70, at 54.

functionalist ecclesiology, a distinction Kaveny provides as a helpful way to understand my view of the church,⁸² does not sound “like me.” I worry that “function” can separate what is done from how what is done is done. On these matters I should like to hope I am an unreflective traditionalist; namely, that there is nothing we can do to stop God showing up if the word is rightly preached and the sacraments rightly celebrated. I remain a high church Mennonite.

The Mennonite side of me may have led Inazu to defend me against the charge that I am a theocrat.⁸³ That is the only point I think Inazu gets wrong in his extremely interesting comparison of Dworkin and me. I am a theocrat. I certainly do not want a rule by priests, but I am a theocrat. I believe that Jesus is Lord, but Jesus Lordship is exercised as a rule of love that prohibits the killing of the neighbor. I would like to rule, but because I am committed to nonviolence I cannot coerce my neighbor to do what I would like them to do. The only alternative is called “politics.”

Macedo repeats the common criticism that I have not done justice to liberalism.⁸⁴ I may be guilty of letting theories of liberalism overdetermine the actual practice of liberal societies, but it turns out that theories become self-fulfilling prophecies. The question of the relation of capitalism and political liberalism is a complicated one, but I do recognize that Rawls was not an apologist for free market capitalism. I am, moreover, an admirer of Adam Smith. Smith’s understanding of the significance of the division of labor for producing people who have to recognize the interests of others is an extraordinary moral vision.

That said, I continue to worry that liberal ideology can function to repress rather than enhance the necessity of politics. Macedo worries that I provide no account of how we are to negotiate diversity.⁸⁵ I confess that I do not do so for at least two reasons. First and foremost, I do not have any idea what such an account would look like because I do not know how you can represent an account of diversity without assuming you have somehow achieved a perspective that is not part of the diversity. Second, I am trying to help Christians recognize that we are part of the “diverse.” The crucial question for me is whether Christians will have anything interesting to say that others would find worthy of consideration.

Macedo suggests that there is an overlap between democratic and Christian virtues.⁸⁶ He identifies the former as “tolerance of reasonable forms of diversity, . . . willingness to act in the face of injustice, sympathy with the less well-off, a capacity to appreciate the point of view of others, a willingness to support fair

82. See Kaveny, *supra* note 69, at 146–47.

83. Inazu, *supra* note 58, at 189–90.

84. Macedo, *supra* note 21.

85. *Id.* at 174–75.

86. *Id.* at 167.

terms of social cooperation.”⁸⁷ I am unclear why these forms of behavior are called virtues, but more importantly, I note that the terms of description are not without controversy. Surely Macedo must acknowledge that there is little agreement about what constitutes a “reasonable form of diversity.”

I remain unconvinced, moreover, that there is an overlap between democratic and Christian virtues. I am sure tolerance is not a Christian virtue because given my account of Christianity I would find it surprising for Christians to have positions of power that would make it necessary for them to be tolerant. Humility, not tolerance, is a Christian virtue. There may be similarities in expression by those shaped by tolerance and those who embody humility, but those similarities are not sufficient to claim identity or overlap. Questions of how to compare liberal virtues with Christian virtues require that the narratives that make those traditions of the virtues intelligible be made articulate. I suspect if that were done, the differences would be evident.

I hope, however, it is clear that I am not against Macedo’s understanding of democracy as the demand for the giving of reasons. I do wonder if that characterization of our politics does not occlude the reality of how our politics works. For example, Paul Kahn argues that such an understanding of politics, that is, the view that every state is to be made and remade on the basis of deliberation and choice, was the revolutionary project of modernity.⁸⁸ America, Kahn argues, is the exemplification of that project just to the extent American was and is imagined to be founded by an act of popular sovereignty.⁸⁹ That liberal presumption, however, fails to acknowledge that “the political begins when I can imagine myself sacrificing myself and killing others to maintain the state. The modern state has fully arrived not when it defends me against violence, but when it conscripts me into the armed force.”⁹⁰

Kahn argues that the violent character of the state cannot be seen if we look only at the law.⁹¹ War, not the law, is the expression of the violence of the state because war makes clear that there is no higher value than the continued existence of the state.⁹² Yet war and the law are interrelated because, as Kahn puts it,

War is the defense of the rule of law because the law is the state understood as an order of meaning. Through war, the state expresses the necessity of its own existence. . . . There are no principles of restraint on the use of force that are implicit in the state that understands itself as the expression of popular sovereignty under the rule of law.⁹³

War and law are, from Kahn’s perspective, not contradictory forces but common expressions of liberal cultures that sustain the modern nation-state.

87. *Id.*

88. KAHN, *supra* note 64, at 115–39.

89. *Id.* at 257–58.

90. *Id.* at 240.

91. *Id.* at 263–64.

92. *Id.* at 238–41.

93. *Id.* at 277.

I call attention to Kahn's understanding of the violence of liberalism because I think the connections he makes to be quite similar to those Stephen Carter has highlighted from my work in his extremely interesting paper.⁹⁴ I am grateful to Carter for his recognition that I am a theologian.⁹⁵ I am not just a theologian, but I am a theologian who thinks God matters. My task is to show what it means to intend the world as if God matters. We do not get to choose God. God has chosen us. That God has chosen us is why God's covenant cannot be understood as a contract. We do not get to choose whether we will be in covenant with God, because God has chosen to be in covenant with us. Accordingly, choice is not the hallmark of freedom but rather freedom derives from our ability to recognize the true and the good as necessary for our formation as people of virtue.

Carter helpfully calls attention to *Mozert v. Hawkins County Board of Education*⁹⁶ to illustrate how liberal practice can be quite coercive.⁹⁷ Liberal political practice and ideology makes it impossible for liberals to recognize that they are exercising hegemonic power in the name of choice. Thus my claim, a claim Carter highlights, that the liberal tradition is determined by the story that we should have no story except the story we chose when we had no story.⁹⁸ That formulation was inspired by Rawls's account of the original position.⁹⁹ No doubt Macedo would argue such a reading is unfair because Rawls does not deny that on the other side of the original position we know we will have a story, we just do not know what it will be. Yet, I think that response fails to do justice to the way people like Vicki Frost understand their faith.

I do think, however, that the illiberal character of the law can at times be used to resist some of the more coercive implications of liberal hegemony that Carter identifies. The law can be a form of resistance because the law is not, at least not yet, based on "choice." "The law," determined as it must be by reasons born from contingency, cannot help but appear "irrational" from a liberal perspective. But the "irrationality" of the law can be a resource against the hegemonic desires of liberals to make all life conform to their understanding of what is necessary for us to be a free people.

So on the whole I think Carter has me right. It is not the case, however, that I disavow all attempts to develop a just war polity.¹⁰⁰ I am a pacifist, but I am more than ready to help those committed to just war to try to think through the institutional formations necessary for that ethic. It is too late to judge a war as

94. Stephen L. Carter, *Must Liberalism Be Violent?: A Reflection on the Work of Stanley Hauerwas*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 201.

95. *Id.* at 201.

96. 827 F.2d 1058 (6th Cir. 1987); see also ROMAN COLES, BEYOND GATED POLITICS: REFLECTIONS FOR THE POSSIBILITY OF DEMOCRACY 239–63 (2005) (providing an insightful analysis of *Mozert*).

97. Carter, *supra* note 94, at 210–11.

98. *Id.* at 208.

99. RAWLS, *supra* note 22, at 17–22, 118–26.

100. Carter, *supra* note 94, at 205.

just if you think that the criteria come into play only as a checklist to see if the war can pass muster. What must be explored is what kind of virtues a people must have to make war a “last resort.” What kind of foreign policy would be a just war foreign policy? What would a just war Pentagon look like? Until those questions are addressed, just war threatens to be little more than an invitation to false consciousness.

Carter suggests that the link between my view of the role of war in liberal societies and my understanding of the violence intrinsic to the liberal state is how both draw on the fear of death.¹⁰¹ Accordingly, Hobbes—not Locke—is the theorist that comes closest to giving expression to the fundamental character of our lives. As Kahn points out, however, too often liberalism fails to account for how the liberal state, like all states, must ask of the citizen sacrifices that cannot be accounted for on liberal grounds.¹⁰²

To end on this note may seem far from the subject of Hauerwas and the law, but Carter has, so to speak, raised the stakes by calling attention to the difference God makes.¹⁰³ That difference, moreover, requires the frank recognition of the violence perpetrated in the name of peace. The law certainly can be one of the forms that violence takes, but I believe the law can also be a gift that allows us to have as well as resolve conflicts without killing one another. The law, however, is not a given, but rather a task never finished.

I should like to think this symposium has in some small way been about that task. If it has, it has been due to those who have written these challenging papers. I can only ask them not to interpret my inadequate response as a failure to appreciate the challenges they have raised. All I can do is promise them I will keep working at it.

101. Carter, *supra* note 94, at 203–04.

102. KAHN, *supra* note 64, at 228–41.

103. For one of the best accounts we have for the challenge modern social and political theory has when trying to deal with strong religious connections, see RONALD BEINER, *CIVIL RELIGION: A DIALOGUE IN THE HISTORY OF POLITICAL PHILOSOPHY* (2011).