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HOW I CHANGED MY MIND*

Thomas L. Shaffer**

Tom Porter, talking to me about the substance of what you might want to hear, mentioned a series of articles in *The Christian Century*, by prominent theologians, called "How I Changed My Mind." I remember especially Karl Barth's three contributions to the series, over a period of thirty years.¹

Ed Gaffney, years ago, introduced me to Barth—and did it with a perfect reference: to the prison sermons Barth gave when he turned, at least a little bit, from being a theologian and returned to being a pastor. Barth said the jail was his favorite pulpit. "There are but few theology professors," he said, "whose sermon listener one can become only after having committed a serious violation of the civil order."²

My own changes of mind are not unique. I am one of a small group of law teachers who have, over the last thirty years, become clearer in formulating an Hebraic legal ethic. We are a minority who have become bolder. We owe such courage as we have located for that to modern pioneers, most notably Harold Berman, and, more lately, Emily Hartigan. What has changed most for us has been the clarity of our public witness; the substance all along has been old-time religion.³ When I say "clarity" I mean that we have come to see this substance in our work, more than we did in, say, 1970.

Clarity about old-time religion is certainly true of Harold and of Emily, and of the others I think of as colleagues in religious legal

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1. Reprinted in Karl Barth, *How I Changed My Mind* (John Knox Press, 1966).

2. *Id.* 71.

3. I mean "religion" in the ordinary sense: "There certainly was and is a certain thing, to which our fathers [and mothers] found it . . . practical to attach and limit the name of religion," as G.K. Chesterton said. It was about "a personal Creator in relation to a personal creature." G.K. Chesterton, *Introduction*, in Francis Thompson, *The Hound of Heaven and Other Poems*, 5-6 (1936). I do not, in using the word in this ordinary way, mean to dispute Barth's and Milner Ball's persuasive distinction between religion and the faith of Jews and Christians. Milner S. Ball, *The Word and the Law* 100-101 (U Chicago Press, 1993).

ethics and religious jurisprudence. We owe a lot to those who have tried, more than we have, to stay in the mainstream, but the people I think of as close colleagues try to speak from the church.⁴ It is useful for me to notice, as Minnesota's Garrison Keillor said, when he returned to the *Prairie Home Companion* this fall, that we do have a reverse gear.

Many of us have also moved in among the communitarians. That has also been a matter of using reverse gear. I suppose it happened to Moses.⁵ But the change may be worth talking about: if a person could account carefully for how she became a communitarian, she might explain why other people did.

I remember when my law school property teacher, Conrad Kellenberg, reached Haar's chapter on zoning: Con, who grew up in New York, seemed to think it was evident to any sensible person that the law could keep a land owner from growing pigs or keeping junk cars. I did not think so; this was perhaps the first time I allowed myself to think that the law can be oppressive and stupid. My classmates—not for the first time—thought I was odd.

The reason for my reaction is that I came from the Mountain West—not so much an adherent of Frederick Jackson Turner's theory of American history as evidence for it. I am the child of frontier women and cowboys, and besides that I grew up a Baptist. We don't really believe in fences, but if you must have them, you should be able to do whatever you want behind the fence that is in front of your own place.

Westerners are ambivalent in that way about community. Some of us have become communitarians, but it is not as easy for us to change our instincts as it is for us to change our principles. So, I am an ambivalent communitarian. My effort in matters of principle sometimes makes me think of B.F. Skinner's Frazier, in *Walden Two*. He was so happy with the community he created through positive reinforcement that he was willing to compare him-

4. Lisa Sowle Cahill provides an example of speaking from the church, and deciding, or trying to, in the church, what to say when we speak, in her essay, *Abortion, Sex and Gender: the Church's Public Voice*, *America* 6 (May 22, 1993) See note 20 of this article.

5. *Exod.* ch. 3 and 4. Moses had become a shepherd among an alien people. He mounted a series of three arguments against the Lord's sending him back to Egypt. He finally resorted to illness to delay the trip back. And he waited until the last minute to circumcise his son. As I reflect on this allusion to Moses, and his reverse gear, I think of a crusty, voluble old carpenter who used to work for my Dad—Joe Hurst. Joe said a person should drive backwards for a quarter of a mile, once in a while, just so he would know how. In Moses's case, the Lord made up for the driver's lack of practice.

self to God Almighty; but he had not changed himself. "Shall we say that as a person I'm a complete failure, and have done with it?" he said. His argument was that his failure as a person had no bearing on the success of his principles. I would not like to try to sell that argument to anybody, but I think of it when I think of myself as a communitarian who is also the only male in three generations of my family who is not a cowboy.

We frontier people do have good stuff to offer to communitarians. We have, for example, our grandmothers. (I hope I will not startle my feminist friends when I notice that men have grandmothers.) My grandmothers had isolated homesteader husbands, as their mothers had, and lots of isolated, relatively rebellious pioneer children. But they were carriers of civilization and revivers of community. My Grandma Shaffer started five one-room schools in Hot Springs County, Wyoming. Grandma Shaffer and her family provided room and board to the teachers they brought out on the railroad from places like Indiana. One of them married my Uncle Roy. Grandma and her pioneer-women neighbors also brought the circuit-riding preachers to the West, and, with them, the institutional church. My Grandma Parker homesteaded in Montana, suffered unbelievably there, and later led—I use the verb advisedly—her Irish husband to relatively civilized political office in Wyoming.

My grandmothers were the ones who set up the monthly Saturday night dances at the school house (probably without saying too much about it to the preachers). They were the ones who observed a morality that invited any traveller to stop in for food and shelter, to stop in their home places and their high-country cabins, whether there was anybody at home or not. My Dad gave it to me as fundamental that a cabin in the mountains was to have a stock of food and firewood in it, and was not to have a lock on the door. That is community stuff, feminine stuff. Dad learned it from his mother.

My grandmothers had to contend with a masculine attitude that regarded nature as hostile. Men in my culture *kill* things—not always for food, either, but sometimes just because they encounter life as an enemy. Willa Cather's *My Antonia* touched on what my grandmothers had to contend with when she had one of her pioneer Nebraska women tolerate the presence of a badger at the edge of her garden, even when he got one of her chickens. She told Jim Burden, a boy, about the badger, but she did not tell the men in the family. They would have killed the badger.

Wyoming, which is where most of my western ancestors were, was the first state to give women status in democratic politics, and it has for a long time had good public education financed by taxes on mineral extraction. There is lots of civic virtue in Wyoming, but you still could not get elected to public office there—man or woman—if you came out in favor of the Brady Bill. My maternal grandfather, John Andrew Parker, was one of the first sheriffs in Hot Springs County. Before Prohibition the county seat, Thermopolis, had more saloons than churches, and, during Prohibition, stills in the country shipped liquor to Omaha. My grandfather, an amiable, gentle Irishman from Kentucky, had a gun, but he never carried it with him. However, being a politician, he was not opposed on principle to using it.

Those influences were, as Saul Bellow's Augie March put it, lined up waiting for me.⁶ Maybe they explain my instinctive ambivalence about community. A family story may better illustrate what I am trying to describe: My great-grandparents homesteaded at South Pass, Wyoming, after they left a little place in Colorado that is still called Shaffers Crossing. They and their children established a cattle ranch at South Pass. One day a travelling cowboy stopped and asked for room, board, and something to do, and my great-grandparents put him to work. The stranger stayed for a couple of weeks and then left. The stranger was the bandit, Butch Cassidy, but my grandparents did not know that. After the stranger left, a neighbor asked my grandfather if he knew who his guest had been.

"No," Grandpa said.

"You mean you didn't even ask him what his name was?"

"No," Grandpa said. "We didn't figure it was any of our business."⁷

That is a story about instinct or, maybe, habit. At the level of principle, where ambivalence is, of course, hidden, I started my life in the law as a civil libertarian. I left law school in 1961, and came back in 1963, with the conviction that the law was a sound place to center one's morals. Civil libertarians do that; they are the most

6. Saul Bellow, the *Adventures of Augie March* 89 (Crest ed. 1965): "Friends, human pals, men and brethren, there is no brief, digest, or shorthand way to say where it leads . . . I am in a crowd that yields results with . . . difficulty and reluctance and am part of it myself."

7. "Pioneer Shaffers Recall Week They Hosted Cassidy but Kept Quiet," the Sun County (Wyoming) Review (January 17, 1971), reports some of the facts.

statist people of all. They think—I thought—that the law exists primarily to protect the individual from the tyranny of the community. The focus of a civil libertarian's concern is the renegade politician, the pornographer, the American Nazi I once represented in South Bend, dissenters from war, and kookie people who are coerced into mental hospitals. The enemies of civil liberties are "mediating associations"—because mediating associations compete with the government, and the government exists to protect the individual. It is the business of civil liberties to keep mediating associations weak and ineffective.

The earliest doubts I had about being a civil libertarian were those you might expect from a Mountain Westerner who finally took time to be consistent. My concern for pig pens and junk cars caused me to notice, for example, that civil libertarians were not willing to apply their principles to the law of property. They were not willing to say, with the late Judge Prettyman, that "[T]he right of a man. . .to warm his slippered feet before his own fireplace is as great as his right to gather with his neighbors in the corner pub and cuss the government."⁸ I gave a talk about that, to a congregation of Unitarians. It was, in essay form, printed in *The American Bar Association Journal*;⁹ Senator Thurman put it in *The Congressional Record*.¹⁰ And so I was seen by my liberal friends to be unstable. (By "liberal" I mean an adherent of the democratic-liberal political philosophy that teaches, in my reckoning, that every person is her own tyrant—that each of us is, most radically, all alone.)

I left the Civil Liberties Union for reasons like that, and because it was unwilling to apply its principles in defense of unborn children and parochial schools. I was still a civil libertarian; I told myself what had happened was that I had become consistent.

What finally caused me to become a communitarian began with the fact that I am one of those legal academics who gets bored with law. One day in 1967, I wondered aloud to Joe Simons, who was then a Holy Cross priest and a counseling psychologist,¹¹

8. E. Barrett Prettyman, *The Nature of Administrative Law*, 44 Va Law Rev 685, 698 (1958).

9. *Of Men and Property: The Liberal Bias Against Property*, 57 ABA J 123 (1970).

10. The Washington Post and a magazine for teachers, *Today's Education*, also reprinted it. A revised, more anthropological, and, I hope, gentler version has been in my text, *The Planning and Drafting of Wills and Trusts*, third edition with Carol Ann Mooney (Foundation, 1991).

11. Simons and his wife, Jeanne Reidy, married after a courtship that took place in significant part in our seminar. Together they wrote *The Risk of Loving* (Herder and

whether we might have a law-psychology, interdisciplinary seminar in the law school at Notre Dame. He asked me, "Do you want to inform law students or to sensitize them?" Sensitize, I said. We set up a course my students called the psychedelic seminar.¹² It included male students and their wives and my Nancy. Together we found our way into learning and teaching and writing about humanistic counseling. We read and promulgated Carl Rogers, Fritz Perls, and Eric Berne; we got material from the National Training Laboratories about body awareness and encounter groups.

The movement there was from the radical individualism of the cowboys and civil libertarians toward a focus on human relationships—in principle—and finally toward the principle that all of law practice is about human relationships, that the best work a lawyer does is to tend to her client's relationships. I have burned up a lot of time, a lot of paper, and a lot of faculty-salary money on that now aging set of arguments.¹³

Everybody I know who made this move—and there were many of us—later moved away from it. I think we moved because it is not evident, in principle, that human relationships are better than being alone. For a Mountain Westerner, being by yourself, in principle, is attractive. Nancy says the kind of community I really believe in is one that supports me and leaves me alone—like the community provided for Henry David Thoreau by the women who lived near Walden Pond. The humanistic psychologists were not communitarians anyway. Relationships, to them, were the products of random encounter blessed by luck and interpersonal attractiveness. If two people met and clicked, there was something to talk about. If not, each of them had to keep looking and looking alone.

In any case, I came to think or to remember that concern with relationships is not enough. You eventually either get shut out of it or let it push you into a broader or deeper concern, and for me that concern was about community. The push was into a sort of anthropological philosophy: for trying to rest thought on observations about people as social, as connected, as not alone. So that

Herder, 1968), *The Human Art of Counseling* (Herder and Herder, 1971), and many other things.

12. Dr. Robert Grismer succeeded Simons as my psychological colleague in these seminars; see our *Experience Based Teaching Methods in Legal Counseling*, 19 Cleve St L Rev 448 (1970).

13. Last updated in James Elkins's and my second edition of a West "Nutshell" book, *Legal Interviewing and Counseling* (West, 1987), which contains citations to the rest.

relationships are not so much a matter of principle as a matter of fact, a given, and an indicator of who people are. I learned about that from my friend and colleague Bob Rodes. It is the intuitive heart of the natural law that is in his book *The Legal Enterprise*.

In this way, my communitarian self got interested in a sort of grass-roots anthropology. But I had to base my anthropology on something other than the law. The law would have led me right back to the civil libertarians. The evident alternatives were intuition (which, in this usage, is Rodes's word) or dense social science, neither of which was entirely attractive. What I did was find a third way—and here it is a good thing I already had tenure. What I did was get into stories, especially good stories about good people. Good people in stories always seem to be not only in determinative relationships but also in determinative communities.¹⁴

I use stories in teaching and writing, and in the Legal Aid Clinic, because I like reading stories more than I like reading dense social science. I have thus written a lot about the ethics in Harper Lee's novel, *To Kill a Mockingbird*. My friend and colleague at Washington and Lee, Roger Groot, once said he had to admire an academic who read a novel and then made a career out of it.

I have also been reinforced in this obsession with stories by friends who justify the pastime with theology—especially my friend and teacher Stanley Hauerwas,¹⁵ who introduced me to story theology and who steadily provides the ammunition a Hoosier lawyer needs to keep himself respectable when he gets paid more than English teachers and theologians do.

Stories gave me the social evidence, the philosophy, and the anthropology I needed to claim to be a communitarian. Poets and story-tellers are communitarians. Inevitably. They have never

14. *On Being a Christian and a Lawyer* (Brigham Young U Press, 1987), my first book on theological legal ethics, is mostly about me getting my theological theories straight, including some jurisprudence and ethics on relationships. It owes a lot, of course, to Martin Buber. *Faith and the Professions* (Brigham Young U Press, 1987) is where I tried to work out a Hoosier lawyer's story theology; it owes a lot to Stanley Hauerwas; it is organized, by the way, to parallel the contents of my law school course book for "professional responsibility" courses, *American Legal Ethics* (Matthew Bender, 1985). *American Lawyers and Their Communities* (University of Notre Dame Press, 1991), which I wrote with my daughter Mary, is where most of the anthropological argument is gathered together.

15. His *Truthfulness and Tragedy* (U of Notre Dame Press, 1977), *Vision and Virtue: Essays in Christian Ethical Reflection* (Fides, 1974), along with a remarkable essay on friendship, *Happiness: The Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes*, 45 *Asbury Theological Journal* 5 (1990), have probably influenced me most—but I hesitate to say, because Hauerwas's published work is so vast and his guidance in letters and conversation have meant so much.

been able to write coherently about lonely individuals. I spent most of a summer once with an English teacher who thought he could demonstrate the possibility with Walt Whitman, but neither he nor Whitman persuaded me. Poets—even Whitman—write about human connections and human communities. The best of the story-tellers—J. Austen, George Eliot, Trollope, Faulkner, Cather, Anne Tyler—write almost universally about connections and communities. Webs, not hierarchies, as the feminists say it.

Stories are places for learning about communities and provide instruction on the relevant principles, but what is fun in them is the moment of surprise that can explain how a cowboy and a civil libertarian looks up one day and discovers that he is not really a liberal after all. I think of a sentence Walker Percy put in the preface to *The Thanatos Syndrome*: “It is strange, but these Louisianians, for all their differences and contrariness, have an affection for one another. It is expressed by small signs and courtesies, even between strangers, *as if they shared a secret.*” (Emphasis added.) John Kruk, first baseman for the Philadelphia Phillies, caught this mood of surprise when he talked about leaving his home town, Kaiser, West Virginia, to go into professional sports. “When I left Kaiser,” he said, “was the first time I ever met anybody I hadn’t met before.”

I hope the Walker Percy fans will have, just now, reflected that *The Thanatos Syndrome*, and its predecessor, *Love Among the Ruins*, do not, in the end, show anything encouraging or philosophically useful about civil communities. The Louisianians Percy wrote about fell apart. They are shooting one another and poisoning the drinking water and abusing their children. Such coercive law as there is has nothing to do with justice. Institutions are havens of corruption. The only community that seems to be a community, at the end, is an AIDS hospice that has been set up, in the woods, by a whisky priest: a man who, in the dying days of democratic liberalism, was struck dumb and made his living by living on top of a fire tower, where he watched in silence for brush fires, and for signs and portents in the skies.

The AIDS hospice is the only community left that might possibly interest somebody who trusts that the Creator of the Universe is a Loving Parent. Percy’s protagonist, Dr. Thomas More, who was, in earlier novels, a lawyer, spends a lot of time at the AIDS hospice. I thought, at the end of the novel, the last time I read it, that the time will come when he will move in there for good. The

AIDS hospice is, of course, the church. Percy was a theologian as well as a poet. He meant to show, as the old Barth said, that God makes no mistakes.¹⁶ Dr. Moore had begun to be, as Hauerwas and I are, a disciple of John Howard Yoder.¹⁷

All of this personal stuff, I hope, says two things: First, it may illustrate the anthropology out of which we law-and-religion types fuss over liberal and communitarian arguments in the humanities, in politics, in jurisprudence, and in ethics. I don't think my own way has been unique.

And, second, it leads me to admit that I have come lately to doubt that communitarian arguments in America will work in principle. Part of what I mean is that I don't think they will lead to anything; I think Americans are and will remain a society of strangers.¹⁸ Intruders broke into my Dad's mountain cabin a few years ago—took everything valuable and trashed what they could not carry. That's a symbol, I guess, although it does not resolve my instinctive ambivalence. Dad was sure the intruders were people from town, but that would not resolve it either. We sold the ranch after Dad died in 1983. I don't know if the new owners leave the cabin stocked and the door unlocked. I hope they do, but, then, it is not my cabin.

The important part for us is that, whether or not we remain a society of strangers, the communitarian movement, as a *movement*, is not critical for a believer. The community that is critically important is the community of the faithful, and the communitarian movement may soon be more threatening to that endeavor than liberalism has been. I get the force of that doleful, negative reaction when I reflect on how much Walter Rauschenbusch and Reinhold Niebuhr and John Ryan wanted to make American democracy Christian, and how their optimism for America, and the way they turned optimism into theology, led American Christians

16. (Cited in note 1, 86)

17. I can say of John what I say of Stanley Hauerwas, (see note 15). John's most important book for lawyers, or anybody, I think, is *The Politics of Jesus* (Eerdmans, 1972, 2d edition 1994). I have also used and taught with *The Priestly Kingdom* (U Notre Dame Press, 1984), and *The Christian Witness to the State* (Faith and Life Press, 1964).

18. This phrase, so far as I have traced it, comes from Alasdair MacIntyre's assessment of the anthropology of American medicine. See his *Patients as Agents*, in S.F. Spicker and H.T. Engelhardt, Jr. eds, *Philosophical Medical Ethics: Its Nature and Significance*, at 197-212 (R. Reidel, 1977), along with his and Hauerwas's essays in *Revisions: Changing Perspectives in Moral Philosophy* (University of Notre Dame Press, 1983), and Hauerwas's *Suffering Presence: Theological Reflections on Medicine, the Mentally Handicapped, and the Church* (University of Notre Dame Press, 1986).

to Hiroshima and Dresden and the Gulf War; to condemning freedom fighters in Central America and pushing the poor further down.

The one place where the two strains in my western culture have always come together is war. Out West, where I come from, the preachers and the cowboys, the grandmothers and the grandfathers, have always agreed on the importance of sending young men to kill the enemies of America. They now send young women as well. The West is a pure case when it comes to killing: I live now in Michigan, which has abolished capital punishment, and none of the Western states has done that. But none of America—not even Michigan—is closer to being the Kingdom than we were when Rauschenbusch wrote about the Social Gospel. The Social Gospel and Christian Realism and Catholic Social Justice¹⁹ tried too hard to make America work, and in the process they weakened the community of the faithful.²⁰

19. I am able to congregate a modern American theology of justice in this way because of Harlan Beckley's excellent description and assessment of these three—*Passion for Justice: Retrieving the Legacies of Walter Rauschenbusch, John A. Ryan, and Reinhold Niebuhr* (Westminster-John Knox, 1992). Harlan and his theological colleague Louis Hodges have been valuable teachers and friends. Compare Beckley's hope for a modern continuum with those "legacies," pp. 344-384, with Elizabeth Mensch and Alan Freeman, who speak, in *The Politics of Virtue* 83-109 (Duke U Press, 1993), of "the secularization of [mainline Christian] religion" and of "schism."

20. Cahill's description of the discussion on abortion, within her denomination (which is also mine) (cited in note 4) is a splendid and lucid example of the church's pondering both what it is to think about moral questions (in this case the question of abortion and questions about the abuse of women), and what it is to say to the civil community, and in this case notably that part of the civil community that claims, as we say, to "administer justice." I read her essay as her brother in the faith and am therefore free to say that she makes me a little nervous when she suggests that we need to temper or modify or compromise what we say outside, in order, she implies, to maintain our influence. For example:

To the extent that we perpetuate this family feud instead of looking for common ground with cultural values that could support abortion alternatives, we also run the risk of sectarian isolation from the "real world" of social institutions and politics in which we think our views should be heard.

I would, with Cahill, complain about "certain self-defined champions of Catholic orthodoxy," but on grounds that had to do with their and our proper business as witnesses to the Lord of the Universe, and not so much, as she puts it, in "optimistic confidence that reasonable public discourse is possible and can lead to greater consensus and social cooperation on justice issues."

The scholar who has done most to consider American *law* as capable of sustaining Cahill's kind of civil conversation is, of course, my friend Emily Hartigan. See her *Surprised by Law*, 1993 Brigham Young U L Rev 147. I am skeptical about the promise in that enterprise (as is Milner S. Ball, cited in note 3), but guesses about success are not as important to me as the possibility that Cahill's and Hartigan's optimism will corrupt both the discussion in the church and the substance of what the church says to the civil community.

I did not come to such a “sectarian” point of view easily. If I have come to it now, and will probably be arguing in the future that the legal ethics I care most about is the legal ethics worked out in the church, it has been uncomfortable for me, and it is still uncomfortable.²¹ I am a child, after all, of what Jefferson called God’s New Israel. I still get goosebumps when I hear “Onward Christian Soldiers.” I am one of those who thinks we should make “America the Beautiful” the national anthem—not only so that we could have something to sing before baseball games that is as pretty as “O Canada,” but also because it celebrates an America that is blessed and at peace.

Maybe all of this explains how a cowboy liberal became a pessimistic communitarian. I take comfort from something Barth wrote in the first of his three “How I Changed My Mind” essays, at an age close to Nancy’s and mine: “In these years one certainly is no longer young. But the demands of life and vocation are still. . . strong enough to close the door—at least partly—to backward-looking self-contemplation, that weakness of age. . . . [I]t ought still to be possible to bring some modern harvests into the granary.”²²

21. My curious sectarianism is found so far in the last chapter of *American Lawyers*, cited in note 14, which is a revision of *The Tension Between Law in America and the Religious Tradition*, in Richard John Neuhaus ed, *Law and the Ordering of Our Life Together* at 28 (Eerdmans, 1989); in *The Church and the Law*, in *Radical Christian and Exemplary Lawyer: A Festschrift Honoring William Stringfellow*, Andrew W. McThenia, Jr., ed (Eerdmans, forthcoming 1995); and in *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *Stanford L Rev* 1859 (1993). John Howard Yoder has been a faithful advisor in these halting efforts, and tolerant of their callowness; I wait for the day when he will outline his own Christian ethic for lawyers.

22. (Cited in note 1, at 50).

