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A DIALOGUE CONCERNING HERESIES

Jack L. Sammons*

INTRODUCTION

The editors have asked me to write an introduction to the dialogue that follows connecting it to the conference theme of forgiveness in the law. I am pleased to do so.

The dialogue is based, very, very loosely, on a dialogue with the same title written by St. Thomas More in 1529 and revised in 1531. In addition to moving More into the present, I have, I fear, taken other great liberties with the good St. Thomas. Rather than defending the Catholic faith against the religious zeal of Luther inspired reformers, as he did in his dialogue, I have him defending the legal profession against the moral zeal of certain, forever to be unnamed, legal ethicists. It is my opinion, one that will probably not be shared by all, that the arguments used in these two defenses are much the same. We find Judge Moore, as I call him, a partner in a large law firm just at the point of accepting a governmental appointment, one that we know, from the real More's life, is not going to go well.

And so, then, what does this dialogue have to do with forgiveness in the law? It reminds us, I think, why there is so little room for forgiveness in the law, that is, that More lost the argument with Luther, and then shows us that what remains of the possibilities for forgiveness in the law depend upon lawyers, like Judge Moore, locating their work as lawyers within a certain understanding of our craft.

I think I can make all this clearer by playing off of a recent article by Tom Shaffer on our theme of forgiveness and law entitled "Forgiveness Disrupts Law."¹ Shaffer, by writing a hypothetical midrash from the point of view of the elder brother in the Parable of the Prodigal Son, argues that forgiveness is a threat to the legal order. The elder son can forgive his brother, as his father has done and, according to Shaffer, as his father wants him to do, only at the very high price of the loss of the community's legal order. This legal order is supported by its own theological and moral claims,

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1. Tom Shaffer, *Forgiveness Disrupts Law*, 4 GRAVEN IMAGES 127 (1998).

Shaffer tells us, but it is, ultimately, backed by force. And so, Shaffer continues, forgiveness must disrupt the law by calling us to life in a different community, a community of forgiveness as opposed to our legal (or even moral or even theological) communities of force. Shaffer's community of forgiveness, like Luther's church, is mostly an abstraction, but he does offer us the helpful example of the struggles of sixteen century Anabaptists.

The image of law and of lawyers at work in Shaffer's argument is a rhetorical caricature. It is law, not as a process, but reduced to that force which is necessary to preserve the legal order as a false, though compelling, security against the uncertainties of our lives. In this order, lawyers are those who use the apparent necessity of this force for the benefit of their clients. They can do this because the people of this community depend upon this force for an order in which their lives can have some security, however false it may be, and can make some social moral sense, even if it is only revenge. So, although he does not say it exactly this way, in using the law's force for their clients, lawyers are really preying on the insecurities and the faithlessness of others. About the best Shaffer can say about these lawyers is that they had better practice "selectively" if they want to be good Christians.² With Luther, Shaffer might say that "one needs two hundred parsons to starve off one lawyer."³

The implicit image of law and lawyers in More's life and work is very different. For him, law and lawyers upheld the legal order of communities, to be sure, but they also worked *against* the force required to do so. They worked most especially against political force, whether exercised by tyrants or by the herd, by hemming it in through the restraints of a structured conversational tradition which, at its best, could nicely balance the preservation of the community with an openness toward the truth of the uncertainties of our lives, the uncertainties that force, as a solution, seeks to deny. More's image of law and lawyers is more like the law we hear in the folk song, *Diamond Joe*: "There is a man you'll hear about most any place you go. And his holdings are in Texas and his name is Diamond Joe. And he carries all his money in a diamond studded jaw. And he never was much bothered by the process of the

2. See *id.* at 134.

3. RICHARD MARIUS, *MARTIN LUTHER: THE CHRISTIAN BETWEEN GOD AND DEATH* 383 (1999). I have cited to Marius a couple of times in this introduction but this is because his books are close at hand. I cannot, however, recommend his biographies of either Luther and More to you as anything other than interesting.

law."⁴ When More saw Henry VIII as a law unto himself, when he saw him as Diamond Joe, if you will, and when Henry demanded More's complicity in this, there was nothing for More to do but die. If this was to be the law, More thought, the practice of it could no longer be God's work, but, like Shaffer's image of it, only the enforcement of a false order, one that denies the uncertainties of our lives, denies our responsibility in the face of these uncertainties, and preys upon those who fear both uncertainties and responsibility.

Of course, More might not have been so theoretical about all this. Man of practical affairs that he was, More might say to Shaffer that even a community of forgiveness, including Shaffer's Anabaptists, is going to need something very analogous to law and lawyers as More understood them, if it is to remain a community of forgiveness. It will need, for example, a communal way of arguing the subtle and difficult distinctions between matters of injustice and matters of misfortune before decisions about such matters, including the decision to forgive, are made. He may have pointed out to Shaffer how the Mennonites, modern descendants of Shaffer's Anabaptist, start with Paul's prohibition in Corinthians about taking people to the law, but end with guidelines on the use of lawyers that could have been written, just as easily, by certain sections of the ABA.⁵

But there is something more important in the difference between More's image of law and lawyers and Shaffer's than just this appreciation of their practicality. After all, we could just say that More was still futilely proclaiming Christendom as encompassing the entire world while Shaffer is very content to find it in small faithful communities, and let their differences be explained by the demographics involved. No, I think we can see a much more basic difference between these images by returning to Shaffer's midrash from the Parable of the Prodigal Son.

4. HOUSTON, JACK OF DIAMONDS (Sanga Music Co., BMI 1967).

5. See Stanley Hauerwas, *Reconciling the Practice of Reason: Casuistry in a Christian Context*, in STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN* 199-219 (1988). What I say in the text about Mennonite and lawyers is not what Hauerwas intends to say in the article. I think, however, that lawyer readers will see this evolving from Paul's prohibition to ABA regulations in his description of the Mennonites. In any event, when Hauerwas describes what is required for casuistical reasoning in a Mennonite community, he came so very close to describing a need for something that looks very much like lawyers, that the same point is made.

For More, I bet, the elder son is not asked to forgive his brother, as Shaffer would have it, for that forgiveness is uniquely the province of the father. The elder son is asked, instead, to forgive his father for the harm, the very real harm, his father has done by forgiving the Prodigal Son. This reading, then, for More, would be closer to what it could mean to be a community of forgiveness. It is a community that knows that our lives are uncertain — “contingent” would be the way to say this now — but does not see this uncertainty as something to be feared. Such a community would accept that the world is a tragic place where we often do harm when we seek only to do good and where decisions are very, very difficult to make. Such a community is not at odds with the law or with lawyers. It knows it needs them. Knows, that is, that in a world that is always up for grabs, and one in which tyrannical responses to this truth, even in Anabaptist communities, are always just around the corner, the process of the law or, as More would have it, a structured conversational tradition, is a very good thing. More would think, I believe, that a community of forgiveness is one that knows God forgives us for the tragic nature of our lives, asks that we do the same with each other, and joins us in our best efforts to do the best we can. In such a community forgiveness does not disrupt legal order; it is essential to it.

These arguments, the ones I have imagined between More and Shaffer, are not that far removed from some of More’s arguments with Luther. Luther read Paul on the law in such a way that the law, failing as it must to satisfy the introspective woes of our very private consciences, reveals our need for salvation by other means.⁶ Shaffer’s article is a secularized version of the same and he struggles, as Luther did, to describe the Church we turn to for these “other means.” The opposing interpretation of Paul, that is, that the blame for our failings is Sin, “and that in such a way that not only the law but the will and mind of man are declared good and are found to be on the side of God,”⁷ is what we would expect to hear from More. In Luther’s reading of Paul, as in Shaffer’s article, there is very little room in the law for forgiveness. For More, however, law is there to help move us toward forgiveness. As I have noted, however, More lost; Luther won,⁸ and so, for now, Shaffer is

6. See KRISTER STENDAHL, *PAUL AMONG THE JEWS AND GENTILES* 78-96 (1976).

7. *Id.* at 94.

8. St. Thomas More was arguing against the Reformation brought on by Luther, so by saying that More lost and Luther won I mean that the Reformation happened, but I also mean to imply that those changes brought on by the Reformation that led

quite right and there is, in fact, very little room for forgiveness in the law.

But More, and his argument, did not just disappear. They left center stage, to be sure, but we can still see them off in the wings patiently awaiting a more public role. When we notice them now, we may be shocked to find that More's argument takes on a radical form. This is because there is no longer any other form it could take. Luther's winning argument was that history, tradition and custom could validate nothing (and so when Shaffer takes Christians out of the legal order nothing of any Christian importance is really lost.) More's position was the extreme opposite. He accepted, for example, in opposition to his friend Erasmus, that "if pious Christians had venerated a supposed relic of a saint for a long time the adored object had to be genuine."⁹ Now, almost five hundred years later, when we see *this* argument off in the wings, it is stunning. Remembering that More was committed not to particular propositions about the faith, but to the project of truth by pious Christians within a Church that corrected itself through careful attention to language and to reason (with something very close, he thought, to common law reasoning in Counsel), what we can now see in More's argument is a very direct, and very modern, confrontation with the Platonic distinction between appearance and reality. From this perspective, More starts to look to us, perversely perhaps, like the opposite Enlightenment bookend, Nietzsche, more than he does anyone of his own time.

Most importantly for our purpose, however, the More seen in this confrontation with Plato is very much a rhetorician. What I want you to see in Judge Moore in the dialogue that follows is that lawyers, at least those who still practice the Greek art of judicial rhetoric and turn force into conversation, are what is left of St. Thomas More and his argument for us. They are all that remain of a public version of this most public of men. And, they are, then, what is left of the possibility of a role for forgiveness in law.

The More I have described for you here is not the More you may have come to expect. There are a lot of More's out there, far too many for me to rehearse in a brief introduction, and each reflects its creator as obviously, I suppose, as my More reflects me. I do

to the Enlightenment were also at stake in the debate. In More's time, and in England, the loss of the argument meant the creation of the Church of England by Henry VIII. Part of what More lost, then, was the claim that there was one true universal church maintained by the traditions, customs and practices of the Catholic Church.

9. MARIUS, *supra* note 3, at 456. Marius describes this argument as "absurd." *Id.*

want to mention one persistent version, however. This one has been described most recently by Professor Robert Bork.¹⁰ Bork's More is a man who is forced, at the crucial moment of his life, to choose between two competing authorities: the legal order and God's order. God, of course, wins the competition. Nothing, I think, could be further from the truth of More's life than this. For Bork has it exactly backwards in seeing More as torn between these two powers. More's life, as I understand it, was instead a living out of their reconciliation through the traditions of the Church. More is, more than anything else, the archetypical one Kingdom man. The latest biography of More, and in my opinion the finest, comes closest to capturing this unity in More's life and death because it is the first to truly recognize how essential the practice of law was to his theology.¹¹ For other biographers, More's practice of law is either an embarrassment, as it was for Erasmus, or is valued only because it is More's practice. For Ackroyd, it is the central feature of his life and thought.

Of course, More himself can be blamed, at least in part, for such misunderstandings. Often, he was just too clever for his own good. Let me end this introduction, then, with one relevant example of this to help you get a feel for the man. Some of More's final words are very well known: "I die the King's good servant, but God's first."¹² Now surely, one would think, we have in these words strong confirmation of Bork's version of More as a man divided, but actually we do not. More's last words were taken from the directions his client, Henry VIII, gave to him upon his appointment to the King's service as *councillor attendant*¹³ and his appointment as Lord Chancellor.¹⁴ Henry told More, in times when Henry was still interested in More acting as a good lawyer: "I want you to

10. See Robert H. Bork, *Thomas More for Our Season*, 94 *FIRST THINGS* 17 (1999).

11. See PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1999). The second best source for this view of More's life is co-authored by the author of the article I have played off of here, Thomas Shaffer. See Stanley Hauerwas & Thomas Shaffer, *Hope Faces Power: Thomas More and the King of England* in STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN* 199-219 (1988). If you plan on doing any research on More, you will want to purchase MICHAEL D. WENTWORTH, *THE ESSENTIAL SIR THOMAS MORE: AN ANNOTATED BIBLIOGRAPHY OF MAJOR MODERN STUDIES* (1995). This is a remarkable resource which, we can hope, Mr. Wentworth will update soon.

12. ACKROYD, *supra* note 11, at 405. See also, JAMES MONTI, *THE KING'S GOOD SERVANT BUT GOD'S FIRST: THE LIFE AND WRITINGS OF ST. THOMAS MORE* (1997).

13. See ACKROYD, *supra* note 11, at 192.

14. See *id.* at 289.

serve God first and your master second.”¹⁵ By repeating this charge from his client at the hour of his death, More was saying to his client: “I am still doing your bidding as a lawyer. I am being faithful to you in the only way a good lawyer can.” My guess is that Henry VIII, even as the tyrant he had become, understood.

I hope you enjoy the dialogue. There are three voices in it. The third voice is in footnotes done by Judge Moore’s unnamed law clerk. The law clerk’s part of the dialogue is often as important, if not more so, than that of the main characters. He offered to me a way of slipping in problems, qualifications, and other thoughts about Judge Moore’s thoughts that would not have been appropriate for the other characters. My own option is that he is the most sensible of three — certainly the one I like the best. In addition to helping with the presentation, however, the law clerk also does the usual job of providing citations, references, and so forth. Because the law clerk’s voice joins the dialogue after this introduction, the numbering of the footnotes starts over again.

* * *

15. *Id.* at 192.

We open in the study of the law suite of Judge Moore, a partner in a large law firm located in Chelsea, Massachusetts. The title "Judge" is honorific now, a constant reminder of his days on the appellate bench. Judge Moore is in his mid-sixties. He is dressed in what is considered casual attire at the firm: a well-worn corduroy jacket, one size too large, with darker corduroy pants. The image, one of warmth, ease and comfort, is disrupted only by a collar and tie too tight for the Judge's large neck. Both are obviously an annoyance to him and, at first sight, one wonders why the Judge does not loosen the fit. He never does.

We find the Judge boxing up books and gathering stacks of papers into files. The process is slow. The Judge pauses over many items, especially the older books.

There is a knock on the door.

JUDGE: Come in.

COURIER: Judge Moore?

JUDGE: Yes?

COURIER: Your secretary said it was all right . . .

JUDGE: And it is. I'm just packing. Now you are a familiar face to me, but . . . I . . . no, wait . . . a courier? Yes! Afraid I don't remember the rest, but I do remember seeing you . . . around the . . . uh

COURIER: (*Pleased at the recognition*) Yes, I was a courier with Fisher, Pole, and . . .

JUDGE: Oh, yes, yes, yes. Of course. But I haven't seen you in awhile, have I?

COURIER: I'm in law school now.

JUDGE: (*With genuine enthusiasm*) Well, then, congratulations! So we didn't frighten you off?

COURIER: (*Abruptly*) No. No, you didn't. Uh . . . one of my professors sent me to see you.

JUDGE: Oh! And here I am leaving the firm, on my way to troublesome things: a government appointment. Sorry, I won't be able to help you much with our hiring committee.

COURIER: No, Judge. I'm not here for that.

JUDGE: Well, then, let me stop guessing. Why did your professor send you to see *me*?

COURIER: He sent me because he said you were a Christian lawyer.

JUDGE: (*A little too loud*) He did, did he? Don't tell anyone around here; they just think I'm good. (*The Judge laughs. Again a*

little too loud. The Courier is puzzled; does not join him) Did he say it that way? Did he say I was a *Christian* lawyer?

COURIER: (*Confused*) Uh . . . I think he said . . . he said . . . he knew you were a Christian and that you were a very good lawyer.

JUDGE: (*More seriously; slightly lowered tone*) How nice. How very nice.

COURIER: He sent me because . . . well, he's my advisor. We went to lunch. I told him that . . . as a Christian . . . I was worried about becoming a lawyer.

JUDGE: Tell me about it.

COURIER: It's pretty much as I said. From what I have learned in law school classes, I'm not sure it is possible for a Christian to be a good lawyer.

JUDGE: What have you learned?

COURIER: I have a professor this semester, Tyndale. He's helping me to see the problem.

JUDGE: What does he teach?

COURIER: Legal ethics.

JUDGE: Hmmm.

COURIER: Yes, well, I see now what troubles me about my other classes.

JUDGE: Yes?

COURIER: There are moral issues in those classes, but no one, especially the professors, seems concerned with them. No one really seems concerned with what is just, good, right or who *should* win. These are not just ignored — they are squelched. We look for legal arguments for either side as if it really doesn't matter who wins. It would be okay, I guess, if there was real substance to the arguments, and the best arguments prevailed, but it doesn't seem like that's the case. You just try to be as persuasive as you can whether you should or not. So we have to make persuasive arguments, as best we can, whether we agree with them or not, and I end up having to argue against things I believe in and argue for people I really wouldn't want to represent. The more I do this it the more I feel my own faith is being . . . well . . . I guess I feel as if it is being left behind.

JUDGE: I certainly hope so. (*The Judge pauses. His unexpected comment does not register with Courier. The Judge let's it go*).

COURIER: In fact, I'm not sure it's good to sue anybody. It doesn't seem to me to be the way Christians should act. So why help other people do something I think is wrong?

JUDGE: Tyndale taught you all this?

COURIER: No, not exactly. What I've learned from him is that we have to be ourselves first and lawyers second. The other courses seem to be about getting ourselves, our true selves, out of the law; Tyndale, I think, tries to put us back in it.

JUDGE: Hmmm.

COURIER: (*Mistaking the Judge's reaction*) Oh, but don't get me wrong. The other professors care about ethics. Don't think they don't. Sometimes they raise ethical issues in class. Things about confidentiality, discovery abuse and so forth. But what they are really *doing* to us, the real ethic I think they are teaching us, never gets examined very much. And that ethic . . . what they are teaching us *to be* . . . whether they mean to or not . . . just seems so . . . so . . . so much totally at odds with what Tyndale is teaching. So you've got ethics in one class working against the ethics of the practice in all the others or, at least, that's how it seems to me. It's unfair. Tyndale has to put who we really are as people, as moral people, back in the practice, but the problem of not being in the practice was caused by the courses we took, as much as by anything else.

JUDGE: So why come to me? This Tyndale seems to be your man.

COURIER: I thought so for a while. It is true that most students, at least the ones who take this seriously, have no trouble with his saying "be true to yourself," but . . . I . . .

JUDGE: Tell me about the ones who don't take it seriously. What do they think?

COURIER: They just dismiss him as preaching. No, not preaching really, since he mostly just gets us to talk about what we think. He wants us to express our *values* and so forth, but it does . . .

JUDGE: (*Sub rosa*) As if having their freedom, they needed nothing else.

COURIER: . . . divide the class.

JUDGE: How's that?

COURIER: We've got . . . uh . . . the *moral* group and we've got the . . . oh, I don't know what to call it, . . . the lawyer group, I guess. is how I'd say it. The lawyer group dismisses the moral group and the moral group thinks the lawyer group is thoughtless.

JUDGE: And you are in the moral group, are you?

COURIER: Yes, but I have trouble with it, Judge. When Tyndale gets to his bottom line . . . that part about being true to yourself, about being a person first and a lawyer second, about recognizing that you are in a role that limits your moral reflections, and the need for true self-reflection, and all the rest of it — (with sudden

enthusiasm) he does this in a lot of interesting, really memorable, ways. It's a good class! We watch videos; talk about movies; read novels . . . (*pauses*) . . . but it all does seem to come down to the same message. Anyhow, for me, being true to myself is not such an easy thing to do. I know I need to learn the context of lawyering, to make the moral connections and rules connections, and somebody like Tyndale can help with this, but, to be *true* to myself? I have to figure out what a Christian should do. It's not just up to me.

JUDGE: (*Sincerely*) Good for you, Courier, good for you.

COURIER: The simple answer some of my friends give me is that I just have to be a Christian lawyer. Only represent the causes I believe in, use the methods I think a Christian should use, and so forth. I imagine I would have to find a Christian law firm or something like that, because nobody else would hire me. Maybe I would have to represent only Christian clients who would understand what I was doing. This makes sense to me. Besides, how could I counsel someone who wasn't a Christian? I wouldn't know what to say. I'm not sure any of this would work, though. Maybe I shouldn't sue people at all. How can you win someone to Christ when you are suing them? Maybe I should just try to help people find peaceful solutions . . . you know, mediate, or something like that. I've heard some of the other students, not just the Christians, saying the same thing. Some said they could only prosecute; some said they could only represent criminal defendants . . . some said they would . . .

JUDGE: (*Speaking to himself*) It sounds as if it is getting worse; the path to war is too well paved. (*Turns back to Courier*) You know, Courier, I think this old man might just be in the wrong place at the wrong time. (*Aside*) What am I to do when the very language we use works against me? (*Pauses*) So what have you concluded?

COURIER: (*Confused*) Uh . . . I think . . . I started to think that the practice Tyndale was describing to me was too much of a temptation, a "near occasion of sin," and, it occurred to me that maybe I was off the path. Maybe I just shouldn't be a lawyer. What's the point? What *is* the point if being a Christian means always watching out for what the practice of law might do to you?

JUDGE: And this is what you said to your advisor, did you?

COURIER: Some of it.

JUDGE: And this is why he sent you to me?

COURIER: Yes, and he asked me to come see him after we talked.

JUDGE: Well, tell me, what do you know about the practice? About the life of a lawyer?

COURIER: Not much.

JUDGE: But your impressions? What are they?

COURIER: I keep hearing . . .

JUDGE: From Tyndale?

COURIER: From Tyndale, but from others sources too. I hear that it's corrupt; driven by greed. There's little sense of community left among lawyers. Morality doesn't matter much; it's just about money. The top lawyers develop narrow specialties — mostly transactional work for corporations — and they look down on the rest of the practice. They denigrate what ordinary lawyers do with ordinary clients. A lot of lawyers are unhappy in their work. They drink too much, don't find it rewarding; don't find meaning in it, and . . . (*obviously ready to continue*).

JUDGE: (*Interrupting*) Let me stop you there. I agree with you! That's good! We can agree that the current practice is becoming corrupt if these are the things we mean by "corrupt." There is, however, going to be a tension between us.

COURIER: Why?

JUDGE: My answer to this corruption is to remind lawyers that they are lawyers and to try to get clearer about what being good at lawyering might mean. You want a revolution, a Christian revolution, maybe just a private one, but what I think is needed is reform. And that's very different. Much harder, really. I take it, though, that this would . . . or, at least from what you have said so far . . . this should puzzle you. Since being a lawyer — an ordinary lawyer representing ordinary clients, some of whom are good and some of whom are not; some whose claims you agree with and some you don't, and always trying to be as persuasive as you can for your client — is suspect, thanks to your Professor Tyndale, you'd have to ask yourself: Why would anyone want to be good at ordinary lawyering? Your revolution has you looking elsewhere for what could be good in the practice of law. That's what you mean, I think, by wanting to be a Christian lawyer. You accused me of the same thing, but, now that we know what it is, I can tell you I am not a Christian lawyer.

COURIER: What are you then?

JUDGE: Just a lawyer. Look, you have come to ask me about this as a fellow Christian so let me answer you in a different way. Did you know I'm a former seminarian?

COURIER: No, I didn't.

JUDGE: Yes, back in my wild youth, before I decided to be a lawyer instead of a priest. Former seminarians love to preach, you know, so you wouldn't mind too much if I imitated your professor and preached a little, would you? You wouldn't deny me this small pleasure, would you?

COURIER: No, of course not, Judge.

JUDGE: Okay, then. The practice of law has a lot to teach you. What your professors, the good ones, not your Tyndale for goodness sake, but the good ones, are doing in class *is* teaching you an ethic. You got that exactly right. They are teaching you *the* ethic of the practice and they are also teaching you *the* theology of the practice, and it is Christian, Courier, whether they know it or not. Take that back to your Tyndale!

COURIER: Judge, half my professors are Jewish!

JUDGE: And thank God for that! It's exactly what you need. (*Calmer*) Look, what I am saying to you is that the practice of law carries a theology just as it carries an ethic. As a Christian, I have to claim that the theology of the practice of law is Christian. I *have* to. If it isn't, if it isn't Christian, you and I should get the hell out now . . . well for me, I guess it's much too late.

COURIER: I don't understand. I really don't. And I've got lots of questions. But, first . . . uh . . . if I said something like that . . . (*pauses hesitantly*) . . . Judge, I know if I said something like that at the law school a lot of people would be offended. Forgive me for this, but isn't that really presumptuous?

JUDGE: If they know you love them, they are not as likely to be offended, so first better be clear that you love them. (*Pauses*) I think the real offense would be to say it any other way. (*Quickly, looking at his watch*) Have you had lunch yet? Some folks here are gathering for a very casual farewell luncheon for me — no speeches — nothing like that. Why don't you join us? Who knows what you . . . and they . . . might learn?

COURIER: Thanks. I'd love to. (*The Judge and the Courier exit*)

* * *

The Judge and the Courier walk back in the suite, chatting. They are more comfortable with each other now. The Judge goes back to the last box he was working on. It is apparent the Judge has invited the Courier to stay and continue the conversation with him.

COURIER: Can we come back to the theology of the practice?

JUDGE: (*Walking behind the desk*) Mind if I continue boxing these up while we talk?

COURIER: Can I help?

JUDGE: No, not really. Have a seat.

COURIER: Thanks. Don't Christians just have a theology of practice and Jews, Muslims the same?

JUDGE: They may, but not as good lawyers.

COURIER: What do you mean?

JUDGE: Look, for Christians the world *is* Christian; for Jews the world *is* Jewish, for Muslim . . . well . . . you get the idea. It would certainly sound terribly presumptuous, to return to your concern, to say to a Jew that the truth to be revealed in *halakha*, for example, is in the Kingdom made possible by Christ, but announcing the Kingdom is really nothing other than the Christian version of *tikkun olam*, the repair of the world, that is the responsibility of all Jews. I don't hear *tikkun olam* as presumptuous or as a threat. Do you? To me it's a relief. The reason people, good people, react so negatively to claims like this is out of fear. And with good cause! The history is dreadful. But what should flow from this Christian presumptuousness, if that is what it is, is the conclusion that as a Christian I must want Muslims to be good Muslims and Jews to be good Jews, and . . . here I may lose you . . . even lawyers to be good lawyers. For me, this is part of the message of the Incarnation.

COURIER: But aren't you telling them what their being good means?

JUDGE: No! Just the opposite. The goodness is up to them. It *has* to be. You are right, however, that I will *name* that goodness within my own tradition. Sure, I tell Jews, Muslims, and even lawyers, that they live in the Kingdom too. What else can I do? But you are asking the right question. If what I want of Jews is their goodness as Jews, because Jews are living in the Kingdom too, then surely I cannot, at least without self contradiction as a Christian, attempt try to explain Judaism to a Jew! Or lawyering to a lawyer for that matter! If the Kingdom is what is there to be revealed through Hebraic tradition, then one of the reasons I want Jews to be good Jews is that I doubt that Christians can be good Christians without it. For each of these traditions has the potential to reveal the meaning of the Kingdom to a Christian in ways that a Christian could never understand on her own.

COURIER: I think I understand that, but you said "even lawyers." Does this really work for lawyers? Aren't you making a religion of the practice of law when you talk this way?

JUDGE: (*Laughs*) Yeah, but there is no heresy in that, is there? Don't you know I'm a *humanist*? A Catholic to be sure, but a humanist! I catch hell for it in the Church, but I don't want you mak-

ing it into a heresy. The Church of Lawyering! I like that. (*Louder*) And no place for accountants because the god of lawyering he is a jealous god! No, the heresy, if there is heresy in this, would be to think that I can understand lawyering in the Kingdom without the Church or understand the Church without lawyering in the Kingdom. Don't you think the Church needs the insights offered through the long history of those rhetoricians who have been doomed to plow forever the rocky conversational fields of our disputes?

COURIER: But, Judge, you are talking about two different traditions, like different religions, and, well, as . . . uh . . . lawyers . . . we are in both, aren't we?

JUDGE: Yes, that's good! There is a difference for us, isn't there! But what this means, I believe, is not that as a Christian I can somehow apply my faith to the practice to establish moral standards for it that aren't there in it already. I am sure you have heard . . . I haven't been very subtle about this . . . that I . . . I really do not tolerate well adjectival uses of Christianity, as in "Christian Lawyering," for I must believe that all good lawyering, truthfully understood, *is* Christian. As a Christian and as a lawyer . . . and I hope to be a good one, one of these days, I have . . . potentially now . . . a unique capability and, always, a unique responsibility to be a witness to the Kingdom that is there in the work that we do as lawyers. If I had to say that in a sermon, I guess it would be: "The responsibility of a lawyer as a Christian is to witness to the practice its own truth." I know that's confusing, but I can't think of another concise way of saying it. So, you know, I don't want you telling people I'm a Christian lawyer. I really don't. I want them to see me as just good. They know I'm a Christian. I don't try to hide it.

COURIER: But how do you do that? How do you witness to the practice its own truth?

JUDGE: By being good . . . by being accepted as good . . . and, through that acceptance, having a say in what being a good lawyer means. The claim Christians must make, the claim that good lawyering is their own, has to be made within the tradition of the practice for the theological reasons I have given you. There is no other audience to whom this could be addressed legitimately. The argument must be made in an ongoing internal conversation about the teleology of the practice. So, you look at the way the practice of law carries on this internal conversation about itself, and you join in. And as rhetoricians, we know, or we should ought to know,

that there are good and bad ways of making these arguments persuasively.

COURIER: But Judge . . . and I know you are not going to like me saying this . . . there is still a presumptuousness in your claim about *the* theology of the practice, isn't there?

JUDGE: Courier, you are *very* concerned with presumptuousness! Is there a Church of Non-presumptuousness out there that I have missed? (*Catching himself*) Moore, why do you say things like that? What is it?

COURIER: No, that's okay. It's presumptuous, isn't it, to talk about "the" theology of practice, presumptuous to claim that what one person, one Christian thinks about the purposes of the practice is right. I mean . . . I know you are a good . . .

JUDGE: (*Interrupting*) My goodness, Courier! Did I say that? You'll have to forgive me! I am trying as hard as I can to get the theology right, but I really have no confidence that I have done so, and I can't because I don't know well enough what getting it right means. Look, the purpose in saying "the" theology is to structure the conversation.

COURIER: What do you mean?

JUDGE: Well, the real purpose in talking about "the" theology is . . . I've stopped preaching now and started confessing . . . the real purpose is to make you do it as well. I want you to see that there *is* a theology within the tradition of the practice. It's real. It is really there. And it is that theology that I am trying to describe. Since it is real, it has authority over what I might say about it, how I might describe it. So I describe "the" theology not as a judgment on the efforts of others to do the same, but as a judgment on myself . . . hoping that you will respond in kind; that you, too, will see the need to describe honestly and accurately something that is there and that is not a matter of our choice. I want this to be an argument about what is the case, Courier! (*Pauses*) I'm really just building on your own insight that the practice, the practice taught to you in your classes on torts, contracts, property and all the rest, has an ethic. Your Tyndale wants you to choose an ethic . . . and a theology . . . for your practice. He wants this to be your choice so, of course, you choose a Christian practice. Oh, he wants it well informed, to be sure, but he sees you as free to choose this way. I don't. I believe there really is something called *legal* ethics.

COURIER: I can see that for ethics, but for theology?

JUDGE: It's a little easier to see *the* ethic because it is so clearly justified by any measure of true success in the practice's own terms.

It's functional, in other words. But do we know what true success is so easily? Do we? If not, it shouldn't be that much more difficult to see the theology involved. Should it? At bottom, Courier, perhaps there is no clear division between the two.

COURIER: Perhaps, but I really had not thought about this as theological, and if I didn't, I don't think any other student has. Do you, Judge?

JUDGE: No, maybe not. Nevertheless, in this practice, this practice of law, there has to be an inquiry . . . more than an inquiry . . . an implicit statement about the nature of the world. This is necessary not only for the working of the practice, but to adequately and honestly locate the practice of law among other practices. There is . . . there must be . . . something descriptive about the way the world is . . . even if the description is only implicit in a lived understanding of true success within the practice . . . in any adequate conception of what it means to be a good lawyer. Doesn't there? And, if so, this, then, is a theology carried . . . that's the way I want to say it . . . carried by the practice of law.¹

COURIER: How does a lawyer go about discovering this theology?

1. LAW CLERK: My apologies for interrupting. I am supposed to be footnoting this dialogue and I have not had much to do so far, but I cannot help interrupting just a little to warn you about a potential issue here. It could trouble you, as it did me, throughout the dialogue. It would be fair to ask the Judge, at some point in what is to follow, why we cannot derive from practices general virtues, perhaps the virtues that are necessary for the existence and continuation of any practice, and from these general virtues derive a theology and an attendant ethic that is not practiced based, that is, in rhetorical terms, one that could be addressed to a universal audience. The Judge would agree, perhaps, that we could do that, but might argue, if he had thought about this at all which, I can assure you, he has not, that there is no good reason . . . okay, no *really good* reason . . . to give preference to such generalization over the specifications found within the practices from which the generalizations were derived. And it needs a really good reason, he might continue, for the process of applying practice derived generalizations, which are not themselves based within a particular practice, back upon the practices from which they came is an exercise fraught with the potential for great distortion. It may, in fact, and I think the Judge would think it would, jeopardize the very understanding of a life well-lived that one seeks through the generalizations. There is a lot to what the Judge might say and I hope I have got him right here. A friend of mine, Rabbi Michael Goldberg, put it this way in a conversation we had the other day: Often, the way in which we come to know someone as a good person is through initial encounters with that person in their performances within the roles that are defined by the practices that constitute their lives. The later description of the person as a good person adds little to this understanding. That's a nice way of putting it and I hope I remember to tell this to the Judge. And, oh yeah, footnoting . . . the Judge's use of practices here is from Aristotle by way of Wittgenstein by way of MacIntyre. This practice has its own unique tensions with this history, however, because it is a practice of rhetoric.

JUDGE: Carefully! It's creative discovery! I don't mean to be facetious, Courier, but you do have to do it carefully. Temptations abound. What I might describe to you as *the* ethic or *the* theology of the practice could be just wishful thinking on my part.² It could be just selective perception; perhaps even self-deception, and so forth: all the problems inherent in examining a tradition you're in, especially examining a tradition in the current context, the one I conceded to you early, of a practice that is becoming more and more corrupt. One whose institutions seem to be forcing it away from its own tradition. That's another way of saying "corrupt," isn't it? You know — I was thinking about this the other day — there may come a difficult time when we have to make descriptive claims about the ethics, the theology, of this tradition — claims about what it requires of us — that are opposed by everyone in the current practice. We may have to claim only the agreement of most who have gone before. But I don't see us in that situation yet.

COURIER: So, if I understand, we witness to the tradition the truth of the tradition, and you see that truth for Christians as having to be Christian?

JUDGE: Yes. I think of this as — but I may have this all wrong, seminary was a long time ago — as a Barthian inquiry. It implies that our first moral task, our first theological task, is to discern the story of which we are a part. There is another theologian, a Baptist, James William McClendon . . . you should read his work sometimes . . . whom I connect with this as well. McClendon teaches that good biography *is* theology.³ What I want to say is the same. But our biographies are composed, in very large measure, aren't they, of the practices that constitute our lives?

2. LAW CLERK: The Judge is right to be worried about this for he is very prone towards wishful thinking. (Maybe I shouldn't be telling you this.) I have heard him say before, for example, that the suppression of women and minorities that has been a part of the history of the practice of law, as it has of most practices, was always at odds with its tradition. He said that this was true even in those times when there may have been no one within the tradition who understood it. This suppression always was wrong within the tradition, he said, and wrong because of the requirements of the practice. I cannot remember exactly how he put this, but I do remember that it had something to do with a requirement of equality of voices within good rhetoric and the need the rhetors of this rhetorical culture have to speak for others. Something like that, anyhow.

3. LAW CLERK: The Judge did not give enough information to the Courier to find the book quickly so here it is: JAMES MCCLENDON, *BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY* (1990).

COURIER: But if you are looking at the practice to determine the theology what difference does being a Christian make? I mean, I know you claim . . . you *name* . . . the good within the practice as Christian, but . . .

JUDGE: (*Interrupting*) “Name” is good. It is a question of who will name this, of who will locate it within a story, isn’t it? But I am very troubled by your question.

COURIER: Why, Judge?

JUDGE: This question about “what difference does it make” — a question that seems so sensible to ask these days — is, I believe, a sign of a theological problem. Do you know the Greek term *phronesis*?

COURIER: Yes, practical wisdom or something close.

JUDGE: More like practical judgment. It’s the knowledge fitted to a particular *praxis* or practice, such as the practice of law. Our world lives in almost morbid fear of our need for *phronesis*. I am not exaggerating here.

COURIER: Why?

JUDGE: Because the need we have for *phronesis* reminds us of the contingency and the interdependency of our lives. You can see this fear very much alive and well in all the professions. They don’t credit their own *phronesis*. Don’t credit the forms of *phronesis* that they both create and depend upon for their own excellences! Instead, they all try to move towards *techne*, as if more knowledge, better technique, more *data* for goodness sake, would somehow make the contingency of our lives go away, as if through *techne* somehow we could no longer be dependent upon ourselves. But, of course, contingency never does go away and we are always dependent upon ourselves. You will think I am an ideologue, but I must tell you that it is not unusual that lawyers would see this clearly, perhaps more clearly than others, for the legal practice has always resisted *techne*.

COURIER: But how does this relate to the question I asked, the question about what difference being a Christian makes?

JUDGE: The dominance of *techne* within Christianity produces a question like that.

COURIER: I don’t follow you.

JUDGE: I’m sorry. I don’t mean to be obscure. To accept our need for *phronesis* would mean accepting the contingency and interdependency of our world, but accepting these imposes upon us a daunting responsibility, doesn’t it? And this scares the hell out of people. So they look to *techne* because they see in it a security, a

security *from* responsibility. The way this shows up in Christianity . . . no, wait . . . let me say it this way: The most obvious example of this in Christianity is fundamentalism. Fundamentalism comes from a fear of the human — the same contingency and interdependency . . . or the fear, as I like to describe it, of living in Biblical times. But we do live in Biblical times and fundamentalists just jump out of the frying pan into the fire: the frying pan of the responsibility our faith imposes upon us, the fire of the false security, the lie, of *techne*. They take the God of history out of history and, in doing so, they reject even the possibility of a Christian *phronesis*.

COURIER: It is not just fundamentalists though, is it?

JUDGE: No. Fundamentalism is just the most obvious example. You are right. The problem is truly pervasive. It is there, for example, whenever people turn Christianity into propositions to be applied . . . applied . . . to life. They do this, I think, because they don't trust Christian *phronesis*. Don't see enough in it to maintain the strictures of our faith. And the reason they don't . . . *maybe* the reason they don't . . . is that they have so little faith to begin with. (*Pause; notices reaction of Courier*) Have I gone too far.?

COURIER: You've condemned a large number, Judge! But my reaction was surprise that you could start from where you did and end in the prophet's role!

JUDGE: Oh my! Is that what I have done? Well, there you have it — my own romantic escape.

COURIER: (*Puzzled*) Uh . . . can we go back a bit? I am not sure I understand how this relates to the question again, the one about what difference does it make?

JUDGE: Yes, fair enough. When people ask "what difference does it make" they are often asking the question from the same perspective of fear of the human and with the same retreat to propositions I have been trying to describe. What difference does being a Christian make in the practice of law? How should I know? How could I know in advance of good Christians living their lives to the fullest in the practice of law? And, you know, I look to find the product of these lives in our practice.

COURIER: Isn't that uh . . . what's the word . . . antinomian?

JUDGE: Antinomian? No, not really. It's morally normative. And in the only way, the only true way, that fallen creatures ever are morally normative. Look, the effect of the Eucharist, the effect of the other sacraments, the effect of the Church, when it works as it should, is a transformation of the person. This transformation is one that does not just provide us with a motivation to be moral, to

be holy — motivations for well-lived lives that are already known. Instead, the transformation is one that leaves us fully dependent upon our own goodness.⁴ And, I see this dependency as inevitable for there are no propositions that are not also dependent upon our own goodness. You learn this in law school, don't you? Being a Christian . . . we are back to your question now . . . makes all the difference, but I certainly can't tell you what difference it will make for you in advance of your living the difference.

COURIER: I don't know. I'm wondering now what role God plays in this? Is nothing revealed?

JUDGE: (*Suddenly looking at his watch*) What time is it? Oh, no! Look at the time! I have to leave to get ready for a dinner with the Judicial Reform Commission. (*Pauses*) Tell you what. Why don't you join us? I'll tell them you are my law clerk. Come, walk with me, and I'll give you the directions on the way out. (*They leave together hurriedly*)

* * *

It is several hours later that evening. The Judge and the Courier have come back to the Judge's law suite after the dinner meeting to pick up a few items the Judge needed before going home and, as both are now anxious to do, to try to reach some closure on their dialogue. As they enter the suite, they are chatting about the conversation the Courier heard at the Judicial Reform Commission dinner.

COURIER: . . . and I saw some of those connections!

JUDGE: Good! That's good to hear. Perhaps I am not too far off then?

COURIER: I wonder, Judge, if you could spell out for me a little more about what the ethic and the theology of the practice are?

JUDGE: (*Returning to his files*) Yes, well, we have talked around the subject, haven't we. But I'm reluctant to do this.

COURIER: Why?

JUDGE: In part because I am likely to make a mess of it, but, in other part, because it will sound too much like a theory to you. This can only be done bottom up. It's not a top down inquiry. The

4. LAW CLERK: Oh, the Judge is in trouble here! Taken out of this context, he would object strenuously to any description of our lives as dependent upon our own goodness for this is the kind of claim made by those who no longer fear God and only fear each other. What the Judge has in mind here, God fearing man that he is, is something quite different, having more to do with the hermeneutic freedom God has given us in our relationship with Him. Being dependent upon our own goodness in this way is not to be in control of our own lives. But I am seriously out of role here, aren't I? I should leave the Judge to his own devices.

way I got started was by struggling with the practice when I first joined it. Ordinary issues . . . very ordinary issues . . . and . . . I'll tell you what. I have a few notes here from a speech I have been preparing for a bar meeting on a similar topic. Perhaps you can be a practice audience for me. (*Shuffles through one of the piles of papers until he finds what he is looking for*) Ah! Here it is.

COURIER: Good!

JUDGE: Maybe I should preface this. I believe that the story of which we lawyers are a part is the story of rhetoric. But it isn't the story of just any rhetoric. It is the tradition of a very particular form of rhetoric, a particular form of representative rhetoric, within a particular rhetorical culture, with particular forms of arguments⁵ addressed to particular audiences who are restrained by particular roles.⁶ This is a story then about maintaining a very particular conversation.⁷ The ethic I am looking for in the practice

5. LAW CLERK: I have learned from the Judge, on other occasions, that it is very important to his concept of the legal practice that it maintain the ability, over time, to understand the quality of arguments such that there can be very successful arguments that are nevertheless very bad arguments. He is particularly concerned with arguments that are bad because they corrupt the audiences the legal conversation requires to be a good conversation on its own terms. I wish the Judge had said these things here, but he did not. I think he was getting tired.

6. LAW CLERK: The Judge, as you may have noticed, is not terribly concerned with problems of role morality. Perhaps part of the reason is that the practice of law leads lawyers, like the Judge, to appreciate the restrictions of roles more than most professions do. A lawyer's most important audiences, judges and jurors, are role restricted. (And clients, too, when it is understood that we impose a particular role upon them by changing their dispute to a social conversation). And, praise God for this! If they were to act true to themselves in these positions, it would be far more difficult to distinguish law from advertising. (Which is not to say that there is no ethic of the rhetoric of advertising, but it is a very different one). "One can sometimes observe marvelous changes in individuals as when some passionately biased person becomes a member of a jury or arbitrator or judge, and when his actions then show the fine transition from bias to an honest effort to deal with the problems at issue in a just and objective fashion." I read that in MAX WERTHEIMER, *PRODUCTIVE THINKING* 135-136, as quoted in CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 21 (1969). And for a beautiful understatement of the potential problem: "If then one allows the existence of audiences of corrupt persons, whom one nonetheless does not want to give up convincing, and, at the same time, if one looks at the matter from the standpoint of the moral quality of the speaker, one finds oneself led, in order to solve the difficulty, to make distinctions and dissociation that do not come as a matter of course." *Id.* at 25. The shaping of the legal audiences is toward audiences that accept rhetorical proof and, because they do, they accept the lawyer's conversion of force to conversation. But here I am getting ahead of the Judge. Sorry.

7. LAW CLERK: The Judge has left something out here, but it is not surprising. It must seem so obvious to him that it does not occur to him that it needs to be said. Yet, I have learned that for some, and perhaps for the Courier, this is the most important thing he could say, and for others, it reveals a serious flaw in his thinking. What

this tradition maintains is the only sort of ethic a tradition can carry. It is a virtue ethic with the virtues being those things that move those in the practice towards its excellences, and the vices those things that head them off in the other direction. And this practice must have — for its own purposes — an ongoing internal inquiry about the teleology, the ends, of the practice. Okay, if you've got all that . . . (*pauses, no interruption*) . . . then the virtues of this practice, it seems, define for us a particular kind of person, even a particular way of life, because they reach beyond the practice itself. I don't think this adds much to your own insights about your education.

COURIER: I do see the connection, but each of us lives in a number of practices maintained by a number of traditions, don't we?

JUDGE: Good! Yes. Yes, of course we do! Of course we do! And there are always tensions among the varied traditions in which we live. This does not mean, however, that there is an ethic, or a self for that matter, that is somehow outside of any of these traditions. Nor does it mean that trying to locate our ethics, as defined by the traditions that constitute our lives, is a mistake.

COURIER: Well, I'm not sure . . . I . . . uh . . . you have us made up of competing ways of life. Where's the integrity in that?

JUDGE: I don't have you "made up," you are made up of what can be competing ways of life. And that is just as confusing as our lives

he has left out is his conviction that the legal conversation he is referring to is always a moral conversation. As with the characteristics of the conversation the Judge does mention, it is a very particular form of moral conversation. In the legal conversation, there are moral appeals made on both sides of any issue because moral appeals are persuasive. This is not to say that the legal rhetor appeals to the particular morality of the judge or of the jury, but that behind each legal argument lies an often unstated moral claim. This moral claim is always toward those without an interest in the matter and is, therefore, more in the nature of a communal appeal about what "we" should do. Thus, the rhetoric required here moves the argument, and therefore also the counseling of clients, away from purely personal appeals or individual demands. It is important, however, to see that these social moral appeals are never, or almost never, directed to a universal audience, but to the role restricted audiences of the legal conversation. Lawyers often enough take a selfish or retributive motivation and convert it not to what it should be in a moral sense, but to what it must be in a rhetorical sense to be persuasive as a social moral appeal to these role restricted audiences. And, in doing so, they give us a decent way to talk about such "all too human" things. One of these days I am going to tell the Judge about another book because it is helpful here. Thomas B. Farrell, as I read him, says that in this way the rhetorican implements a practical wisdom through the complementary participation of someone else, namely, the rhetorical audience. THOMAS B. FARRELL, *NORMS OF RHETORICAL CULTURE* 73 (1993). I'm pretty sure the Judge would like that way of putting it, but you never can tell. It's not a good idea to make predictions about the Judge. What is best about him is the way he can surprise you.

are, and integrity is just as difficult as it really is. Look, I said that the practice this tradition of rhetoric maintains must have within it an ongoing inquiry about the teleology of the practice.

COURIER: Yes? I can see that. It would have to — to stay on course, to adjust to changes, to stay alive, I guess.

JUDGE: Yes! Exactly right! Well then, the practice requires practitioners capable of providing a good internal critique of the practice — one that is good because it considers those things beyond the practice that could threaten the quality of it or the maintenance of it or both. Let me put this in terms that will be all too real to you too soon. In this firm, I am proud to say, after much argument, we decided to drop minimum billable hours for associates, to encourage our associates to spend time with their families, to move them through departments so that they did not specialize too early, to design our offices and plan our schedules so that relationships among associates and partners could develop more informally, and to ask associates to join partners in doing pro bono work so that they would see other kinds of clients, other parts of the community, develop a sense of the profession, and so forth. And we did these things for two good reasons, although we did not talk about it this way. The first reason is what we are talking about. The story of which we are a part as lawyers needs real, well balanced, thoughtful people who are just like what our associates can now become. Or so we hope.

COURIER: And the second?

JUDGE: The second is that we still believe that what we offer to clients is a particular form of *phronesis* and, even though it is a particular form, even though, that is, it is a *phronesis* perfectly fitted to this practice; it too reaches beyond the practice because it has to! Our work is done in relationships with many other people in many other roles and our *phronesis* as rhetoricians has to reflect this.

COURIER: Tell me if I have this wrong, but what you are describing here is not that far from what we were saying this morning about the relationships among religious traditions.

JUDGE: No, not wrong at all. There's a connection. I hadn't thought of it in that way, but you are right there is a connection. And there is a way of understanding integrity in this, although it is certainly not a simple matter, is it?

COURIER: No. It isn't and I am still troubled by it.

JUDGE: Let me try to address this. We are in deep waters here, aren't we?

COURIER: Yes, I guess, we are.

JUDGE: And I don't swim that well. (*Pauses in thought*) There is no doubt that there is a story, a narrative, of each single life. As Aristotle put it, man is one in number. What we talk about when we use the word "integrity" is, I think, the coherence of each individual narrative. Integrity is the "fittingness" or the "appropriateness" of a person's conduct within the overall narrative of his or her life. If this is true, then it is wrong to think that integrity is to be found in some private, some internal world for the very sense of this "fittingness" is not our own. I think this is psychologically true as well. The virtues, even the general virtues that we might use to describe the integrity of a whole life, for example, can never be adequately understood as things that we carry around inside ourselves.⁸ You know, even our strongest emotions are not our own in this way, but are based on narratives that are beyond ourselves.⁹ (*Pauses again in thought*) But these are, as you can see, very complex matters, and I don't know that I am up to the task this present to us, and . . . uh . . .

COURIER: (*Interrupting; seeing the Judge's difficulty*) No, Judge, that's enough. I am sorry I took you away from your lecture notes. Let's go back.

JUDGE: Thanks you for coming to the rescue. What I was planning on saying . . . these notes are still sketchy . . . is a summary of what I think I have learned from the practice about its ethics. I have tried to be descriptive. (*Pauses*) I'm not at all sure this is a good idea. (*Shuffles through notes, sits down, looks up again*) Are you?

COURIER: Please go ahead, Judge.

JUDGE: Okay, I was going to say that I have found, in my own practice, five requirements of our practice, interrelated requirements, that are the source of a lawyer's ethics. There is first the ethics of the required relationship with the one for whom the lawyer is speaking. There is nothing so personal as to speak for an-

8. LAW CLERK: This is the kind of statement the Judge should back up at least a little, don't you think? He could do so by citing to OWEN FLANAGAN, *VARIETIES OF MORAL PERSONALITIES: ETHICS AND PSYCHOLOGICAL REALISM* (1991). I have read Flanagan and, as I read him, he is very much in the Judge's camp.

9. LAW CLERK: I am not sure how the Judge comes up with this stuff. There is an excellent article — I remember this one from graduate school — that makes the same point. It's Martha Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, *ETHICS* 225 (1988). But I don't think the Judge read it. If I remember correctly, it has some nasty language in it that would not be his cup of tea. Let me tell you what the Judge said to me once, which I did not understand at the time. Maybe it fits here. He said: "We cannot understand our lives until we can hear them being played by somebody on a Martin D-18."

other and, because this is true, the form this relationship must take for the speaking to be truly for another is very ethically demanding. It is for this relationship that we honor client confidences, avoid conflicts, give preference to our clients over our own needs, and so forth. But the purpose of the required relationship also limits what we do for our clients.

COURIER: Limits?

JUDGE: Well, for example, the confidentiality we offer our clients is not just some general obligation of loyalty or even fidelity. It is certainly not there *just* to encourage client disclosures to their lawyers. It is the particular confidentiality needed to preserve a relationship necessary to speak for another within this rhetorical culture, and, if in a particular issue the questioned confidentiality does not serve this purpose or is even destructive of it, then we know that it is not the confidentiality that good lawyering requires. Nor, for that matter, is it something a client can, with any justification, insist upon. For clients must respect the fact that they came to a lawyer; accept, that is, that a good lawyer will practice true to the requirements of her craft. Thinking about it this way . . . I hope . . . offers a far more nuanced way of addressing confidentiality issues. (*Pauses*) Perhaps, this is the kind of thinking your Tyndale should be doing. But, let me go on because this may become clearer.

COURIER: Of course.

JUDGE: A second requirement is our obligation as good lawyers to maintain the legal conversation and to try to improve its quality.

COURIER: Is that like "officer of the court?"

JUDGE: No! Not like that at all! If that expression is meant to describe what I just said, it is a terribly misleading way of doing it.

COURIER: Why?

JUDGE: Because, from a lawyer's perspective, the legal conversation stands in judgment of the courts, of the adversarial system, of judges — of all those potential sources of ethical authority over your "officer." We are responsible for the maintenance and the quality of the legal conversation. Sometimes this means we have to resist the court, resist the judge, resist the entire adversarial system if need be, when we see it corrupting that for which we are responsible and upon which we depend for the quality of our work. (*Pauses*) We do so, however, in anguish and not in anger. (*Pauses*) No, what I have in mind is similar instead to the obligation to protect the playing field that is there in all practices, the general obligation not to foul one's own nest, not to warp the carpenters rule before using it, and so forth. There are lots of metaphors, because

it is so pervasive. For lawyers, it includes, to be sure, protection over time of the unique language we use, the language into which we translate our client's claims, but it is far more than this.¹⁰ And notice, Courier — I said earlier that these were interrelated requirements — how the ethics of the playing field are both in tension with and depend upon the ethics of the required client relationship. If the client is hiring a lawyer, the client surely needs to accept that the lawyer will not foul her own nest. The lawyer, however, must present this limitation, a limitation upon a relationship the client may feel he is entitled to, in ways that do not destroy the relationship that is required for good lawyering. For what quality could the conversation possibly have if it does not remain the conversation of our clients? So there is tension between these first two requirements of good lawyering . . . ah, now there is fertile ground for hard work by your Professor Tyndale!

COURIER: You are going to give him a lot to do! Judge, he's a very thoughtful man, a very intelligent man, well read. I think I gave you the wrong impression. He would love to be a part of this conversation.

JUDGE: Perhaps.¹¹ (*Quickly returning to his topic*) Now the third requirement is closely related to the second. I have thought of keeping them together, but they are better apart. The third sources of our ethic is the ethics of persuasion. Again, though, this is not just any persuasion — remember all the limitations of my little preface: particular audience and so forth — but the ethics of persuasion within our particular rhetorical culture with its clearly defined roles. I have in mind here a certain respect for our audiences and their roles, but I also have in mind those constitutive rules of the conversation such that if you use some other methods to per-

10. LAW CLERK: I know, because I have had the opportunity to consult the Judge's lecture notes, that the Judge is thinking here of the work of James Boyd White on our obligations as lawyers to the language of the law. No surprise; the Judge loves White. The Judge's notes on this express some disappointed, however, that White has never spelled out the practical applications of this ethical obligation. I wish the Judge would take a look at BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA* (1990). There is much in the Judge's descriptions, with its playing fields and so forth, that is spelled out very nicely in Suit's work.

11. LAW CLERK: The Judge sees Tyndale, I know this to be true, as incapable of offering any response to Nietzsche's challenge to morality, and he does not think Nietzsche would love to be a part of this conversation so he is not likely to take the Courier up on this. Nietzsche is always there, somewhere, in the Judge's thinking. In some ways I think his life has been an exercise in learning how to come to terms with Nietzsche. If you have no place to stand in reading Nietzsche, if you can find no way of turning him fairly to your own purposes, then the Judge is not really that interested in you although, of course, he would never let on that this is true.

suade you are no longer engaged in the legal conversation but are outside of it. I am afraid I have not said that very well. Is it clear enough?

COURIER: I think so. For example, bribery, in all its many and subtle forms, is out, because it corrupts the audience.

JUDGE: Yes. Good. You have it. Bribery, in fact, would not only be corrupting and outside the constitutive rules of the game, but also destructive of the practice in the same way that cheating is destructive of any game. But I don't want you to think . . . and I can see by your description of bribery that you don't think . . . that this requirement only involves egregious wrongs. You can see the same wrong that bribery is in very subtle tempting of our audiences to make decisions upon improper bases. The issue is there appears in every time we consider a closing argument. It is there in every evidentiary issue; in every conversation with a journalist, in every negotiation with another lawyer, and on and on. It reaches all that we do as lawyers. So this is not just about egregious wrongs. In fact, the ethics of this are very subtle, wholly pervasive, and require great discernment. It is very troubling, for example, when the temptation the lawyer faces is to take advantage of the other side, to deny to your opponent's client her own participation in the conversation, and so forth. And the question for the lawyer is whether the proposed advocacy is within the game, to use the metaphor again, or outside and destructive of it. This is part of what lawyers talk about when they talk among themselves about ethical dilemmas. It is part of that ongoing internal inquiry I was talking about before. Of course, good lawyers don't talk about it the way we are doing here. They do it better, far more naturally.

COURIER: I heard some of this at dinner, I think.

JUDGE: Different context. But, yes, I think you probably did. The fourth requirement . . . let me look back at the notes again for I have lost my train of thought . . . (*reading paper*) . . . okay, the fourth source . . . no, wait, I think I can put the fourth and fifth together. So the next one would be the ethics of critique: internal critique, similar to what we were just saying, and *external* critique done internally. (*Amused by the expression*)

COURIER: (*No reaction*)

JUDGE: (*Returning to his notes*) Uh . . . the fourth requirement of our practice, the fourth source of the lawyer's ethics is the need we have as rhetoricians to critique our own rhetorical culture. Here, let me add this note: (*writing*) "internally and externally." The internal critique puts us in judgment of current practice so that the

question, "Is this true to who we are," is always asked. For us, one crucial element of this is keeping the language of the law connected over time so that what I have been calling the legal conversation is, in fact, a conversation. The *external* critique . . . (*writing on the paper*) . . . "done internally" . . . asks about institutional concerns, about keeping the practice adequately connected to the culture in which it is located, and about its place at the table of all practices. (*Looking up at Courier*) You can see the interrelationship again, can't you? The legal conversation must remain understandably about those things that our clients bring to us. It has to in order to retain its cultural validity as a way of handling social disputes and it has to retain that validity if it is to continue as a conversation at all. So even though we translate our clients' concerns to the language of law, they must be able see their concerns at least reflected in the conversation, don't they? Not as they brought them to us, of course, but at least converted in an understandable way to the particular persuasive demands of this particular social conversation about social disputes. Isn't this right?

COURIER: I think so, but I can see that you depend a lot on external critique.

JUDGE: I do?

COURIER: Yes, well, if I have it right, the constant accommodations the practice makes to the culture are the product of your external critique. And these are not just institutional accommodations, but also individual accommodations. Aren't they?

JUDGE: Yes, they are. Do you see the problem? Why the external critique must be done internally?

COURIER: Yes. Otherwise, the culture would corrupt the practice. The judgement, the balancing, would be very different.

JUDGE: Yes, and, when that happens, the ethic, the theology — "the goods" — that are carried by the practice are lost. (*Pause*) Well, Courier, I see I am not needed here anymore. But I do want to be clear about something that I may have passed over too quickly. As you can see, all these requirements are needed to maintain the practice and to maintain the quality of the legal conversation and I'm offering these requirements as the source of legal ethics. These are the maintenance obligations of one who wishes to be a good lawyer, and it is in these obligations that we find the primary ethical restraints No! Wait! It's wrong to refer to

these as restraints.¹² They are in fulfillment of good lawyering. Let me try again. (*Writing on the paper*) These constitutive ethical obligations of good lawyering are something that we impose upon our clients. The clients, by becoming clients, enters into our world of practice and, in doing so, must accept those things that are essential to the quality of our work. They have to accept, for example, the truthfulness the conversation depends upon, the required consideration of the persuasiveness of arguments on the other side — even if for no reason other than to know how to respond to them — the openness of the conversation to all, the inherent equality of each voice, the particular requirements of persuading our particular audiences, and accept the social nature of their own disputes.

COURIER: Is that the end of your notes?

JUDGE: Yes, but I'm not sure how to end the talk.

COURIER: Do you hold out your four requirements as offering different solutions to ethical issues. I mean are you going to work though some examples with the audience?

JUDGE: They do offer different solutions, often enough. And I can work through some examples if you think it needs them.

COURIER: Yes, I do.

JUDGE: The audience may be disappointed though.¹³ The same tensions that show up in the usual discussions of ethical issues show up in the ones I wish to have.

COURIER: I don't see that as a problem, Judge. Those tensions are there within the traditions of the practice. What you are doing is giving lawyers a way of identifying the tensions better than before.

12. LAW CLERK: There you go. The Judge is thinking about Nietzsche again.

13. LAW CLERK: Sorry to keep interrupting but, having heard the Judge work through examples with law clerks, I know that the Courier may be disappointed with the examples as well but not for the same reason. If the Courier thinks that the Judge is going to talk about traditions and practices and the like, he is in for a disappointment. Mostly the Judge talks about laws, ethical regulations, ethical obligations and exercises of judgments and it is all very contextual. Every time he and I chat about ethical issues, he insists that we spend most of the time playing with the hypothetical to see if the issue will go away. The Judge says that the real moral work is done in framing the issue. So, what you would likely hear from the Judge would be efforts to describe the situation as accurately as he can. He surely does not offer a decision procedure for lawyers. He tries instead to explain what ethical questions in the practice are questions about. One of the things he has helped me with is in understanding why some questions are so very difficult. The Judge, by the way, sees legal restraints on lawyers as those things that cannot be justified in the legal conversation. So when he talks about the *law* of lawyering he often comes back around to the same things discussed here.

In some ways, those are the tensions that define the practice, aren't they? So no one should expect them to just go away.

JUDGE: Thank you, Courier. And we have hundreds of years of trying to work through these tensions, don't we? Surely we have learned something about them, don't you think? What I would want to do with examples is to plug lawyers in to what we may have learned as a practice; to give them a better way of thinking through these problems, one that is supportive of the practice rather than, as is too often the case in these discussions, destructive of it.

COURIER: Can I press you a little, I know it is getting late, but . . .

JUDGE: (*Interrupting*) You can, but I know I am no longer needed here.

COURIER: Maybe. You have a lot of faith in the legal conversation and I was wondering what justification you think it has.

JUDGE: (*Not responding*)

COURIER: What's the point, in other words? What does it do? What do *we* do as lawyers? I'm not sure how to say this.

JUDGE: No, you've said it well enough. It is just hard to answer. There is a risk here of imposing something upon the practice that is not the practice. You know, if you said that the conversation was about justice, for example, you would have so much explaining to do about what this "justice" means because the justice that is carried by the practice of law is not at all what most people mean by justice.¹⁴ But I don't want to go through all that so let me just say that its justification is . . . or, rather . . . what we do as lawyers is convert force to conversation.

COURIER: For peace?

JUDGE: You mean between the parties?

COURIER: Yes.

JUDGE: Then no, not peace, although peace may come. But no, it isn't about peace. This is a legal conversation for sinners. It is one that lives within human frailty. Much of what we do is keep people who want to harm each other from doing so and those who might do so in the future from getting themselves into tempting situations. That's not peace. I try very hard, within the requirements of good lawyering, to keep a potential for peace open, but if peace between the parties comes it is more a matter of grace than a product of my work. (*Pauses*) I think I want to say this more *brutally*:

14. LAW CLERK: The judge once told me that the primary example we have of lawyers seeking "justice" is overzealous prosecutors who think they know what justice is.

If I tried to accomplish peace through my practice, I would not be a good lawyer.

COURIER: So what you do, then, is convert issues and potential issues between people into conversations and into language games within the conversation so they aren't resolved by force?

JUDGE: Yes, I guess. And "games" seems right. *Good* games. Is that good enough?

COURIER: I don't know. The conversation itself rests on force, doesn't it?

JUDGE: Of course, it does! It rests on the social force that is a necessary precondition for the conversation itself.¹⁵ There may be a lot more force in the adversarial system than this, but from a rhetorician's point of view the justified force is the force needed by the conversation. Rhetoricians don't try to get rid of force in the world. We just try to take the inevitable use of force, including the force we use, and turn it into an argument in our own language as best we can. (*Pauses*) And you know, when true tyranny arises, we can be challenged to give our lives to this effort, and some good lawyers have. (*Catches himself*) I must be getting tired, Courier. I'm making this sound romantic and it isn't. Let me put it more mundanely: It is a common mistake to think that the use of force for the client is the goal of lawyering or that the use of peace is the same. The goal is the legal conversation; the rest is always and of necessity left to the audiences to whom the speaking is addressed. And, you know we have not talked about this much, but one of the audiences is the internal audience of the client.

COURIER: But Judge, why not be peace makers? I am troubled by your not seeing peace as a goal.

JUDGE: If God cares about peace between neighbors, as we know He does, should He not also care about the peace of communities of sinful people over time? Lawyers do not serve peace directly, but by converting force to conversation, and doing so as best they can in a fallen world filled with people for whom force has enormous appeal, enormous *moral* appeal, perhaps lawyers can be called "peace makers" too without doing too much damage to the Beatitudes or to the practice. But I am not sure about this. I am

15. LAW CLERK: Apparently, the Judge has forgotten that he got this idea from reading Perelman back in the early seventies. Here is a citation if you want to see the sources: For a discussion of the pre-conditions required for argumentative conversation, see C.H. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 14-17 (1969); and, for more on the requirement of binding force for decisions made upon rhetorical presentations and the rhetorical requirement of the connection of argument to action, see *id.* at 58-59.

not at all comfortable with it. I usually try to avoid the question of justification because it is so easy to go astray from the reality of the practice in the process of justifying. I don't know. The question of justification just does not arise very naturally from within a practice.

COURIER: Fair . . .

JUDGE: (*Interrupting*) Justifications are sort of the mission statements of philosophy.

COURIER: Fair enough, but aren't we back to theological questions then?

JUDGE: You mean back to where we started? (*Laughs*)

COURIER: Yes.

JUDGE: (*Bemused*) Well, the theological questions have already been answered, Courier.

COURIER: I was afraid you were going to say that, Judge, but can we talk them out just a little?

JUDGE: And I was afraid you'd say that. (*He laughs and is joined by Courier*) Okay. I think I said something like success, as defined within the practice, depends upon a certain understanding of the world. Right?

COURIER: Something like that, I believe.

JUDGE: And I "named" this, to use your term, a Christian theology. So, I said, the practice carries with it a certain Christian theology.

COURIER: Yes, from a Christian perspective.

JUDGE: Which, I think we agreed, is, of necessity, the perspective that this is the way the world is.

COURIER: Right, I am with you again.

JUDGE: The rhetorical world — the world of good arguments, good *moral* arguments,¹⁶ on both sides of every dispute, the world in which we are dependent upon that which "adheres" to the mind of our audiences and "the liaison of ideas" for the good, dependent upon that which persuades, in other words, and not that which "convinces,"¹⁷ dependent upon the very language that we use — is

16. LAW CLERK: Didn't I tell you the Judge depended upon this particular unarticulated understanding of the legal conversation.

17. LAW CLERK: The terminology he is using here, "adheres," "liaison of ideas," and "convinces" (as opposed to persuasion) is all Perelman talk again. See, CH. PERELMAN AND L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 14 (1969). The Judge puts an awful lot of trust in a sense of what is appropriate; a lot of trust in what "fits." I see this in his theology and in his practice-based ethics, don't you? He would say that these are a rhetorician's standards and they make clear both the interdependency and the contingency of our rhetorical

a world of contingent and tragic choices by fallen beings who need force just to be able to talk to one another other about those things that seem to matter to them the most. Because it is contingent, we are left fully responsible for the goodness of our choices. What you saw as your corruption as a Christian in the classroom was no such thing. It was a display of this contingent world to you. It was, as you said, a challenge to your faith, but I would insist that it was a good challenge, a challenge that called your faith to a new maturity, called it to wrestle, more than it had before, with the truthfulness of our fallenness and how one might, nevertheless, serve God. (*Pauses*) But people don't like to hear about responsibility, do they? It is distressing.

COURIER: No, I guess they . . . uh . . . I guess *I* don't. But what of God?

JUDGE: He is involved with us in this same troubling story; not bracketed away from it.¹⁸ Isn't the Incarnation about God's willingness to live our lives with us? Look, at least one of the central messages of our Hebraic tradition is that what we do matters, *really matters*. The world is changed, *truly changed*, by our decisions. There is more room in this story, for the new, for the created, than there is in almost any other. There is room in it for the unique meaning of individual lives.

COURIER: And . . . ?

world. It looks like an aesthetic ethic, even an aesthetic theology, to me. What do you think? I think the Judge has some hard work of his own to do here and the kind he does not like to do: epistemology, justification — the "mission statement" stuff he treated lightly before. But please do not tell him I said that. Let me do it my way later on.

18. LAW CLERK: I wish the Judge would use his own words more so I did not have to keep doing this. These terms are, I think, taken from James McClendon.

Our question must rather be whether the life experience of a Hammar skjold or an Ives is or is not understood better when it is treated as experience with God; that is, whether (as I believe) the ongoing story of their lives makes more or fuller sense when the involvement of God in that story is recognized, or when it is bracketed.

JAMES MCCLENDON, *BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY* 160 (1990). So, I would like to ask the Judge, how does it make "fuller sense?" I guess the Judge, with some irritation, would tell me that this too is a rhetorical standard and remind me again of our dependency and so forth. Sometimes I think the Judge is pretty radical for an old lawyer. He has a Wittgenstein-like aversion to letting things settle down securely in one place, if you know what I mean. For him, security is a mortal sin, I think. He has said to me many times that "we" — and I am never sure what he means by that — are called to insecurity. But when he says this it sounds something like Sherlock Holmes telling Dr. Watson "Come, Watson, the game is afoot." You know, he is enthusiastic, even joyful. It's strange.

JUDGE: And . . . then . . . the very meaning of your work as a lawyer is in the recognition that it is . . . that it can be . . . God's work with you.

COURIER: In the recognition and not in the revelation?

JUDGE: They are forever together. Surely the world works in such a way that we cannot escape from our own humanity! God has never revealed himself to us in ways that do not call upon our discernment, our ongoing discernment, through history and over time. For, if this were true, it would not be to us that He was revealed. To say that God's work is at the heart of our traditions, as I have tried to say here, Courier, is not to deny God's revelation but to accept the one to whom God's reveals and with whom He works.

COURIER: But how then does God work with us?

JUDGE: It is all a relationship, isn't it? Isn't that what this is all about? A relationship? I know this sounds terribly mundane, but it is true, isn't it? Look, we are, despite our most fervent wishes to the contrary, always co-Creators with a loving God in a contingent world.

COURIER: It's frightening to think of it that way.

JUDGE: Yes, I know. I am glad you said it that way. To think that we are in that kind of relationship with the One who created us! The truer issue for us as Christians is having the courage to recognize the responsibility of this relationship. As I see it with these old lawyer's eyes, it is the responsibility of living in contingency, living in interdependency, living in dependency or, as I said before, of recognizing that we live in Biblical times. (*Pauses*)

COURIER: (*Starts to speak*) Uh . . .

JUDGE: (*Interrupts*) You know, Courier, it occurs to me now, thanks to our conversation, that it is only in this recognition that we can come to know what it means to be who we are. To say that the Kingdom is within means, I think, that we cannot know ourselves until we locate this self within the Kingdom. And, still trying to answer your good question now, I have to know that, don't I? I have to know who we are to know how God works with us. Perhaps, this is what it means to practice law in the Kingdom, this coming to terms with who we are.

COURIER: And we can do this when we do those things I feared? I mean as lawyers, we can do this?

JUDGE: You mean making arguments that are not "yours," representing people you do not agree with, trusting the outcome of persuasion, and on and on through the litany of the ethical condemnation of lawyering?

COURIER: Yes.

JUDGE: I think so. With a hope and a patience made possible by Christ.¹⁹ With a trust that man's good work, when truly done well, is work with God. A trust that the Creation continue. Our lives as lawyers, rightfully understood, are based on a miracle. This is the claim Christians offer against the powers that would claim the practice as their own. Here, let me read something to you if I can find it. (*Thumbs rapidly though a stack of note cards until he finds what he is looking for*) Yes, here it is: Christian hope means "exposing the non-necessity of supposing, like Nietzscheans, difference, non-totalization, and indeterminacy of meaning necessarily imply arbitrariness and violence."²⁰ I ask you, Courier, who, in the everyday

19. LAW CLERK: There he goes again. The Judge is borrowing here, and distorting a little, something that he got from another theologian, Stanley Hauerwas: "Patience is not merely what we must do until we are saved. It is our salvation." STANLEY HAUERWAS, *WILDERNESS WANDERING: PROBING TWENTIETH CENTURY THEOLOGY AND PHILOSOPHY* 180 (1997).

20. LAW CLERK: I found the same note card later on. On it the Judge attributes the quote to JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* 5-6 (1990). He found it in HAUERWAS, *supra* note 19, at 190 (1997). What Milbank, a philosophy of religion professor, said may be true about "Nietzscheans," but it is hardly fair to Nietzsche who saw himself as offering an alternative, even a light hearted one, to the pessimism of Schopenhauer — an affirmation of life in the face of the conditions Milbank describes. People like Milbank, who try to define themselves against Nietzsche, do not seem to understand how much their view of the world is Nietzschean. Here is another quote from Milbank to show you what I mean. This one comes from John Milbank, *The Ethics of Self-Sacrifice*, 91 *FIRST THINGS* 33, 37 (1999):

Thus we live under the ethical sway of an abstract otherness, mirroring in the ethical realm the legal assumptions of the respect for the rights of the individual in general with indifference to that individual's gender, character or cultural specificity. Given the assumption of such a state, two things follow: our responsibilities tend to become unlimited because we owe our lives infinitely to every other person; and the ethical good never arrives — we can never fulfill this impossible responsibility, and no one could ever legitimately relax and enjoy the benefits of the sacrifices of others. Thus the only thing that is achieved is the continued carrying out of self obliteration. Liberals pretend that continuous self obliteration is the demand of the moral law, but in reality it is only the demand of the liberal state, which cannot put a brake upon sacrifice because it is unable to promote any positive goals or values that would define true humanity. It follows that the exaltation of pure self-sacrifice for the other is secretly the sacrifice of all individuals to the impersonality of the formal procedural law of the state and marketplace. Like the antique polis, this alone abides, this alone is eternal.

If you added to the end of this quote "thus spake Zarathustra" you would be off, but not by as much as Milbank would like us to believe. The Judge introduced me to Nietzsche. I was, of course, surprised that he did, but now I have a better understanding of what he wanted me to get from him and it was not Milbank's "arbitrariness and violence." In fact, I now keep having this feeling that there was a holy and terrible sadness when Nietzsche, at the beginning of his insanity, rushed in to save that horse

world of practical affairs, other than good lawyers, act as if that were true? Most either hide from indeterminacy or see in it a world of power.

COURIER: I can see that, Judge, but it is so hard to see work with God in so much of what lawyers do?

JUDGE: Because it is so mundane?

COURIER: Well, that, too, but I was thinking because there is so much complicity with wrong doing.

JUDGE: Well, then, I am about to lose you.

COURIER: You are?

JUDGE: Yes, I was called the other day by an attorney for a cigarette manufacturer who wanted me to consult on a case that might be brought in this jurisdiction. I could not take the case because I'm leaving practice, but I probably would have taken it on.

COURIER: That's the complicity part.

JUDGE: I hope it works both ways for you.

COURIER: What do you mean?

JUDGE: I hope you worry just as much about complicity with the good.

COURIER: I don't follow.

JUDGE: Complicity with what most would see as a good cause, prosecution of criminals, for example. It's the same issue. But I'll leave that to get back to my tobacco case. I don't think the problem of complicity can be solved by withdrawing or refusing to take the cases you find morally troubling. In fact, that attitude, blinds you to your complicity in the harm you do in those cases you do not find morally troubling. In a fallen world you cannot avoid complicity in evil. You cannot deny that the world is tragic. And . . . of course . . . this is not an excuse. It is, instead, part of the truth that allows us to judge evil correctly. The alternative to complicity is not some personal moral purity, but the hope and the patience — the hope and the patience of the conversation that is our alternative to force, if you prefer — the hope and the patience I was talking about.

COURIER: But Judge we don't need the legal conversation to know that what the cigarette manufacturers are doing is wrong.

JUDGE: Of course not! We need the legal conversation to know what to do about wrongs, all kind of wrongs, especially those done in the name of righting wrongs. Look, you are saying, in essence,

from a beating. Did I say that? Sorry. Carried away. Anyhow, take a look at TYLER T. ROBERTS, *CONTESTING SPIRITS: NIETZSCHE, AFFIRMATION, RELIGION* (1998) or, even better, PETER BERKOWITZ, *NIETZSCHE: THE ETHICS OF AN IMMORALIST* (1995).

that we know what must be done in this situation. Lawyers just don't *know* what others know must be true. This is one of the many reasons people don't like us. We await the outcome of a good legal conversation. It takes a lot of patience to do that, doesn't it? There is nothing more destructive of this conversation, and of the good it provides, than those who try to make it serve the known good. You can see that in my prosecution example, can't you. So I don't really need to pursue that, do I? And when the "true believers" pursue outcomes other than the conversation's outcome, trust in the conversation is lost, isn't it? I see that going on now all the time, don't you?

COURIER: I suppose so.

JUDGE: Lawyers are responsible for the clients they choose; morally responsible for the work they do.²¹ But not in the way many think. Not as an exercise in some personal moral harmony. The *personal* moral responsibility of lawyers is a personal responsibility for those morals carried by the practice such that, for example, the representation of those with whom we disagree is a moral act. The selection of clients based on a personal moral agreement with the justness of the cause, even "all things considered", is a form of denial of moral responsibility for the practice. And I ask you which is really more important?

COURIER: I suppose — at least in the way you have described the practice — the morals of the practice. I'm not sure. What did you mean? Lawyers not knowing what others know?

JUDGE: Do you remember Nathanael?

COURIER: Sure.

JUDGE: Well, Nathanael was willing to go see, with Philip, if "anything good could come out of Nazareth." Most people wouldn't have bothered to make the trip. Lawyers tend to be more like Nathanael when they are at their best. (*Long pause*) Courier, it is all pretty mundane. Lawyers go about seeing God's work in contractual disputes, in petty domestic squabbles, in slip and falls, and so forth.²² I've always thought that Christ's messages were much

21. LAW CLERK: Did you notice how the Courier did not ask a question here? The Judge is off on his own frolic, I think. Sometimes he does this. Sometimes he seems as if he is arguing with somebody else. It can be annoying.

22. LAW CLERK: Although, it does not look like it, what the Judge is saying here, I have learned, is connected in his mind with the complex reaction of Saint Thomas More, a man with whom the Judge is very familiar, to the sanctification of ordinary life during the Reformation. I have found a very good analysis of this that, while it does not mention More, helped me make sense of how the Judge makes sense of More's reaction. See, CHARLES TAYLOR, SOURCES OF SELF: THE MAKING OF THE

the same: do unto others, love your enemies, follow the law except when it does not make good sense to do so, and live your lives so that you will come to know what this “good sense” is. God, Christ announces with His life, is at work in these things with you, so use your Christian head. This is what is radical and transformative in the Incarnation, but we want more and this wanting more is itself the sign of our fallenness. Not evidence of some striving after the divine, not evidence of the divine spark within us waiting to burst

MODERN IDENTITY 215-229 (1989). For More, it was a theological mistake to think of monasticism, a practice he conceded was extremely corrupt in his time, as creating a hierarchy of spiritual life that devalued the ordinary, as a “slur on the spiritual standing of productive labour and family life.” *Id.* at 218. More, for all his horrible polemics against Luther — Is there any writing in all of literature more disappointing? — was in the awkward position for a good Catholic of agreeing both with Luther’s assessment of the conditions of the Church and his efforts to sanctify ordinary life (although the latter is not how Luther would have described what he was doing for he shared with More a fear of a peasant’s revolt). For More, Luther, of course, was making a horrible theological mistake, a heresy that risked the salvation of others. Sanctification of ordinary life could only come, he knew, through the ongoing tradition of the Church, a tradition maintained best through the conversation of the Council. He saw, better than most, the future that Luther offered and it frightened him to death.

More, one of the patron saints of lawyering, tried to live a life of faith mediated by the Church through his work as a lawyer, a work that he saw as deeply connected to the sacraments because all things must be. He tried, then, to live out as a lawyer his theological argument against Luther (and he did a better job of it this way than through his polemics). More believed Luther could lead us one of two ways: a Church destroying liberalism or a fierce Puritanism that substituted obedience and command for the ongoing work with God that is the continuing creation of the world and he wanted to live his life in opposition to both.

I do not think that More would have been troubled at all, and might even have agreed, with Mill’s criticism of the toll on human lives of Calvinists’ efforts to make strict obedience a central virtue. Like modern fundamentalists, these Calvinists thought that the rigidity of command could take over the role of the living tradition in maintaining the strictures of Christianity and, in so thinking, they tried to substitute dead words for a living faith. Or so, I think More would have thought and so, I think, the Judge would as well. My apologies to you if this footnote goes too far afield from the dialogue or if it does not interest you. Prompted by the Judge’s interest in him, I have read a lot about More recently and I wanted to get some use out of it. There are a lot of books on More these days, but I want to warn you that most people see in More whatever they want to see and what they want to see is often their own reflection. Can you imagine that? You would be truly amazed at the odd uses people have made of More’s life. Among the works I have read, the best article I found for the Judge’s purposes, *the one I am going to copy for him because it is so close to what he is saying here*, is Stanley Hauerwas & Thomas Shaffer, *Hope Faces Power: Thomas More and the King of England*, in STANLEY HAUERWAS, CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD AND LIVING IN BETWEEN 199-219 (1988). This is true despite the fact that the authors rely almost entirely upon the More of Bolt’s A MAN FOR ALL SEASONS, a More that, to my reading, bears only a resemblance to the “real” More. The Judge will probably want to be more careful with the facts of More’s life.

into self-consuming flame. The opposite, I think. It is yet another way of avoiding the God in whom we would see our own responsibility for the good. Surely there is for all Christians a banality of goodness that we deny at our peril. (*Pauses*) But I fight a losing battle in saying this, Courier, because everyone wants more. Doesn't help to say, I suppose, that there is a form of sainthood possible within these ordinary lawyer lives.²³

COURIER: And an understanding of evil as well?

JUDGE: Yes, a distinctive way of seeing a separation from God in those who seek to take themselves out of history, out of co-Creation, and out of responsibility. We can see a demonic in our institutions, including our churches. We can see a politics based on the motivations of a quest for the security of simplicity, of intolerance of ambiguity and complexity, of avoiding the need to wrestle with the world so that it reflects our own work. A politics of impatience and fear. Notice how the practice of law run counter to these practices, proceeding, as it does, in hope and with faith in the potential redemption of the fallen. Lawyering resist those who do not keep talking things out, who do not see in the openings provided by the complexity of our minds, the openings through which God's grace

23. LAW CLERK: Early on, after the Judge told the Courier about McClendon, I thought I should read him. In one section of the book the Judge refers to, McClendon relies upon Guardini to recall something similar to what the Judge is saying in the text here:

So Guardini turns to speak of a "new kind of saint," who can embody sanity in this generation. In effect, his book is an evangelistic summons to take up the way of practical holiness in daily life. This way, however, is not nowadays to be that of detachment or asceticism; it is to be fulfilled by a self-abandoning obedience to God's directives just as these are mediated by the secular situations in which one finds oneself. The saint's way is, therefore, not to be extraordinary; no one will easily identify a modern saint. 'Their surrounds are standardized: they work in laboratories, in factories, in administrative agencies . . . lives in homes which are often the same to the slightest detail . . . dress the same . . . are subject to uniform 'packages' of education, entertainment, legislation. In such an environment, how could they lead a Christian way of life which had to express itself in extraordinary religious practices and experiences? They would have to become strangers to their own ways of existence; they themselves would have to recognize their lives as absurdities.' Nevertheless, there is a particular saintly task for today, and that is the task of changing or reshaping the world God has entrusted to human beings. For even today, "man is still answerable for the world, and the world is entrusted to man . . . His mission is not a 'profane' task paralleling the religious one. It is of itself and as such religious or rather Christian. In the final analysis there is one obedience, one service which man owes God in his faith and in his work."

McClendon, *supra* note 18, at 157 (citations omitted.) I cannot get over how good that is. I can see why the Judge recommended it.

can come. Lawyers are, at their best, people trained to live in Biblical times. But it is hard to accept. Hard to see it because it's not romantic. It is anti-romantic, if that's a word, and romanticism is how we have come to define our personal selves. (Pauses. Lighter now.) But enough blathering . . .

COURIER: Blathering, Judge? I don't . . .

JUDGE: (*Interrupting*) Someone is going to want to cut my head off one of these days for trying to be a good lawyer, trying to turn disputes about power into conversations about words, trying to hold on to the traditions in which we come to know who we really are. There you have it. (*Smiles*) I have caught myself romanticizing. (*Gets up from his chair slowly*) Haven't you had enough from this Christian lawyer? My mundane advice to you is that if you want to be a Christian lawyer do the things Christians have done to remain Christians for two thousand years. You know the rest. Probably better than I do. Isn't much, is it?

COURIER: No, I think it is . . . uh . . .

JUDGE: (*Interrupting*) Tell you what. Let's stay in touch. Here's my card, let me write in the new phone number.

COURIER: Thank you, Judge. You are

JUDGE: (*Interrupting again as if uncomfortable*) No need; enjoyed it. And Courier?

COURIER: Yes.

JUDGE: No more Tyndale. Go find a good clinician.

* * *

The Courier left quickly after shaking the Judge's hands, took the elevator down to the parking garage, and drove out into the sparse late night city traffic towards the interstate that would take him back to his apartment near the Law School. The radio was on when he started the car, tuned to the college station as it usually was, but he didn't notice it. As he was approaching his exit, the words of the song being played slowly came to his attention: ". . . *I've seen your flag on the marbled arch, but love is not a victory march; it's a cold and it's a broken Hallelujah . . .*" and he recognized the young man's voice . . . "*It's not a cry that you hear at night; it's not somebody who's seen the light; it's a cold and it's a broken Hallelujah . . .*" and he wondered if the miracled world was not much more romantic than the good judge knew.²⁴

24. LAW CLERK: He was listening to Leonard Cohen's song, *Hallelujah*, as performed by the late Jeff Buckley. There are numerous versions of this song. I only found the quoted verses in the version sung by Buckley. Okay, that's it for me. Thanks for reading.

