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Cover Page Footnote

Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; supervising attorney, Notre Dame Legal Aid Clinic. I am grateful for the assistance of Joseph Bauer, Samuel W. Calhoun, Linda Harrington, Russell Pearce, Robert E. Rodes, Jr., Nancy J. Shaffer, Jay Tidmarsh, and John Howard Yoder.

FAITH TENDS TO SUBVERT LEGAL ORDER

Thomas L. Shaffer*

We are an incarnate people . . . a people of inculturation. Our faith lives in and through the cultures we inhabit. . . . Inculturation is not the same as “acculturation.” To become acculturated is to capitulate to the wisdom, myths, and reality of a culture. It reduces the faith to a . . . function of ethnicity or ideology. . . . Faith must always resist acculturation, or it will have nothing to say to the world or to the culture.

John F. Kavanaugh¹

TWO old friends and colleagues died in the spring of 1997. Both share with me a Baptist boyhood and a Roman Catholic middle age. Both showed me that the relevance of religion to a lawyer’s work is best approached with believers’ irony.

Frank Booker, descendant of Cherokee Indians, Missouri farmers, railroaders, and Baptist ministers, taught law at Stetson and then Notre Dame, with a style all his own and with a steady eye on how important the law is. After his funeral, one of his students remembered for me a day in Frank’s first-year torts class. They were several weeks into law school and were full of the majesty of Cardozo’s *Palsgraf* opinion—hell-bent on acculturation into the law. Frank summoned up his preacher’s voice for them: “Remember,” he said, “the common law is no friend of the common man.”

Bill Lewers was a Holy Cross priest. He taught at Kentucky and Illinois before he became a Roman Catholic and found his way to Notre Dame. Somebody once asked him why he became a Catholic. He said he came in because he believed in the social teachings of the Church. And then, he said, he looked around and found out he was the only one who did.

The honor I owe my friends moves me to what I hope is a radical point for this project. The point is this: Faith tends to subvert legal order. Or, as Bill Lewers would say—it doesn’t much, but it should.

* * *

I need to make some distinctions that will recognize the importance in my catholic tradition of the medieval Scholastics: “Seldom affirm,” they said, “never deny, always *distinguish*.”

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1. John F. Kavanaugh, S.J., *The Word Encountered* 68 (1996).

First distinction: Between the government's problem with religion and religion's problem with the government. I take it our business together is religion's problem with the government. That is not a radical point, but it might warn the church-state types that they may have come to the wrong meeting.

Second distinction: Between American civil religion and the faith of Jews and Christians—that is, between what religious people do when they put the stars and stripes next to the altar or pulpit, as distinguished from what they do when they worship the God of Moses, Mohammed, and Jesus. That is a radical point only if you are inclined to worship idols.²

To get, then, to the radical part: First, an image and an example. A meeting of protesting Christians in Zurich in October, 1523.

The Protestant Reformation was underway there. A priest named Huldryck Zwingli was commissioned by the city fathers to preach and to preside at religious disputations. He gathered a group of pastors and theologians to discuss the difference between the Lord's supper and the mass. They came to some conclusions, and Zwingli said he would submit their conclusions for implementation by the city fathers.

A priest named Simon Stumpf objected. He said seeking approval of the law was contrary to scripture. He cited the way the first Jewish Christians decided what to do, in the Acts of the Apostles, and said: "[T]he decision has already been made, the Spirit of God [in the congregation] decides."³ He accepted the consensus of the circumstantial congregation of Christians in Zurich. He rebelled in saying that turning to government was not the way to work out the implications of faith. His position was subversive of legal order—of Catholic Christendom, as well as the order of the mainline Reformation.⁴

Stumpf, Conrad Grebel, and the other radical reformers of Zurich concluded that Christianity had been wrong since the Fourth century of the Common Era, from and after the conversion to Christianity of the Emperor Constantine. The mistake of the Fourth Century Christians, and of Lutherans, Calvinists, and Zwinglians in the sixteenth, was to turn the church over to the government.⁵

2. My daughter Mary and I attempted to describe this distinction biblically in the last chapter of our book *American Lawyers and Their Communities* (1991). We suggest there what I depend on here, in making this second distinction—that is, that, for modern "first-world" people, idolatry is not the worship of trees and little dolls, but of what we care about. *Id.* at 209-17. As Walter Brueggemann says: "It is a mark of discernment and maturity to strip life down to one compelling loyalty, to be freed of all the others that turn out to be idolatrous." Walter Brueggemann, *The Threat of Life: Sermons on Pain and Weakness* 92 (1996).

3. William R. Estep, *The Anabaptist Story* 12 (1984).

4. *Id.* at 8-17.

5. *Id.* My sources, in addition to Estep, *supra* note 3, are J. Denny Weaver, *Becoming Anabaptist* (1987); John Howard Yoder, *Gospel Renewal and the Roots of Nonviolence*, *Faith and Freedom*, Dec. 1995, at 5, along with other material from to Yoder's work, cited *infra*; J. Lawrence Burkholder, *Nonresistance, Nonviolent Resist-*

The radical reformers proposed a free church of adult members, and they were pacifists. They rejected infant baptism, violence, and what they called "the sword." Rejection of infant baptism subverted the legal order of medieval Christendom and of the Reformation, in both of which all subjects of the state were Christians and all Christians were subjects of the state.⁶ Rejection of the sword subverted a fundamental principle of almost all Christians then and ever since, and of Jews since the Enlightenment: that the faithful should be willing to kill for legal order. (Some radical reformers were put to death for saying that capital punishment was wrong.⁷)

If there was any doubt about how subversive those first Anabaptists were seen to be, it was removed by the persistent slaughter of them by the establishment—Catholic princes in some places, and, in Switzerland and elsewhere, by "magisterial" Protestants. It has been hard for me, tamed as I am by Enlightenment tolerance, to understand the murderous rage of 16th Century mainline Christians against the radical reformers. The persistent and sadistic slaughter of those who peacefully undertook to revive a "believers church" astonishes me. I

ance, and Power, in Kingdom, Cross, and Community 131 (John Richard Burkholder & Calvin Redekop eds., 1976); and Ronald J. Sider, *Christian Ethics and the Good News of the Kingdom: Doing Christian Ethics in an Eschatological Key*, in Terry L. Brensinger & E. Morris Sider, *Within the Perfection of Christ* 13 (1990).

6. The late Lutheran theologian Helmut Thielicke implied this as the politics of the "magisterial" Reformation, and, in retrospect, had what I take to be mainline Lutheran doubts about it: "Perhaps, as we think back on the past millennium, we never wanted anything like a Christian culture and Christian states in which everybody was automatically dumped into the big sack of Christendom and included as a matter of course among the possessors of baptismal certificates simply by being born and by the operation of ecclesiastical custom, even though they had no personal relationship whatever to Jesus of Nazareth. And perhaps we owe it to the goodness of God that all this crumbled away in our hands and continues to do so." Christ and the Meaning of Life 61 (John W. Doberstein trans. 1962); see also David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword*, 47 *J. Legal Educ.* 28, 29-31 (1997).

There is fruitful disagreement between Christian theologians who regard the legal enterprise as alien (although not always hostile) to their communal loyalties, and those who regard the legal enterprise as capable of significant change—between, that is, the theology of the believers' church, the descendants of the sixteenth century Anabaptists, and both Marxist Christian theory and the theology of liberation.

John Howard Yoder focused the disagreement on the primordial creation (or calling) of a believing community:

The form of liberation in the biblical witness . . . the creation of a confessing community which is viable without or against the force of the state, and does not glorify that power structure even by the effort to topple it. The *content* of liberation in the biblical witness is not the 'nation-state' or the 'class-state' brotherhood engineered after the take-over but the covenantal peoplehood already existing because God has given it, and sure of its future because of the Name ('identity') of God, not because of a coming campaign. . . . [P]ilgrim peoplehood is projected by the Bible as the shape of salvation in any age.

John Howard Yoder, *Liberating Comes First: Exodus Precedes Sinai* 9-10 (1972).

7. Estep, *supra* note 3, at 47.

won't describe the killing. Believe me, it was as hate-filled and cruel as 20th Century examples we might think of.⁸

I suppose there is an analogy here, in the 20th Century, to the non-violent religious witness of Gandhi and Dr. King. The guns of the British colonial rulers in India, and the fire hoses and police dogs in Birmingham, were responses to Gandhi's and King's subversion of legal order.⁹ And there, as in 16th Century Europe, the response of those who manage legal order was vigorous and ugly.

8. Smolin, *supra* note 6, at 31-32, describes some of it. My friend and teacher, Robert E. Rodes, Jr., points out that some of these persecutors probably regarded the Anabaptists as child abusers: The fate of an infant who died in infancy, unbaptized, was limbo in Catholic theology, hell in Protestant theology. But Rodes is enough of a liberation theologian to see that rationale as supportive of an ideology of oppression. The Anabaptists at the time also saw it that way. Melchior Rinck, in a letter written circa 1530, said, "[B]oth the work-saints [Roman Catholics] and the scribes [magisterial reformers] strive so mightily concerning infant baptism . . . not . . . out of love for the children, for they are precisely the ones who consume the bread that belongs to the children and to the poor orphans, and fatten themselves on it . . ." Translated and quoted in John Howard Yoder, *The Legacy of Michael Sattler* 136 (1973).

9. Professor Eugene W. Harper of the Fordham University Law Faculty pointed out that Dr. King invoked an argument against unjust law that resembled that of St. Thomas Aquinas, which is to say that Dr. King's Christian witness was not Anabaptist in the sense I am describing here. That would be true as well, I suppose, of Gandhi. I invoke both as analogues, to make the argument that their exercise of faith tended to subvert legal order. It would be interesting to explore the differences they would have had with the Anabaptists on the moral authority of legal order, but that is not my purpose here. It makes my point to say that the *tendency* of religious witness in all three cases—the *effect* of it—the way it was seen by the managers of the law—was subversion of legal order.

Religious witness subverts not only legal order, but also the order of organized religion to the extent organized religion supports legal order. A recent minor theme in the resurgence of interest in religion in America has been religious judgment on the Roman Catholic Church's failure to maintain a clear witness against social injustice. Such a passionate servant of fairness as Len Deighton's Bernie Samson is thus moved to say, "[E]very dedicated Catholic I know says he's lapsed." Len Deighton, *Hope* 258 (1995). Recent instances that echo for me the ironic observation of my late friend Bill Lewers: Rembert G. Weakland, "*Economic Justice for All*" *Ten Years Later*, *America*, Mar. 22, 1997, at 8; Denis Murphy, *Wanted: Both Democracy and Theology of Liberation*, *America*, Mar. 29, 1997, at 4; Moises Sandoval, *An "Old Prophet" Rattles the Status Quo*, *Nat'l Cath. Rep.*, Dec. 27, 1996, at 18 (referring to Archbishop Patricio Flores).

It is possible to lay the neglect of social justice among Christians at the door of academic theology. Luke Timothy Johnson, a respected academic theologian, thus speaks of his discipline as being "less about God than about the politics of identity or linguistic halls of mirrors. . . . Even those who seek to retrieve the theological enterprise find themselves in the infinite regress apparently demanded by academic rigor." Luke Timothy Johnson, *Explaining God Away*, *Commonweal*, Dec. 20, 1996, at 18. (Thank God that no such observation could be made about legal academics.) My friend and teacher John Howard Yoder would, I think, join Professor Johnson more as an ally than a critic. See, for examples of Yoder's steady argument, within academic theology, for what Johnson seems to find missing, *The Christian Witness to the State* (1964), and *Nevertheless: The Varieties of Religious Pacifism* (1971). Yoder's most systematic and relatively popular works are *The Politics of Jesus* (1972) (2d ed. 1994), and *The Priestly Kingdom* (1984).

The believers' church sought to follow Jesus by not being violent. That tended to subvert legal order not because the believers church *aimed at* subversion but because the law would not let them go. They offended the law when they refused civil offices that involved force. They offended in theory when they said they could not *obey* the state but were willing to *be subject* to it. That is, they rejected its ideology but did not resist either its claim to power or its lethal force.

They did not resist its claim to power. They did not, that is, oppose the law; their subversive effect was in not accepting the ideology of the law, the *rule of law*. When legal rules offended their biblical faith, their position was either to disobey and be killed, or to be subject to what the government wanted. On the one hand, they did not enroll their children in Christendom. On the other hand, they paid their taxes. Such a novel distinction meant that they had to decide, among themselves, whether they were going to support what the government was up to, or ignore it (when they could), or go along with it. It proposed a novel political theology, and, even more radically, with Samuel Stumpf, it proposed a procedure for giving direction to its political theology.

A friend of mine, a legal-aid lawyer and a Mennonite, put it this way: "There *are* some things we do." She "seeks the peace of the city" in which the Lord has put her, to quote the prophet Jeremiah (29:7), and that opens to her talent and energy all sorts of civic endeavor, from political reform to schools to protecting the environment. It gives her something to do *as a lawyer*, as a *legal-aid lawyer* in this case.¹⁰

10. Her believers' church does not suppose, to quote Robert E. Rodes, Jr., that it is "an . . . exclusive location of liberating events." Robert E. Rodes, Jr., *Law and Liberation* 4 (1986). Rosemary Radford Ruether, suggests that "seeking the peace of the city," even as a lawyer, is not limited to the inoffensive but can be prophetic—both in its confrontation of the law and in its confrontation of modern organized religion:

The prophetic paradigm not only criticized unjust and oppressive power but also criticized the use of religion to sacralize such oppressive power. This shift in the social location of religion is the root of the Marxist critique of religion. Both the prophets and the gospels decry the use of law or ritual . . . without regard to social concern for justice and mercy. . . . It is a self-criticism that aims at the renewal of the ethical content of religious practice.

Rosemary Radford Ruether, *Feminist Spirituality and Historical Religion*, Harvard Divinity Bulletin, Mar. 1986, at 5,

The mainline church preserves a theology (an ecclesiology) that limits what it is willing to do, so that "seeking the peace of the city" is not in theory (whatever it is in practice in modern nation-states) sub-cultural. In the Pastoral Constitution on the Church in the Modern World, for example: "[E]arthly progress must be carefully distinguished from the growth of Christ's kingdom, to the extent that the former can contribute to the better ordering of human society, it is of vital concern to the Kingdom of God." Second Vatican Council, Pastoral Constitution on the Church in the Modern World, at para. 39 (1965). My colleague Brian E. Daley, S.J., speaks thus of Christians "bringing justice, mutual reverence, and peaceful unity to the world." Brian E. Daley, *Judgment Day or Jubilee? Approaching the Millennium, America*,

Most of the modern descendants of the radical reformers are separate because they are separated by modern cultures of deviance. They are pushed aside. They are nonetheless “loving critics of the status quo,” in Ronald Sider’s characterization. They “live as a new model in the very heart of the perverted culture, pointing by their words and life to God’s alternative . . . a visible model of shalom far ahead of surrounding society in its concrete manifestation of right relationships among people.”¹¹

Rabbi Lawrence Kushner provides a parallel from modern Judaism, an example of shalom ahead of the surrounding society, in his amiable book about the patriarch Jacob, whom the Lord named Israel: A member of Rabbi Kushner’s congregation in Massachusetts, an emigrant from the Soviet Union, told him about what the members of the congregation in Leningrad used to do on *Simchat Torah*. They danced, not in the synagogue, as is customary in Massachusetts, but in the street in front of the synagogue—so that the law would see them and impose legal sanctions on them. “So you see,” he said, “to dance on such an occasion, this is a different kind of dance.”¹² The brave Jews in Leningrad were like the radical reformers in Zurich, who openly baptized adults.¹³

May 31, 1997, at 20. He concludes a careful discussion of Jewish and Christian apocalypticism: “Jesus is struggling with us, promising to come again in glory, but calling us to share now in his labor of loving and healing this fragile and sinful world.” *Id.* at 21. The critical question, then, as I see it, and as I think my friend the Mennonite legal-aid lawyer would, is the forum and the process for deciding what Christians are called to do at particular times and places in a nation’s history.

11. Sider, *supra* note 5, at 27-28. Sider identifies the prophetic witness of the believers’ church, which is to be distinguished from its “sectarian” attempt to preserve its integrity within a legal order it regards as legitimate—even divinely decreed—but alien to its purposes. A secular analogue that might help illustrate the latter half of that distinction is the way women in Victorian fiction coped in unfortunate marriages. Consider, for example, a comparison of the principal female characters in George Eliot’s *Middlemarch*: Rosamond consents to male domination and pretends in a devious way to obey her husband, but she is not subordinate. The more admirable wife in the story, Dorothea Brooke, is subordinate to her husband Causabon, and to the conventions of Victorian marriage, but retains her integrity and, within her integrity, develops the virtues subordination requires. The effect of her practice of these virtues, as it turns out, is to subvert Causabon’s vain project. George Eliot, *Middlemarch* (Mod. Libr. ed. 1994).

12. Lawrence Kushner, *God Was in This Place & I, I Did Not Know* 91-92 (1991).

13. The theological beginning of Anabaptism is probably the Schleithem declaration of 1527; that was also a religious (ecclesiological) beginning, in that, after Schleithem, the believers’ church was openly separate—with separate congregations and separate pastors. Burkholder and Weaver fix the religious beginning 22 years earlier, on January 21, 1525. The council in Zurich had ordered the baptism of all babies within eight days of birth. The radical reformers promptly held a meeting—relatively public, apparently—at which a group of adults were, one by one, baptized. This ceremony took place in the home of Anna Mantz; her son George was the first Anabaptist martyr—killed by public authority, in her presence, shortly after and because of the baptisms. Burkholder, *supra* note 5, at 36, 50; Weaver, *supra* note 5, at 47. The radical reformers, as part of the doctrine of discipleship (following Jesus’s example), taught that such suffering was a consequence of faith—even a test of it—notably

These subversive actions, subversive because of the law's reaction to them, are communal; their meaning is communal. "Only God's relationship to Israel gives significance to our lives, and only when fear is rooted in significance is it worthy of our human energy,"¹⁴ Rabbi David R. Blumenthal says. "Meaning is a function of *choseness*, not an assumption of personal judgment."¹⁵

"[T]he primordial ethical obligation," as John Howard Yoder put it in reference to the primitive church, "is the cohesion of the believing community in the face of the pressures working against its identity. . . . [T]he claim to be the only bearers of truth, which is ecumenical bad manners in our pluralistic and tolerant setting, is a simple fact when (in your eyes) your survival is the only way for the honor of the only true God to be upheld in your corner."¹⁶

The Anabaptists of Zurich are an example from history of the relevance of religion to a lawyer's work. I commend it to you, if not for emulation, then, because, as Holmes said of Mephistopheles, there is something to be said for the intellect that is not humbugged by a phrase. It keeps the green scum off the pond, he said.

* * *

The Bible provides a second way. If you open the Bible at random ten times, you will find that half the texts you see say that God is a God of justice, that He hates injustice, and that He hears the cry of those who suffer from the injustice of the law. The Bible's emphasis on justice thus tends to subvert legal order. This radical meaning of biblical justice has been tamed by institutional religion, because it is too drastic to support a comfortable partnership with legal order. Radical meaning here is also far beyond what democratic liberal politics and "the veil of ignorance" have come up with, by way of considering, for example, the situation of the underclass in the legal order of bureaucratic capitalism.

Biblical justice has not been useful for, say, welfare reform. In both liberal and religious sentiment, the conventional meaning of biblical justice has been reduced to debilitating safety nets or admonitions to charity, to calls for points of light—which leads to Boy Scout food drives on Sunday mornings and to social and economic arrangements that oppress the poor. Those things are what the ruling class in America, which includes all of those who benefit from the rule of

because such actions as the forming of new congregations, and baptizing adults, invited the scrutiny of the law.

14. David R. Blumenthal, *God at the Center* 19 (1988).

15. *Id.*

16. John Howard Yoder, *Ethics and Eschatology*, 6 *Ex Auditu* 120, 123 (1990). A similar argument, from a somewhat more mainline Protestant perspective, is in James Wm. McClendon, Jr., *Ethics: Systematic Theology*, ch. 8 (1986).

law—all of those for whom law is ideology—believe, and want to believe.

But the Bible (Psalms 146:7-9, N.E.B.) says,

The Lord feeds the hungry and sets the prisoner free.

The Lord . . . straightens backs which are bent. . . .

The Lord gives heart to the orphan and widow but turns the course of the [strong] to their ruin.

Psalms Nine and Ten express this in a poem written by (or for) the oppressed: “[F]or thou hast upheld my right and my cause, seated on thy throne, thou righteous judge” (*Psalms* 9:4, N.E.B.). In this biblical poetry, someone whose back is bent speaks for herself. She characterizes the ideology of her oppressors—noting how the oppressors recognize God but put Him at a distance, so that He does not interfere with their arrangements, so that justice for the oppressed is pushed into the afterlife. The modern Calvinist theologian Walter Brueggemann gives this as the meaning of those Psalms:

[T]he powerful control the social discourse of the community, that is, define the terms of social communication, and thereby manipulate social power and shape social relations to their own advantage.¹⁷

“[R]aw, material power inevitably depends on the power of ideology,”¹⁸ he says. But in the Psalms, the Lord is a *third* voice in a conflicted political argument; God takes sides; He disrupts political and legal order. He confronts legal ideology, which protects the wealth of the powerful and provides ease to the consciences of lawyers. Legal ideology, then and now, is as characteristic of ecclesiastical domination as it is of domination of the poor by the government, and of the government by the comfortable: The Lord confronts religion, because religion is afraid to confront the rule of law.

17. Walter Brueggemann, *Psalms 9-10: A Counter to Conventional Social Reality*, in *The Psalms: The Life of Faith* 227, nn.21 & 22 (Patrick D. Miller ed., 1995). I mention lawyers here not as an aside but as a clear example of the ruling class in bureaucratic capitalism. The organized American Bar has, of late, come to announce an ideology of “professionalism” as its way to keep American lawyers from not being accountable to the wider society: Professionalism, to the extent it has meaning beyond that claim, is defended, as are other elements of the bureaucratic ruling class, by the appeal to expertise. “Experts are addicts,” though, as LeCarre’s Gerald Westerby put it. “They are servants of whatever system hires them. They perpetuate it. When we are tortured, we shall be tortured by experts. When we are hanged, experts will hang us When the world is destroyed, it will be destroyed not by its madmen but by the sanity of its experts.” John LeCarre, *Russia House* 207 (1989). “These are the sort of bureaucratic pen-pushers,” Bernie Samson said, “who think a peace treaty is more important than a peace.” Deighton, *supra* note 9, at 269. William May gives the point ethical focus in his *Notes on the Ethics of Doctors and Lawyers* (1977). My friend and teacher Bob Rodes remembers a talk at Notre Dame in which Father Gustavo Gutierrez characterized such piety as, “Our Father Who art in heaven—stay there!”

18. *Id.*

The rule of law is a dogma in American civil religion, but American civil religion did not invent it. Brueggemann's colleague at the Presbyterian seminary in Georgia, Justo Gonzalez, shows how it began in the Christian church as early as the Fourth Century, when texts such as these Psalms were translated for Christians from prophetic witness to an admonition to the poor—when the political power of such scriptural texts was tamed by theologians. The moral problem posed by wealth among the followers of Jesus thus became a problem not for the wealthy, *but for the poor*, who were told by their Christian teachers to accept their lot as the will of God: "Through this teaching the burden of conscience tends to . . . be placed increasingly on those whose material needs are so pressing that [the] preoccupation with them is nearly inescapable . . . [T]hat gentlemen oppress the poor . . . [and] manifest their [own] concern with material things . . . is less important."¹⁹

The Bible, read *politically*, tends to subvert legal order. For another tamed example, familiar to Christians, consider St. Paul's use of "law" in the Letter to the Church in Rome. Christian theologians have diluted St. Paul's meaning and encouraged anti-semitism by teaching that "law" there refers only to contemporary Jewish law—to dietary rules and circumcision. Suppose instead that he meant the law you and I teach and write about. Then, as Mexican theologian Jose Porfirio Miranda puts it, "Sin . . . has become structured into human civilization itself, whose most characteristic and quintessential expression is the law."²⁰ Our law, American law-school law.

19. Justo L. Gonzalez, *Faith and Wealth* 230 (1990). I have lately undertaken to represent debtors and tenants in the systems American law maintains for summary eviction and the garnishment of the wages of the working poor. I have learned not to doubt the contemporary force of Gonzalez's characterization.

It is to the advantage of the ruling class to create the principle that people are born into a legal order as well as into a culture, even though, in fact:

The "state" of the jurists is linked, despite its "ideological nature," to an objective reality, just as the most fantastic dream is still based on reality. . . . [The ruling class] has never . . . lost sight of the fact that class society is . . . the battlefield of a bitter class war, where the machinery of state represents a very powerful weapon. On this battlefield, relations do not appear to be in the least . . . a minimal limitation of the freedom of the personality indispensable to human coexistence.

Evgeny B. Pashukanis, *Law and Marxism: A General Theory* 148-50 (1929) (Chris Arthur ed., Barbara Einhorn trans., Pluto Press 1989); *see also* Catharine A. MacKinnon, "*Freedom from Unreal Loyalties*": *On Fidelity in Constitutional Interpretation*, 65 *Fordham L. Rev.* 1773 (1997) (arguing that fidelity to American constitutional law has meaning only when such an assumption is examined and in some real sense found to be valid).

20. Jose Porfirio Miranda, *Marx and the Bible: A Critique of the Philosophy of Oppression* 204-05 (John Eagleson trans., 1974). According to Miranda, the object is "to break definitively with all law and with all the human civilization that is supported by the law." *Id.*; *see also* Hugh Collins, *Marxism and Law* (1982); Charles C. West, *Marxist Ethics*, in *The Westminster Dictionary of Christian Ethics* 368 (James F. Childress & John Macquarrie eds., 1986).

In a similar way, in Psalms 9 and 10, the Lord takes the side of the oppressed and turns the conflicted conversations Israel heard then, and we hear now, under such deceitful labels as “welfare reform,” into *cases in court* which the Lord Himself judges. Brueggemann reads these Psalms and imagines law as civil procedure: “[I]n this courtroom under the governance of [the Lord] . . . the usual power relations between the strong and the weak are interrupted, transformed, and rectified, so that the weak and marginal speak here as they are permitted to speak nowhere else.”²¹ On to the merits, the Lord gives legal judgment and applies *stare decisis*: “I will tell the story of [the Lord’s] marvelous acts. . . . For the Avenger of blood has remembered men’s desire, and has not forgotten the cry of the poor” (*Psalms* 9:1, 12).²²

When I read Brueggemann’s clever use of law-school arcana, I thought of a recent survey of Indiana courts: The average time spent on a case in small-claims court, which is where almost all summary evictions and wage garnishments are obtained, is twelve minutes. That’s for cases the judges hear. If default judgments are considered, the time is closer to twelve seconds—or maybe no time at all: In my county, default judgments and wage garnishments are ordered without a judge even being in the building.

The theological situation here—the relevance of religion for a lawyer’s work—resembles Marxist analysis—or, if you prefer, the analysis of liberation theology.²³ The Psalms describe a society in which false consciousness and the hegemonic ideology of the dominant class customarily and conventionally prevail. Class warfare is described, there and *for us*, in a voice otherwise suppressed in politics and the law, a revolutionary voice that describes victory for the oppressed: “Thou hast heard the lament of the humble, O Lord, and art attentive to their heart’s desire, bringing justice to the orphan and downtrodden that fear may never drive [the poor] from their homes again” (*Psalms* 10:17-18).

Radical religion recognizes what the Marxists call alienation, the effect of oppression by the economically powerful, and a consequence of the rule of law as the ideology of the oppressor. The person at the bottom is denied identity: She exists for the purposes of others. Avivah Gottlieb Zornberg quotes to this effect a medieval Jewish sage [who quoted phrases from the Midrash on Genesis 29:11]: “The poor [person] lacks an essential autonomy; he depends on others for his sense of life. There is a ‘fountain of life’ that should flow from the

21. Brueggemann, *supra* note 17, at 220.

22. *See id.* at 221 (interpreting the quoted verse).

23. I emphasize Marxist *analysis*. It is difficult for a believer to follow the other half of Marxist ideology—its teleology, its theory of how things will end up. Jews and Christians do not envision a classless social order as the goal of their faith.

self, unconditioned by the will of others. Without this organic independence, a person is 'as though dead.'"²⁴

Such strains of biblical anger no doubt explain much of what Jews mean when they talk about justice. Albert Vorspan referred to "the Jewish passion for justice" and celebrated Louis D. Brandeis as "a giant of justice" in America.²⁵ He meant something more scriptural than the veil of ignorance—something more scriptural than democratic liberal equality.

Maimonides gives Zornberg's point about identity a poignant and melancholy symbol: Jewish law attempts to restore lost identity when the pauper is not only accounted dead, but is dead in fact: Jews bury their dead, according to Maimonides, in an inexpensive shroud and cover their faces—in both cases in order not to shame the poor "whose faces," he said, "have turned livid as a result of undernourishment."²⁶

* * *

The relevance of religion to the work of a lawyer, as subversive politics, then, is a challenge to the comfort of lawyers. The story of liberation, from Exodus through the presence of the black church in America, and the meaning of our sacred scripture say this to us: Either be serious when you say (or sing) that our God is a God of justice, that the Lord hears the cry of the poor, or don't bother to suppose that religion has relevance for what lawyers do: "We have no choice but to let our theology function in relation to socioeconomic reality and power," Brueggemann says.²⁷ "To deny this linkage is to engage in self-deception. It is to imagine that when we interpret we can preclude 'advocacy.'"²⁸ He means the advocacy that tends to subvert legal order.

Advocacy, in these religious readings, even when it does not mean to, tends to subvert legal order.

24. Avivah Gottlieb Zornberg, *Genesis: The Beginning of Desire* 203 (1995).

25. Albert Vorspan, *Giants of Justice* (1960).

26. III *The Code of Maimonides (Mishneh Torah)* 173-74 (1949).

27. Brueggemann, *supra* note 17, at 233 n.32.

28. *Id.*

Notes & Observations