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FAITH AND THE LIBERAL LEGAL ORDER: AN APPRECIATIVE RESPONSE TO SHAFFER AND THE SYMBOLISM WORKSHOP

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WHEN lawyers of faith gather together, they tend to long for some version of the *fides* of the High Middle Ages. *Fides* was that single word which once meant, simultaneously, "belief" in God, "fidelity" in marriage, and "fealty" within the legal, economic, and political hierarchy.[1] At least at the level of aspiration, all those relationships, now so disparate, were once joined by *fides* into a single harmonious whole within which, ontologically, human virtues and human laws were linked to the laws of nature and nature's God.[2] While we cannot return to the *fides* a bygone era, nor to the epistemology which made it possible, we seem nevertheless to yearn for at least some sense of natural congruence between the public life of the law and a life of faith, which today's dominant culture so relentlessly labels private.

That yearning was evident at the Conference. Nevertheless, Tom Shaffer's keynote speech[3] contained a potentially jarring message of radical disruption and discontinuity, not of harmonious, integrated wholeness. His proposed model for our reflection and imitation was not the integrative legalism of the High Middle Ages, but the subversively nonviolent Anabaptist communities of the radical Reformation.[4] The Anabaptists, of course, never posed the question now so typical of modern liberal religious *pathos*: "How can we show that we are relevant to the legal and political order?" Nor did they aggressively pursue the opportunity to wield coercive legal and political power, in the manner of so many Christians since the reign of Constantine. Both liberal *pathos* and political aggression presuppose the natural inevitability of the violently coercive legal order.

The Anabaptists were (peacefully) disruptive because they rejected precisely that presupposition. The radical wing of the Reformation understood—as Shaffer insisted—that when viewed through the lens of faith, the coercive nature of all law backed by the power of the state

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1. *See* John T. Noonan, Jr., The Believer and the Powers That Are 36 (1987).

2. *See* Steven Ozment, The Age of Reform 1250-1550, at 22-32 (1980).

3. Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 Ford. L. Rev. 1089 (1998).

4. *Id.* at 1090-96.

necessarily presents an initial problem of radical discontinuity.[5] Lawyers, accustomed to the assumed legitimacy of the modern nation state, start from the opposite vantage point—that of the legalist for whom religion poses a "problem," which must be handled within the framework of constitutional law. Thus, even lawyers of faith might find themselves thinking of the American legal and political order as their analytic starting point: One's own faith then becomes the problem. Shaffer reminded us that when faith forms the initial premise, the lens through which the world is viewed, then the coercive legal order itself becomes the problem.[6]

Moreover, by insisting that the scripture of the Abrahamic faiths holds out an alternative model and promise of uncoerced *shalom*, Shaffer attacked the foundational premise of legal analysis itself, the premise of an inevitable conflict which can be contained only by way of coerced legal mediation.[7] The radically subversive communal practices of the Anabaptists were radical and subversive because the Anabaptists denied that premise, and constructed whole communities where the learned practice of forgiveness replaced state coercion. In addition, they actively demonstrated that a life lived freely for the (forgiven) other was not a life lived in the competitive pursuit of gain and privatized comfort. For that reason, as Shaffer boldly suggested, there may be more than a little resonance between Marxist and Christian critiques of capitalism.[8]

As the Conference moved on, Shaffer's Anabaptists tended to drop from view, although there were occasional mentions of a pesky antinomian strain in Christian thought—a strain which, from some faith perspectives, is either perverse or simply incomprehensible.[9] Other-

5. *Id.* at 1090-92.

6. *Id.* at 1092-94. In Robert Cover's stark words, "[l]egal interpretation takes place in a field of pain and death." Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986). While law and polity may be ordained by God, as a tragic necessity in a fallen world, the emphasis must always be on "tragic." *See also* Shaffer, *supra* note 3, at 1092-93.

For a criminal law scholar's argument that the justification of law's violent reality should be recognized as the central problem for legal analysis, see Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 L. & Hist. Rev. 113 (1998), especially 159-162.

7. *See* Shaffer, *supra* note 3, at 1094.

8. *See id.* 1098-99. For an argument that a transformative model of communal life, as well as, specifically, a critique of an "acquisitive culture," can be located within Jewish scripture, see Walter Brueggemann, Interpretation and Obedience: From Faithful Reading to Faithful Living 12-14 (1991).

9. *See* John Winthrop, *A Short Story of the Rise, Reign and Ruine of the Antinomians, Familists and Libertines*, *in* David D. Hall, The Antinomian Controversy (2d ed. 1990). Of course, the "heretical" Antinomians had a good deal of influence on American Church/State doctrine, by way of Roger Williams. *See* Perry Miller, Roger Williams: His Contribution to the American Tradition (1953); Noonan, *supra* note 1, at 61-71. For the importance of Williams's "wall of separation between the garden of the church and the wilderness of the world" imagery, see Noonan, *supra* note 1, at 66,

wise, the search at the Conference was, for the most part, a search for continuity, not disruption.

Shaffer's message contains a special urgency, however. Intellectual confidence in the liberal Enlightenment's model of the autonomous individual self, enjoying rights protected by a neutral legal order, has been steadily eroding, and with it has eroded the legal order's underlying claim to legitimacy. If, as Shaffer argued, the true faith community is subversive to the modern legal order, so too are the most vigorous intellectual currents now abroad in the land. Within that current postmodernist, essentially Nietszchian, context, the "difference" faith holds out might be viewed as a source of (disruptive) hope.[10]

The particular Anabaptist model Shaffer described can hardly be startling to lawyers, given the well-known case of *Wisconsin v. Yoder*,[11] where the Old Order Amish successfully won exemption from the state's compulsory education law for Amish children past eighth grade.[12] In *Yoder*, the legal system directly confronted religion as a radically different praxis, as a model of "communal subversive acts." In Chief Justice Burger's oft-cited elegiac description, the Old Order Amish, following the tradition of the Anabaptists,

> return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. . . . The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.[13]

In justifying the exception, the Chief Justice could also point to an element of historical continuity with early American farming life, and to the law-abiding record of the Old Order Amish.[14] He seemed at pains, in fact, implicitly to separate the Amish from other counter-

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and Milner S. Ball, Lying Down Together: Law, Metaphor, and Theology 23-27 (1985).

10. *See* John Milbank, Theology and Social Theory: Beyond Secular Reason 278-379 (1990) (discussing the relation between Christian theology and postmodernism). For a discussion of theology as a narrative tradition needing no modern, foundationalist premises, and hence at home in a postliberal, postmodern culture, see George A. Lindbeck, The Nature of Doctrine: Religion and Theology in a Postliberal Age (1984). *See also* Ronald Thieman, Constructing a Public Theology: The Church in a Pluralistic Culture 126-41 (1991) (suggesting the construction of a theology without foundationalist presuppositions). For a discussion of the same issues in the context of Jewish law, see Ze'ev W. Falk, *Jewish Religious Law in the Modern (and Postmodern) World*, 11 J.L. & Religion 465 (1994-95).

11. 406 U.S. 205 (1972).

12. *Id.* at 234.

13. *Id.* at 210-11.

14. *Id.* at 210-13.

cultural forces then running rampant. By contrast to the rest of the world in 1972, no doubt the Old Order Amish seemed reassuringly quaint.

Justice Douglas, quite properly, refused to be similarly beguiled.[15] If freedom meant the Enlightenment's promised freedom of the autonomous self, the bearer of rights as protected by the neutrality of the law, then of course the Amish adolescents should have the opportunity to attend school.[16] Amish communal practice (or indoctrination, as Justice Douglas seemed to imply) precluded precisely those cultural and economic choices which American culture otherwise offered as legally protected rights. For Justice Douglas, moreover, the case highlighted and clarified a lurking and related question: Within the terms of liberal legalism, the only religious freedom that the Court could coherently and consistently protect was freedom as the right to (private) belief, not (public) religious practice.[17] Here Justice Douglas was in accord with the Enlightenment model of toleration advanced by Locke[18] and Jefferson,[19] if not necessarily by Madison.[20] His basic approach is also consistent with the Court's current Free Exercise jurisprudence.[21]

Yoder is a pivotal case because the question was so clearly one in which a whole social practice was at odds with Enlightenment presuppositions. Religious practice, for the Amish, meant more than ceremonial practice. It meant life lived with an alternative inner orientation of the "self" which could only be learned and realized in a community formed by a practiced, narrative conformity to Biblical sources and Biblical promise. The purely autonomous self Justice Douglas sought to protect was, for the Amish, an incoherent construct (as it now is in the postmodernist literature as well); so too were the

15. *Id.* at 241-49 (Douglas, J., dissenting).

16. *See id.* at 245-46 (Douglas, J., dissenting).

17. *Id.* at 247 (Douglas, J., dissenting).

18. John Locke, *A Letter Concerning Toleration* (1689), *in* 6 The Works of John Locke 1, at 44-45 (photo. reprint 1963) (1823). Essentially, the magistrate determines what will and will not be permitted. *Id.* Michael McConnell argues that Locke's formulation rendered religious freedom even more vulnerable than other rights. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1434 n.134 (1990).

19. Thomas Jefferson, Notes on the State of Virginia 159 (William Peden ed., 1982) (1785) ("The legitimate powers of government extend to such acts only as are injurious to others."). Here Jefferson clearly (and snidely) distinguishes belief, about which the polity can be indifferent, and acts, which can harm others.

20. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* The Complete Madison: His Basic Writings 299, 300 (Saul K. Padover ed., 1953); *see also* McConnell, *supra* note 18, at 1452-55.

21. *See e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (upholding a "neutral" prohibition on drug use, despite burden imposed on religion, as applied to Native American ceremonial use of peyote); City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act and reaffirming *Smith*'s low level scrutiny as the operative Constitutional standard).

distinction between belief and practice, and the parallel distinction between private and public. "Forgiveness," for example, is meaningless as a "belief" without practice; for the Amish, forgiveness cannot be a purely private option available as a legally-protected, subjective value choice, since it is the very basis of their community life. Thus, Justice Douglas, not without reason, feared the coercive aspect of Amish training, and wanted to protect the "rights" of young Amish adolescents. Nowhere, however, is the hidden coercion implicit in the protection of rights more apparent than in the state's effort to coerce the Amish children into attending a public school, for the sake, paradoxically, of their own freedom. Here the supposed absolute freedom and power of the individual, Enlightenment self confronts the power of the state, and finds its own (Hobbesian) mirror image. The Old Order Amish in *Yoder* inserted themselves between the state and the individual, disrupting their strangely symbiotic oppositional relationship, and thereby challenging the model itself. The Amish prevailed, one suspects, only because of brilliant lawyering by William Bentley Ball, and because of a Chief Justice's nostalgia for gentler times—times for which the relatively static cultural practices of the Old Order Amish were an unthreatening reminder.

If, as Shaffer suggests, a faith community must ultimately find itself at odds with the underlying premises of the supposedly neutral, secular legal order, then the legal model of neutrality in the protection of religious rights will at some point show signs of incoherence, strain, and breakdown. One such "sign" might be the oft-noted tendency of Establishment Clause and Free Exercise Clause claims toward reversibility—the tendency for free exercise claims to give rise to Establishment Clause problems, and for enforcement of the Establishment Clause to raise free exercise problems.[22] Any free exercise exemption to an otherwise impartial law is "non-neutral" with respect to religion. Thus Justice Stevens, in *City of Boerne v. Flores*, stated directly that the Religious Freedom Restoration Act's protection of "free" religious exercise was unconstitutional on Establishment Clause grounds alone, since it mandated exemptions for religious groups (e.g., to the zoning regulations at issue in the case) that were unavailable to atheist or agnostic groups.[23] The Symbolism Workshop at the Conference discussed a number of cases where blanket prohibitions going to garb in the courtroom (e.g., headgear) might be lifted for the sake of religious garb.[24] Arguably, such exemptions would reveal the same fatal lack of strict neutrality.

22. *See* Norman Redlich et al., Constitutional Law 1527 (3d ed. 1996) (reflecting on the Establishment Clause as both protecting and undercutting free exercise).

23. 117 S. Ct. at 2172 (Stevens, J., concurring).

24. *See Report of Working Group #8*, 66 Ford. L. Rev. 1631, 1632 (1998) [hereinafter *Report #8*]; *see also* Samuel J. Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 Ford. L. Rev. 1505, 1506-13 (1998).

More interesting questions emerge from Establishment Clause cases where free exercise rights are potentially burdened. For example, in *Roberts v. Madigan*,[25] a Bible visible on an elementary school classroom desk raised Establishment Clause concerns that could be handled only by (non-neutrally) disfavoring the Bible as compared to other books, thereby interfering with the teacher's free exercise.[26] As we discussed in the Workshop, a judge who keeps religious symbols in her courtroom raises a similar problem.[27] Even where the Establishment Clause questions have been clearly decided and the law seems unambiguous, as with officially mandated school prayer, countless communities across the country feel that their religious "rights" have been violated by *Engel v. Vitale*.[28] Constitutional guidelines are routinely ignored, and actual public school practices are a good deal more variable than one would ever suppose from casebook law. As we discussed at length during the Workshop, there may often be more than a little wisdom in not interfering with a relatively cohesive, homogeneous community whose public symbols or school practices violate the Establishment Clause. Rigor in the enforcement of "freedom," viewed from another perspective, might simply be naked coercion.

Although less often noted, strikingly parallel dilemmas emerge from the perspective of religious adherents who seek public expression of their faith, and run the consequent danger of either desecration or idolatry. It is one of the great ironies of Religion Clause jurisprudence that the Christmas creche in *Lynch v. Donnelly*[29] passed Constitutional muster because it was so thoroughly tasteless and so obviously geared to encouraging a binge of holiday consumerism—a Pyrrhic victory for any sincere Christian, as Justice Blackmun's dissent pointed out.[30] Similarly, the extended *LaRocca* proceedings in the New York courts, discussed in our Workshop, concerned an attorney/priest's "right" to wear clerical garb while defending a client.[31] At one point, the New York Supreme Court opined that the priest should indeed be allowed to wear that garb, but only because priestly garb no longer carries much moral weight anyway: Because priests no longer command the respect and trust once accorded them, the religious sym-

25. 921 F.2d 1047 (10th Cir. 1990).

26. *Id.* at 1055-56.

27. *See* Butler-Brust, *supra* note 24, at 1631 ; *see also* Levine, *supra* note 24, at 1524-40.

28. 370 U.S. 421 (1962). The Court in *Engel* held that state officials may not compose an official state prayer and require that it be recited in state public schools, even if the prayer is non-denominational and neutral. *Id.* at 424.

29. 465 U.S. 668 (1984).

30. *Id.* at 726-27 (Blackmun, J., dissenting).

31. *See* Levine, *supra* note 24, at 1515-21. The classic case on religious garb is, of course, *Goldman v. Weinberger*, 475 U.S. 503 (1986), where the Court refused to find a free exercise exemption for the wearing of a yarmulke while in military uniform.

bolism is without significance and would not sway a jury.[32] Like the creche in *Lynch*, to be acceptable a religious symbol must lose its force.

Similarly, one might have argued that the real problem with the insipid school prayer in *Engel* lay in the Regents' obvious use of prayer for the purpose of instilling patriotism.[33] So too, in the contentions and protracted debate over the courtroom display of the Ten Commandments in *Alabama Freethought Association v. Moore*,[34] some of us were more troubled by the arguably idolatrous use of scripture to give religious sanction to legal proceedings, than by the implicit state endorsement of religion.[35]

On the other hand, to strip insistently the legal system of all reference to theological roots is to deny history.[36] Even the Enlightenment model itself represents a complex reconfiguration of constructs whose origins were theological.[37] Moreover, the process of (ahistorical) stripping of religion from law forces the individual adherent, once again, into the implicit concession that religion is a private matter of belief, with no legitimate relevance to one's public occupational practice. In other words, between the stark dualities the Enlightenment model holds out—state/individual, public/private—the serious adherent has no coherent place to locate herself.

An insistently communal life of serious religious practice therefore becomes, virtually by definition, subversive to the Enlightenment legalist model. Interposed as a mediating structure between the absolute freedom of the individual and the absolute power of the state, religion defies law's claim to be the only possible mediator of conflict. It does so not by falsely pretending "neutrality" in the coercive management of inevitable social conflict, but by holding out a wholly alternative (and not at all neutral) promise of *shalom*.

None of this is meant to suggest that any particular case has been wrongly decided. On the whole, in fact, the American system's combination of separation with toleration could be far worse, veering off into oppressive, dispirited religous establishment and/or outright, selective prohibition. The point is about incongruence. As Shaffer suggested, religion has a persistently disruptive tendency to call into

32. People v. Rodriquez, 424 N.Y.S.2d 600, 603-605 (Sup. Ct. 1979); *see also* Levine, *supra* note 24, at 1519-20.

33. Engel v. Vitale, 370 U.S. 421, 422 (1962).

34. 893 F. Supp. 1522, 1525 (N.D. Ala. 1995); *see Report #8*, *supra* note 24, at 1631; Levine, *supra* note 24, at 1533-36.

35. Discussion in Working Group #8, June 3, 1997.

36. For an example of an historical work which now has become a classic on the relation between religion and law, see Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983).

37. For discussion of the complexity of those changes and interrelationships see, e.g., Charles Taylor, Sources of the Self (1989), and Alasdair MacIntyre, After Virtue: A Study in Moral Theory (2d ed. 1984).

question the basic presuppositions of the liberal legal order, and the legal order, when it attempts to "handle" religion in a conscientiously neutral manner, finds itself reduced to conceptual incoherence.

This incoherence, as noted already, hardly comes as a surprise in these postmodernist times. The story told by the Enlightenment, the story of the autonomous self protected by a rational and neutral legal order, has already lost its hold for many. As a number of theologians have argued, the demise of the Enlightenment opens a space for theology, especially for theology conceived as an ongoing narrative tradition within which belief and practice collapse into each other.[38]

Nevertheless, the space opened by postmodernism can easily be filled instead by the allure of the market. Shaffer failed to fully credit the extraordinary intellectual and cultural power of market capitalism, with its unbounded capacity to appeal to the self as the situs of ever-expanding and ever-more playful desire. In the market, postmodernism's oft-feared relativity of value finds a welcoming home: Unlike Marxism, postmodernism assumes no foundational reality from which to critique capitalism as mere "ideology."

Theologians who embrace postmodernism also tend to underestimate the extraordinary force of postmodernism's own *mythos*—the Nietzschian *mythos* of power. Against the compelling postmodernist depiction of social life as the inevitable interplay of diffuse power relations, Shaffer dared to propose that a counter-narrative could be told, in history, through communal practice. It is a narrative about the promise of *shalom* rather than the exercise of power—and, also, necessarily, about the (Augustinian) reorientation of desire itself. It is not, these days, an easy story to tell.[39]

38. *See, e.g.*, Lindbeck, *supra* note 10. Stanley Hauerwas, a well-known postliberal theologian, has an emphasis like Shaffer's on the coercive state as a "problem" for theology, and on narrative communal practice. *See* Stanley Hauerwas, Dispatches from the Front: Theological Engagements with the Secular (1994). For Hauerwas specifically on the public/private question, see After Christendom?: How the Church is to Behave if Freedom, Justice, and a Christian Nation are Bad Ideas 58-68 (1991).

The influence of John Howard Yoder, whose *Politics of Jesus: Vicit Agnus Noster* (1972) has become classic, is evident in any discussion of these themes. For a tribute to Yoder following his death last December, see Michael G. Cartwright, *Radical Catholicity: Reflections on the Life and Work of Theologian John Howard Yoder*, The Christian Century, Jan. 21, 1998, at 44.

39. For an extraordinary elaboration of these themes in depth, see John Milbank, *supra* note 10.