

FOREWORD

STANLEY HAUERWAS AND THE LAW: IS THERE ANYTHING TO SAY?

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It might seem odd to devote a symposium in a law journal to a theologian who has argued for withdrawal from any form of government that “resorts to violence in order to maintain internal order and external security”¹ and who wonders whether lawyers “may in fact be going straight to hell.”² If this is the starting point, then what conversation is to be had? But Stanley Hauerwas is closer to the law than most people realize. He has published in law reviews³ and taught in law schools.⁴ He has also signed amicus briefs,⁵ testified as an expert witness, and served as a jury foreman in a rape trial.⁶

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1. STANLEY HAUERWAS, *Introduction*, in CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN 1, 15 (1988) [hereinafter HAUERWAS, *Introduction*].

2. Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 MERCER L. REV. 743, 750 (1993).

3. See Stanley Hauerwas & Michael Baxter, *The Kingship of Christ: Why Freedom of “Belief” Is Not Enough*, 42 DEPAUL L. REV. 107 (1992); Stanley Hauerwas & Richard Church, *The Art of Description: How John Noonan Reasons*, 76 NOTRE DAME L. REV. 849 (2001); Stanley Hauerwas & Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME L. REV. 569, 578 (1979); Hauerwas, *supra* note 2; see also Stanley Hauerwas, Sanford Levinson & Mark Tushnet, *Faith in the Republic: A Francis Lewis Law Center Conversation*, 45 WASH. & LEE L. REV. 467 (1988).

4. Hauerwas co-taught first-year contracts with Thomas Shaffer at Notre Dame Law School. Since 1988, he has held a joint appointment as Professor of Law and Divinity at Duke. Hauerwas has never presumed much about his law school appointment, once telling me that it functioned primarily so that “people like you could come take classes with me for credit.”

5. See Brief for 20 Theologians and Scholars of Religion as Amici Curiae Supporting Petitioners, *Good News Club v. Milford Central School*, 533 U.S. 98 (2000) (No. 99-2036), 2000 WL 1803627; Brief for Michael J. Broyde, et al. as Amici Curiae Supporting Plaintiff/Appellant, *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (No. 01-4176), 2002 WL 32520423.

6. Hauerwas recounted these last two experiences at a meeting of the Christian Legal Society at Duke Law School on April 14, 2011. His personal engagement with the law is particularly important because of the ways in which he connects theology to personal narrative. By way of example, Hauerwas is well known for weaving forceful and frequent invocations of his Texan roots into his theological arguments. See, e.g., STANLEY HAUERWAS, *A Tale of Two Stories: On Being a Christian and a Texan*,

Of course, the academy is a bit more particular with its recognition—expert testimony and amicus briefs alone would not have led to a journal symposium. But beyond his moonlighting as a legal advocate, Hauerwas has emerged as one of the foremost scholars and public intellectuals of the last four decades. He has written scores of books and hundreds of articles,⁷ has been named “America’s Best Theologian” by *Time* magazine,⁸ and has delivered the prestigious Gifford Lectures.⁹ He has arguably “articulated the most coherent and influential political theology in and for the North American context”¹⁰ and has been “at the forefront of major transformations in theology” including virtue ethics, the role of narrative and community, and understandings of medicine and illness.¹¹ Hauerwas’s arguments have shaped theological education and reached a broader public through books and sermons—both his own and those of the pastors and educators whom he has influenced.¹² His views have been scrutinized by some of the leading thinkers in religious studies,¹³ sociology,¹⁴ history,¹⁵ political theory,¹⁶ moral philosophy,¹⁷ and literary theory.¹⁸ And they

in CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN, *supra* note 1, at 25 [hereinafter *A Tale of Two Stories*]. For Hauerwas, what we believe and what we write have everything to do with the lives we live. These epistemic and theological commitments make any introduction to Hauerwas’s thought difficult absent some engagement with his biography and the intellectual influences that have shaped him. I do not attempt to make those connections here only because others have ably performed that task. See, e.g., William Cavanaugh, *Stan the Man: A Thoroughly Biased Account of a Complete Unobjective Person*, in STANLEY HAUERWAS, THE HAUERWAS READER 17 (John Berkman & Michael Cartwright eds., 2001); Charles R. Pinches, Kelly S. Johnson & Charles M. Collier, *Introduction*, in UNSETTLING ARGUMENTS: A FESTSCHRIFT ON THE OCCASION OF STANLEY HAUERWAS’S 70TH BIRTHDAY at ix (Charles R. Pinches, Kelly S. Johnson & Charles M. Collier eds., 2010) [hereinafter UNSETTLING ARGUMENTS]. Hauerwas’s autobiography also maps many of the connections between his life and work. See STANLEY HAUERWAS, HANNAH’S CHILD: A THEOLOGIAN’S MEMOIR (2010) [hereinafter HANNAH’S CHILD].

7. In addition to more than forty books and 300 articles that he has authored, thirty books and dissertations have been devoted to his work.

8. See Jean Bethke Elshtain, *Christian Contrarian*, TIME, Sept. 17, 2001, at 74.

9. Hauerwas’s Gifford Lectures are published in STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE (2001).

10. R.R. Reno, *Stanley Hauerwas*, in THE BLACKWELL COMPANION TO POLITICAL THEOLOGY 302 (Peter Scott & William Cavanaugh eds., 2004)

11. L. Gregory Jones, Reinhard Hutter & C. Rosalee Velloso Ewell, *Engaging Stanley Hauerwas*, in GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS 7 (L. Gregory Jones, Reinhard Hutter & C. Rosalee Velloso Ewell eds., 2005)

12. By way of example, his book *Resident Aliens* (coauthored with William Willimon) has sold over 75,000 copies. See STANLEY HAUERWAS & WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY (1989). John Berkman suggests that “*Resident Aliens* is probably the biggest-selling work by an academic theological ethicist since Joseph Fletcher’s *Situation Ethics* in the 1960s.” John Berkman, *Introduction to the Hauerwas Reader*, in THE HAUERWAS READER, *supra* note 6, at 3.

13. See JEFFREY STOUT, DEMOCRACY AND TRADITION (2004); Peter Ochs, *Abrahamic Hauerwas*, in GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS, *supra* note 11.

14. See JAMES DAVISON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD (2010); Robert N. Bellah, *God and King*, in GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS, *supra* note 11, at 112.

15. See Robert Louis Wilken, *A Constantinian Bishop: St. Ambrose of Milan*, in GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS, *supra* note 11, at 73.

16. See STANLEY HAUERWAS & ROMAND COLES, CHRISTIANITY, DEMOCRACY, AND THE

have been largely ignored in legal scholarship.¹⁹

The inattention to Hauerwas in legal scholarship is particularly odd given that he has written for decades about issues central to the law: violence, liberalism, bioethics, disability, interpretation, capital punishment, just war theory, reconciliation, public reason, patriotism, euthanasia, abortion, and religious freedom, to name only a few of the more obvious connections. And the general lack of familiarity with Hauerwas by legal scholars (even among many of those who write in the area of law and religion) has contributed to a growing divide. As Jeffrey Stout has observed, “[t]he more thoroughly Rawlsian our law schools and ethics centers become, the more radically Hauerwasian the theological schools become.”²⁰

* * *

Hauerwas has been a persistent critic of contemporary liberal political thought.²¹ His arguments resemble those advanced by scholars ranging from Alasdair MacIntyre to Stanley Fish who, in different ways, challenge liberalism’s purported neutrality and its suppression of theological discourse.²²

RADICAL ORDINARY (2008); Elshtain, *supra* note 8 (“Before communitarianism became a buzzword, Hauerwas addressed community. Before the Americans with Disabilities Act, he wrote perhaps his most engaging work on persons with disabilities and how, as a community, we react to their presence. He anticipated debates about genetic manipulation. Before talk of ‘the virtues’ became widespread, Hauerwas wrote about the need for an account of our habits as members of communities.”).

17. See REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY (Alasdair MacIntyre & Stanley Hauerwas eds., 1983); H. Tristram Engelhardt, Jr., *The Belligerent Kingdom, in GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS*, *supra* note 11, at 193; Martha C. Nussbaum, *A Reply to Stanley Hauerwas*, 57 SOUNDINGS 725 (1989).

18. Stanley Fish wrote that Hauerwas “has been the most eloquent voice proclaiming the morality of particularism and the immorality of universalism.” THE HAUERWAS READER, *supra* note 6 (endorsements).

19. As of this writing, Hauerwas has been cited only twenty-six times in the “top twenty” law reviews. Mark Tushnet, Michael Perry, and Thomas Shaffer account for one-third of those citations. Jeff Powell is an important exception not reflected in law review citation counts. See H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993) (based on a dissertation directed by Hauerwas); H. Jefferson Powell, *The Earthly Peace of the Liberal Republic, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 91 (Michael W. McConnell et al. eds., 2001).

20. STOUT, *supra* note 13, at 75.

21. As Stephen Macedo notes in his essay, “liberalism” has many different meanings, and Hauerwas is not always entirely clear about which one he is invoking. See Stephen Macedo, *Hauerwas, Liberalism, and Public Reason: Terms of Engagement?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 161, 162. I understand Hauerwas’s primary critiques to be directed at variants of Rawlsian liberalism that (1) privilege the individual, the right, and the autonomous over the community, the good, and the dependent; (2) facilitate unreflective allegiance to the nation-state; and (3) extract propositions from their background contexts. My own uses of the terms “liberalism” and “liberal political thought” in this introductory essay are intended to convey these three critiques.

22. See, e.g., STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO 135 (1994) (“[W]hat if reason or rationality itself rests on belief? Then it would be the case that the opposition between reason and belief was a false one, and that every situation of contest should be recharacterized as a quarrel between two sets of belief with no possibility of recourse to a mode of deliberation that was not itself an extension of belief. This is in fact my view of the matter and I would defend it by asking a question that the ideology of reason must repress: where do reasons come

But Hauerwas differs from other well-known critics because he writes as a theologian. In other words, he is both echoing second-order arguments against the claims of liberalism and displaying first-order arguments from within a particular theological tradition.

Some of Hauerwas's critics may be right to argue that he "reacts against a type of liberalism that exists mostly on the pages of books by Rawls, Rorty, and their followers, and not in actual practice."²³ But that description is least true of the academy.²⁴ Much teaching and scholarship relies upon unacknowledged constraints on argumentative practices from professors who embrace the ideals of Rawlsian public reason or, more strikingly, whose epistemic commitments welcome a spectacular diversity of viewpoints and worldviews—except for theological ones.²⁵ As a result, a great deal of scholarship ignores or too easily dismisses theological argument.²⁶ If public reason and epistemic bias have succeeded anywhere in squelching theological argument, it is in the academy.

Contrary to the academy's dominant orthodoxies, Hauerwas insists that Christian theology properly belongs in contemporary discourse: "[A]t the very least Christianity names an ongoing argument across centuries of a tradition which has established why some texts must be read and read in relation to other texts."²⁷ As a result, "Christians for all their shortcomings still represent an ongoing educated public that means they must . . . have agreements that make their disagreements intelligible."²⁸ It is for this reason that

[Christians] should not avoid exploring what differences their convictions might make for why they do what they do. That difference will, of course, vary from subject to subject but surely such an investigation is the kind of work a university should

from? The liberal answer must be that reasons come from nowhere, that they reflect the structure of the universe or at least of the human brain; but in fact reasons always come from somewhere, and the somewhere they come from is precisely the realm to which they are (rhetorically) opposed, the realm of particular (angled, partisan, biased) assumptions and agendas."); ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 345 (1988) ("[L]iberalism can provide no compelling arguments in favor of its conception of the human good except by appeal to premises which collectively already presuppose that theory.").

23. William T. Cavanaugh, *A Politics of Vulnerability: Hauerwas and Democracy*, in *UNSETTLING ARGUMENTS*, *supra* note 6, at 89, 91 (describing critiques raised in *STOUT*, *supra* note 13).

24. Cf. Michael W. McConnell, "God is Dead and We Have Killed Him!": *Freedom of Religion in the Post-modern Age*, 1993 *BYU L. REV.* 163, 166 ("Religion has not been confined to the purely private, but informs discussions of justice and provides a framework for community. Unsecular America has not lost its voice. But in most of academia, and in many walks of life dominated by the secular elite, the news of the death of God has been taken to heart and the voice of religion is all but silenced."); BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 298–364 (2012).

25. See *id.* ("[P]ost-modernists find it convenient to keep in place some of the intellectually discredited baggage of liberalism when the issue is religion.").

26. Cf. Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 *NOTRE DAME L. REV.* 119, 175 (2011) ("Our political culture pays little attention to the substance of religiously grounded arguments. That disregard—including disregard of critical disagreements—seriously diminishes the content of our public political debate.").

27. STANLEY HAUERWAS, *THE STATE OF THE UNIVERSITY: ACADEMIC KNOWLEDGES AND THE KNOWLEDGE OF GOD* 90 (2007).

28. *Id.*

sponsor. I obviously think that would be true of those working in other religious and nonreligious traditions. Of course, such work would make the university more conflictual but I see no reason why that is a disadvantage.²⁹

Hauerwas's arguments echo Alasdair MacIntyre's aspirations for the university "as a place of constrained disagreement, of imposed participation in conflict, in which a central responsibility of higher education would be to initiate students into conflict."³⁰ This process would require participants

to enter into controversy with other rival standpoints, doing so *both* in order to exhibit what is mistaken in that rival standpoint in the light of the understanding afforded one's own point of view *and* in order to test and retest the central theses advanced from one's own point of view against the strongest possible objections to them to be derived from one's opponents.³¹

These kinds of challenges are particularly salient for law schools. Few people today believe that law is a science with precise answers that can be discovered through the right deductive reasoning.³² Once that kind of formalism is rejected, we are left to justify law through persuasion—a task made all the more important to the extent that legal scholarship and legal education help to situate legal practice.³³ The enactment and enforcement of laws and judicial decisions separate the practice of law from the practice of academic inquiry—many dimensions of legal practice have no analogue to ending a class with puzzled ambiguity or concluding a paper with questions for further study. Laws can be changed, but some resolution is always in force—and sometimes those resolutions limit freedom and kill people and destroy ways of life.³⁴ The question for legal scholars is whether a dialogue of persuasion in the space between legal theory and legal practice is capacious enough for theological argument.

Hauerwas's work is not easily classified along familiar ideological lines.³⁵ For all of his well-known critiques of contemporary liberalism, he has also rankled religious conservatives with his commitment to nonviolence and his

29. *Id.* at 91 n.19.

30. ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION 230–31 (1990).

31. *Id.* at 231.

32. Indeed, the rigid formalism ascribed to a past era of American jurisprudence may itself be overstated. See BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 3 (2010) ("The story about the legal formalists is largely an invention. . . . Legal theory discussions of legal formalism are irrelevant, misleading, or empty.").

33. The relationship between legal scholarship and legal practice is not always clear, as evidenced by the discussion that ensued following Chief Justice Roberts's dismissal of the value of law review articles for the bar. See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

34. For a highly influential account, see Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

35. Indeed, even Hauerwas's titles manage to offend across the political spectrum. See, e.g., STANLEY HAUERWAS, AFTER CHRISTENDOM: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS (1991); STANLEY HAUERWAS, *Why Gays (as a Group) are Morally Superior to Christians (as a Group)*, in THE HAUERWAS READER, *supra* note 6, at 519.

epistemology.³⁶ Consider, for example, one of his many one-liners: “Truth is not a set of propositions about the world; rather, truth is Jesus Christ.”³⁷ Hauerwas takes both independent clauses seriously. The former is driven by his epistemic commitments; the latter by his ontological commitments. Neither can be separated from the kinds of arguments that he makes. Both are often elided by his interlocutors. Some religious conservatives who insist on decontextualized propositions (“The Bible says . . .”) miss the crux of Hauerwas’s argument that interpretations, including Biblical ones, are shaped by practices.³⁸ Some secular liberals who dismiss even *talk* of Jesus miss the commitments that, for Hauerwas, drive everything.

Hauerwas’s distance from both left and right ideologies also complicates his views about the relationship between “public” and “private,” a distinction that is both foundational to liberal theory and vulnerable to numerous critiques.³⁹ Hauerwas is simultaneously trying to explode and entrench the categories—his writing suggests that the oppositional terms are caught up in a category mistake. In one sense, the church is “private” vis-à-vis the “public” actors that constitute the state because the community of the church embodies a different way of life—a different kind of politics—than that of the state. Power and coercion can be abused on both sides of this institutional divide, but a theologically and constitutionally significant line remains.⁴⁰ Yet at the same time, Hauerwas resists the ways in which liberal thought has “privatized” religious faith by recasting it as a politically irrelevant “belief.” Thomas Jefferson famously quipped that his neighbor’s mere belief “neither picks my pocket nor breaks my leg.”⁴¹ But religious belief is often most destabilizing and most politically significant when it inspires religious action.⁴² The hard questions of religious freedom emerge not from the interior of unspoken “belief,” but in word and

36. Hauerwas’s most concise argument against foundationalism can be found in the first thirty pages of STANLEY HAUERWAS, *UNLEASHING THE SCRIPTURE: FREEING THE BIBLE FROM CAPTIVITY TO AMERICA* (1993). His central interpretive claim is that an individual interpreter cannot discern the meaning of a text in isolation from his community. This primary claim includes two corollaries: (1) engaging with a community to discern the meaning of a text requires initiation and participation in the practices of the community; and (2) failing to recognize the need for this community inevitably leads to a reliance on individual subjective judgment masked as “common sense.”

37. WILLIAM WILLIMON & STANLEY HAUERWAS, *LORD TEACH US: THE LORD’S PRAYER AND THE CHRISTIAN LIFE* 16 (1996).

38. It is important here to address a tendency—particularly acute in the legal academy—to equate religious conservatism with fundamentalism. Some religious conservatives are fundamentalists (and foundationalists) who insist that the plain meaning of a text is readily apparent to any reader. But many religious conservatives are not foundationalists, and that is increasingly the case today—due at least in part to Hauerwas’s influence in theological education over the past forty years.

39. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

40. This dimension of Hauerwas’s thought is consistent with arguments made by a number of political theologians writing in an Augustinian vein. See, e.g., ERIC GREGORY, *POLITICS AND THE ORDER OF LOVE: AN AUGUSTINIAN ETHIC OF DEMOCRATIC CITIZENSHIP* (2008); JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY* (1990).

41. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 159 (William Peden ed., 1955) (1785).

42. See Hauerwas & Baxter, *supra* note 3.

deed. The boundaries of that freedom reflect an uneasy settlement of jurisdictional claims competing over the meanings of acts and allegiances. Hauerwas's description of the "church as polis" contests the assumption that the nation-state—including, and perhaps especially, its legislators and judges—is the ultimate arbiter of these meanings.⁴³ In this sense, the church is essentially "public."

This dimension of Hauerwas's writing calls to mind the powerful and controversial work of Robert Cover.⁴⁴ A related idea in Cover's work—the connection between law and violence—points toward a deep tension, or at least a deep ambivalence, in Hauerwas's engagement with the law.⁴⁵ Hauerwas is convinced that Christianity requires a commitment to pacifism, and he has been an outspoken opponent of capital punishment⁴⁶ and modern conceptions of just war theory.⁴⁷ He was, in fact, one of the lone public voices to criticize the military response to the September 11, 2001 terrorist attacks.⁴⁸ Yet his pacifism—combined with his distrust of the nation-state—raises important questions about the extent to which he can sanction Christian participation in the law.

It is too simplistic to contend that Hauerwas rejects this kind of participation outright. He has argued that "[w]hat is required for Christians is not withdrawal but a sense of selective service and the ability to set priorities."⁴⁹ This challenge "does not entail that Christians must withdraw from the economic, cultural, legal, and political life of our societies," or "that Christians are to avoid all contact with the law or are in principle prevented from practicing law."⁵⁰ In fact, Hauerwas has written appreciatively of lawyers and the possibility of legal practice. In an essay coauthored with Jeff Powell, he lauded William Stringfellow's "social witness of presence" and his ability "to practice law humanly."⁵¹ And in an early essay coauthored with Thomas Shaffer, Hauerwas

43. See STANLEY HAUERWAS, *IN GOOD COMPANY: THE CHURCH AS POLIS* (1997).

44. See, e.g., Cover, *supra* note 34; Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). The link between Cover and Hauerwas is largely unexplored in both legal and theological scholarship.

45. See Cover, *supra* note 44. To my knowledge, Hauerwas has not previously written about the implications of Cover's arguments. In his response to this symposium, Hauerwas writes that Cover's work "left a lasting impression." Stanley Hauerwas, *Hauerwas on "Hauerwas and the Law": Trying to Have Something to Say*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 233, 238.

46. See, e.g., Stanley Hauerwas, *Punishing Christians: A Pacifist Approach to the Issue of Capital Punishment*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 57 (E. Owens et al. eds., 2004).

47. See, e.g., STANLEY HAUERWAS & FRANK LENTRICCHIA, *DISSSENT FROM THE HOMELAND: ESSAYS AFTER SEPTEMBER 11* (2003).

48. See *id.*; see also HAUERWAS, HANNAH'S CHILD, *supra* note 6, at 264–72 (discussing the challenges related to the positions he voiced after September 11).

49. HAUERWAS, *Introduction*, *supra* note 1, at 15.

50. STANLEY HAUERWAS, *Why the "Sectarian Temptation" Is a Misrepresentation: A Response to James Gustafson*, in THE HAUERWAS READER, *supra* note 6, at 90, 104.

51. Stanley Hauerwas & Jeff Powell, *Creation as Apocalyptic: A Homage to William Stringfellow*, in RADICAL CHRISTIAN AND EXEMPLARY LAWYER: HONORING WILLIAM STRINGFELLOW 31, 35, 37

praised the iconic Thomas More as an example “of those who wield power but who try to live truthfully.”⁵²

Yet Hauerwas has remained vague about what faithful legal practice might look like in contemporary American society—how Christian lawyers today might wield power and live truthfully. His worry that “the law has become increasingly coercive in the interest of maintaining order” suggests to him that “the Christians who presently serve as lawyers may find themselves in greater tension with their profession.”⁵³ The concrete possibilities of navigating this tension seem even more elusive when one considers Hauerwas’s ardent pacifism in light of Cover’s memorable phrase that “legal interpretation takes place in a field of pain and death.”⁵⁴ Here Hauerwas’s own participation in the law (his law teaching, amicus briefs, expert testimony, and jury service) complicates his critiques and pushes him for an account of what faithful practices might look like.⁵⁵

* * *

Engagement with theological argument is not easy—it requires patient reading and thinking, particularly from those confronting unfamiliar discourses and ideas. But the effort is both philosophically and vocationally warranted. With respect to the former, an openness to the “other” is a core dimension of the poststructuralist thought embraced by many legal scholars. With respect to the latter, the task of mediating unfamiliar concepts and ideas is part of what lawyers do.⁵⁶ Our engagement with challenging ideas—including theological ones—helps us to make “connections to possible and plausible states of affairs” and to “integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’”⁵⁷

The articles in this symposium further this engagement. They connect Hauerwas’s theological arguments to discrete areas of the law and engage more broadly in questions of political and legal theory. Bradley Wendel challenges Hauerwas’s reluctance to address the kinds of local conflicts that emerge from what Jeremy Waldron has called “the circumstances of politics.”⁵⁸ Wendel

(Andrew W. McThenia, Jr. ed., 1995).

52. Hauerwas & Shaffer, *supra* note 3, at 583. Hauerwas and Shaffer also argue that “the most elementary hope that law has” is that “analysis and knowledge will go a long way toward containing power.” *Id.* at 578.

53. Hauerwas, *A Tale of Two Stories*, *supra* note 6, at 104–05.

54. Cover, *supra* note 44, at 1601.

55. Cf. STANLEY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE 239 (“I do not believe pacifists are any less implicated in the violence that grips our lives than those who believe that violence is a ‘necessary evil.’”).

56. I focus here on lawyers because the symposium explores connections between theology and law. But not all of those facilitating these connections are trained as lawyers or teach in law schools: James Logan is a theologian, and Steve Macedo is a political theorist.

57. See Cover, *supra* note 34.

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

argues that “the law provides a means to balance and resolve competing considerations, such as the need for economic development and the protection of the environment, in a way that allows citizens to treat one another with respect.”⁵⁹ He is not overly sanguine—he observes “striking” parallels between Hauerwas’s theological critiques and non-theological critiques suggesting that a legal ethics grounded in “thin, procedural values cuts lawyers off from the moral resources that would give meaning to their professional lives.”⁶⁰ But Wendel pushes Hauerwas toward a more hopeful view of legal practice.

Elizabeth Schiltz enlists Hauerwas to critique contemporary approaches to disability law.⁶¹ Beginning with Hauerwas’s observation that “[n]o group exposes the pretensions of the humanism that shapes the practices of modernity more thoroughly than the mentally handicapped,”⁶² Schiltz explores some of the deep tensions in contemporary disability rights theory—including the implications for selective abortions and withholding of medical treatment. She builds upon observations by legal scholar Samuel Bagenstos but suggests that Hauerwas’s arguments expose significant problems in Bagenstos’s attempts to reconcile the tensions.⁶³ Schiltz situates much of her article in Hauerwas’s reflections on L’Arche, “an international federation of small, residential faith-centered communities where people with and without intellectual disabilities live together in friendship.”⁶⁴

Michael Moreland explores the significance of Hauerwas’s writing to bioethics.⁶⁵ Moreland examines the ways in which the philosophical framing of intentional torts—an important antecedent to the law of bioethics—“has become muddled in ways that Hauerwas’s own critique of bioethics and his earliest work in the philosophy of action indicate.”⁶⁶ Moreland traces the significance of Elizabeth Anscombe’s work on intention to Hauerwas’s own thinking and then explains the implications of Hauerwas’s observations on the “confusion about intention” for notions of harm in legal doctrine.⁶⁷ This

LAW AND DISAGREEMENT (1999).

59. Wendel, *supra* note 58, at 17.

60. *Id.* at 3. Wendel has himself advanced some of these non-theological critiques in W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

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

62. Stanley Hauerwas, *Timeful Friends: Living with the Handicapped*, in *CRITICAL REFLECTIONS ON STANLEY HAUERWAS’ THEOLOGY OF DISABILITY* 11, 14 (John Swinton ed., 2004).

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

64. Schiltz, *supra* note 61, at 25. For Hauerwas’s reflections on L’Arche, see STANLEY HAUERWAS & JEAN VANIER, *LIVING GENTLY IN A VIOLENT WORLD* (2008). Vanier founded the first L’Arche community in Trosly-Breuil, France, in 1964. Today L’Arche has over 150 communities operating in forty different countries. See L’ARCHE INTERNATIONALE, www.larche.org (last visited Mar. 5, 2012).

65. Michael P. Moreland, *Mistakes About Intention in the Law of Bioethics*, 75 *LAW & CONTEMP. PROBS.*, no. 4, 2012 at 53.

66. *Id.* at 54.

67. *Id.* at 62.

confusion extended into the law of bioethics as philosophical argument in that area came to be dominated by autonomy and consequentialism—a confusion evidenced in some of the arguments advanced in the “right to die” cases, *Washington v. Glucksberg* and *Vacco v. Quill*.⁶⁸ Drawing from these contemporary examples, Moreland shows the continued relevance of Hauerwas’s arguments to emerging questions of bioethics.

James Logan considers the difference that Christian theology might make in addressing the state of punishment and incarceration in the United States.⁶⁹ His vision of “good punishment” embodies a “politics of healing the memories of wrongdoing by way of the acknowledgement of sin within a communal setting of forgiveness and reconciliation.”⁷⁰ Reading Logan’s article, one is struck by the visceral language that situates his argument, including a gruesome and detailed account of prison rape by a self-described “Black punk.”⁷¹ A few sentences later, he appeals to “the memory of an executed-yet-living God to guide us while living at the crossroads of Good Friday and Easter.”⁷² These two descriptions are bound to encounter different receptions in the socially conditioned guild of legal scholars. We know what to do with the first one—critical theory has rightly shown us that we cannot begin to understand the plight of a “Black punk” or the social reality that he embodies if we sanitize his story or extract it from the background context that made it possible. But Logan’s second description warrants the same epistemic charity; indeed, it is the only way to make sense of what he means by the possibility of “good punishment.”

Charlton Copeland explores the narrative dimension of Hauerwas’s theology and asks whether legal and theological reflections on the politics of liberation push Hauerwas toward a more capacious and open-ended conception of narrative.⁷³ Copeland draws connections between narrative arguments that took shape in law and theology in response to critiques of modernist assumptions in both disciplines. As he notes, proponents of “legal storytelling” use narrative to “critique, reject, and ultimately transform the dominant paradigms of the larger society,” while Hauerwas’s “narrative theology project aims to recover an authentic Christian identity *for* the Christian community’s self-understanding, rather than for its comprehension by the external

68. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

69. James Logan, *Healing Memory, Ontological Intimacy, and U.S. Imprisonment: Toward a Christian Politics of “Good Punishment” in Civil Society*, 75 LAW & CONTEMP. PROBS. no. 4, 2012 at 77. William Stuntz’s posthumously published work on criminal law draws upon related ideas in a non-theological context and might offer one of the best examples of “translation” in this difficult area of law. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

70. Logan, *supra* note 69, at 79.

71. *Id.* at 85–86.

72. *Id.* at 86.

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

community.”⁷⁴ Copeland considers the implications of these different narrative frameworks for same-sex marriage debates.

David Skeel focuses on what he calls the “prophetic temptation” in Hauerwas’s writing—taking “prophetic stances” on public issues but showing less willingness to “intervene[] more directly in the political process.”⁷⁵ Skeel contrasts Hauerwas’s theological ethics with the “social optimism” of Walter Rauschenbusch and the “pragmatic” accommodation of Reinhold Niebuhr.⁷⁶ Despite Hauerwas’s concern that political involvement could “dilute the visibility of the church,”⁷⁷ Skeel contends that “Hauerwasian theology does not preclude participatory engagement.”⁷⁸ He develops his arguments with three examples: the Civil Rights Movement, abortion, and debt relief laws. Skeel suggests that Hauerwas’s abortion writings “gesture toward [the] possibility” of a participatory role for the church,⁷⁹ and challenges Hauerwas (and those influenced by his ideas) to engage in “the political debate over the legal structure of debt and debt relief.”⁸⁰

Cathleen Kaveny explores connections between Hauerwas’s work and contract law, building upon “the historical and normative overlap between the notions of ‘covenant’ and ‘contract.’”⁸¹ She turns to the theologian Karl Barth to frame “the possibilities for *ad hoc* engagement of theology and secular disciplines.”⁸² Kaveny also contends that Hauerwas should welcome Paul Ramsey’s account of natural law “because it privileges the context-dependent, narrative-oriented approach of the common law as a locus for the articulation of moral norms.”⁸³ She concludes by suggesting that these narrative insights would be particularly fruitful in exploring “the norms embedded in and illustrated by the cases of contract law.”⁸⁴

Stephen Macedo offers a more critical take on Hauerwas’s challenges to the narratives of contemporary liberalism.⁸⁵ Macedo questions Hauerwas’s uniformly negative description of the liberal project and his reliance on political

74. *Id.* at 91.

75. David A. Skeel, Jr., *Hauerwasian Christian Legal Theory*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 115, 116, 124.

76. *Id.* at 117, 121.

77. *Id.* at 123.

78. *Id.* at 124.

79. *Id.* at 126.

80. *Id.* at 131.

81. Cathleen Kaveny, *Hauerwas and the Law: Framing a Productive Conversation*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 135, 136.

82. *Id.*

83. *Id.* at 155.

84. *Id.* at 159.

85. Macedo, *supra* note 21. For illustrative examples of Macedo’s writing on public reason, see STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 ETHICS 468 (1995); Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573 (2001).

theorists like Alasdair MacIntyre and Sheldon Wolin. As Macedo writes, “[i]t is hazardous and unfair to interpret a tradition of thought based mainly on the claims of its harshest critics, as if taking one’s bearings on Christianity from the late Christopher Hitchens.”⁸⁶ Macedo suggests that Hauerwas look more charitably at, or work toward a better description of, the “moral core” of the liberal project, which emphasizes “the political importance of equal basic individual rights” and “the demand that legitimate governments must secure citizens in a range of basic rights and that the people must be able to hold their governments accountable.”⁸⁷ He argues that liberalism must be understood as a practical and moral program for responding to a variety of problems—including the problem of establishing peaceful democracies in conditions of religious and ethical diversity. Macedo suggests that many of Hauerwas’s critiques miss the moral core and the practical orientation of liberalism, and that once these are appreciated there may be more common ground than Hauerwas allows.

My contribution uses Hauerwas to critique Ronald Dworkin’s theory of legal interpretation.⁸⁸ I pay particular attention to Dworkin’s assertion in *Justice in Robes* that “[j]udges may not appeal to religious convictions or goals in liberal societies because such convictions cannot figure in an overall comprehensive justification of the legal structure of a liberal and tolerant pluralistic community.”⁸⁹ I contend that this constraint unjustifiably excludes Hauerwas’s arguments from our common enterprise of legal interpretation and illustrate my claim by comparing the ways in which both thinkers approach the abortion controversy.

Stephen Carter’s article returns to one of the fundamental questions of law and one of the fundamental challenges to Hauerwas’s engagement with the law: “Must liberalism be violent?”⁹⁰ Carter draws attention to Hauerwas’s nonviolence and suggests that “his views on the violence of war and his views on the violence of the liberal state are inextricably linked.”⁹¹ But Carter argues that this connection need not make the liberal state “irredeemable.”⁹² To the contrary, the critiques of liberalism that emerge from Hauerwas’s thought may have “important implications for public policy” and the law reform project.⁹³

The articles are followed by a dialogue between Professor Hauerwas and Professor H. Jefferson Powell.⁹⁴ The transcribed dialogue took place at a

86. Macedo, *supra* note 21, at 169. Other contributors to this symposium make similar observations. See Wendel, *supra* note 58, at 3–4.

87. Macedo, *supra* note 21, at 162–163.

88. John D. Inazu, *The Limits of Integrity*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 181.

89. RONALD DWORKIN, *JUSTICE IN ROBES* 254 (2006).

90. Stephen L. Carter, *Must Liberalism Be Violent?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 201.

91. *Id.*

92. *Id.* at 215.

93. *Id.* at 201, 215–216.

94. *A Dialogue Between a Theologian and a Lawyer*, LAW & CONTEMP. PROBS., no 4, 2012 at 221. Professors Powell and Hauerwas were for many years colleagues at Duke, and Hauerwas supervised Powell’s doctoral studies that formed the basis of Powell’s *Moral Tradition*, *supra* note 19. For some

conference at Duke University School of Law on September 9, 2011 that included presentations based on early drafts of these symposium articles.⁹⁵ The dialogue between Hauerwas and Powell covers a range of topics including the formation of law students, the civil rights movement, and the role of violence in the law.

Professor Hauerwas's response to the articles deepens some of the connections that others in this symposium have drawn between his work and legal theory.⁹⁶ He suggests that lawyers have assumed a privileged role in our society because the law "became the only means we had to resolve moral disputes."⁹⁷ For this reason, "the law can manifest the deepest theological and moral commitments of a people,"⁹⁸ and legal theory maintains "a deep regard for the continuing moral intelligibility of the law in what many regard as a morally unintelligible society if not universe."⁹⁹ But, as Hauerwas writes, "[t]here is only one problem—it is politics all the way down."¹⁰⁰ With that claim, Hauerwas reasserts his charge that "[l]iberal political practice and ideology makes it impossible for liberals to recognize that they are exercising hegemonic power in the name of choice."¹⁰¹ And yet these arguments, familiar to Hauerwas's readers, do not preclude his appreciation for the law. The law manifests power, but "power can also often be an alternative to violence."¹⁰² And while "[t]he law certainly can be one of the forms that violence takes," the law "can also be a gift that allows us to have as well as resolve conflicts without killing one another."¹⁰³

This symposium is not a *Festschrift* for Stanley Hauerwas.¹⁰⁴ The contributors include not only longtime friends and former students but also critics and strangers to his work. The articles reveal disagreement with Hauerwas's ideas, suppositions, and methodologies. But their engagement with Hauerwas, and his response, take seriously the possibility of theological argument in law—the possibility that there is something to be said.

tentative comparisons between Hauerwas and Powell, see John D. Inazu, *Between Liberalism and Theocracy*, 33 CAMPBELL L. REV. 591, 601–06 (2011).

95. The conference was titled "Theology and Law: Engaging with Stanley Hauerwas," and was supported by the Franklin Humanities Institute, Washington University School of Law, Duke Law School's Program in Public Law, Duke Divinity School, and the John C. Danforth Center on Religion and Politics. In addition to the authors of the symposium essays, the conference benefited from the participation of Paul Griffiths, Guy-Uriel Charles, and Stanley Fish.

96. Hauerwas, *supra* note 45.

97. *Id.* at 235.

98. *Id.*

99. *Id.* at 244.

100. *Id.*

101. *Id.* at 250.

102. *Id.* at 237.

103. *Id.* at 251.

104. Not that he is lacking in this department. See FAITHFULNESS AND FORTITUDE: CONVERSATIONS WITH THE THEOLOGICAL ETHICS OF STANLEY HAUERWAS (Mark Thiessen Nation & Samuel Wells eds., 2000); GOD, TRUTH, AND WITNESS: ENGAGING STANLEY HAUERWAS, *supra* note 7; UNSETTLING ARGUMENTS, *supra* note 6.