LAWYERING IN THE CHRISTIAN COLONY: SOME HAUERWASIAN THEMES, REFLECTIONS, AND QUESTIONS

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I
INTRODUCTION

The basic question for secular philosophical legal ethics, following the formulation in an influential paper by Charles Fried, is often taken to be, "Can a good lawyer be a good person?"[1] This question highlights the possibility that obligations owed as a matter of one's professional role might conflict with duties owed qua moral agent. As classic case studies illustrate, lawyers may be required to keep information confidential that could be used to prevent serious harm if disclosed,[2] assert a technical defense to defeat a just claim,[3] or provide legal representation to loathsome clients like the Grand Wizard of the Ku Klux Klan or a former guard at the Treblinka concentration camp.[4] The so-called standard conception of legal ethics tells lawyers that they must act out of exclusive concern for the legal interests of their clients. A lawyer is permitted to disregard the interests of affected third parties and the public interest, if it would be in the client's interests to do so, and if the law permits the violation in question of the third party or public interest. Why must a lawyer, for example, interpose a procedural defense to enable her client to avoid paying a debt she admits she owes? Because it is in the client's interests, the maneuver is "within the bounds of the law" in the sense that neither the client nor the lawyer would be subject to legal penalties for employing it, and because the lawyer's only moral obligation arises from the duty of loyalty to her client who has the autonomy to choose whether or not to repay the debt. Critics of the standard conception claim that when lawyers violate the rights of non-clients by deceiving, humiliating, or manipulating them, the purported justifications they

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1. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer–Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

2. *See, e.g.*, Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).

3. *See, e.g.*, Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957).

4. For an analysis of numerous client-selection cases, see W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 122–55 (2010).

offer fail to excuse the moral wrongs they commit.[5] Although loyalty to clients may be an important value, other values are also implicated in these cases, and defenders of the standard conception must also justify a priority principle that gives client-regarding obligations greater weight than obligations owed to affected non-clients or to society as a whole.

For the purposes of this symposium on the relevance of the work of Stanley Hauerwas for the law, the important thing to notice about this debate is that most defenses of the standard conception are grounded, in one way or another, in political liberalism.[6] The liberal foundation is evident in Stephen Pepper's well-known warning against government by an "oligarchy of lawyers."[7] At least regarding competent adults, all of us are moral agents, responsible for determining how to lead our lives. The law necessarily imposes restrictions on what we may do, but no one else is empowered to place restrictions on our autonomy. In a complex, highly legalistic society, however, we are necessarily required in some cases to seek advice from legally trained professionals to determine whether our proposed course of conduct may violate the law, or to employ mechanisms provided by the legal system (such as contracts, wills and trusts, and business entities) to achieve our goals. In providing this assistance, lawyers should not impose their own views about the morality of their clients' conduct. Rather, they should assist their clients in implementing their own plans and providing technical assistance.[8]

As any reader of Hauerwas knows, this is an aspect of the modernist anomie he warns about. In a modern liberal society, autonomy to decide for oneself is exalted into the first principle of ethics, with the result that individuals are cut off from the resources they need (traditions, communities, stories) to construct meaningful lives for themselves. This kind of alienation can be cured only by associating oneself with a community—for Hauerwas this is the church—and sharing in the ongoing development of its history. Before turning to the theological critique of liberalism, however, it is noteworthy that some lawyers outside the church have also found the standard conception unsatisfying

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5. *See, e.g.*, ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES (1999); DAVID LUBAN, LAWYERS AND JUSTICE (1988); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 97–298 (2007).

6. *See, e.g.*, TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613; Fried, *supra* note 1; WENDEL, *supra* note 4. Bill Simon and Bob Gordon have long emphasized that the strongest critiques of the standard conception are essentially critiques of liberalism. *See, e.g.*, Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 230 (Robert L. Nelson ed., 1992).

7. Pepper, *supra* note 6, at 617.

8. The summary in this paragraph of the liberal argument for the standard conception is somewhat schematic, and defenders of the standard conception may differ from it in certain details. For example, Pepper believes lawyers should engage in moral dialogue with their clients. *See* Pepper, *supra* note 6, at 630–31. Monroe Freedman, another staunch defender of the standard conception, insists that lawyers are fully morally accountable for their choice of whom to represent, but not morally accountable for the means of representation. *See* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 4.02 (4th ed. 2010).

because its grounding in thin, procedural values cuts lawyers off from the moral resources that would give meaning to their professional lives. Students go to law school hoping to learn to do justice, observes Bill Simon, but they graduate with the belief that they are supposed to be merely instruments for the realization of their clients' lawful ends.[9] Lawyers learn that their role is not about pursuing justice, but about defending clients' interests, which may not have anything to do with justice. Morally conscientious lawyers may therefore try to distance themselves from responsibility for the substantive injustice in which they are implicated, but in doing so they learn to identify themselves with this stance of detachment.[10] A liberal legal ethics leads ineluctably to an impoverished self-conception of lawyers as ethical professionals. Moreover, it leads lawyers into complicity with violence as they use the means of coercion supplied by the state to secure rights and goods sought by their clients.[11]

The parallels between the philosophical criticism of the standard conception and Hauerwas's theological critique of liberalism are striking. Thus, one may ask whether a Christian lawyer can follow some version of the standard conception. In this paper I want to give an affirmative answer to that question, but defending this position would seem to require the Herculean task of coming to grips with the vast corpus of Hauerwas's scholarship. His argument against liberalism from a Christian point of view is extraordinarily complex and composed of many strands—some methodological, like his emphasis on the inextricability of values from a narrative situated within a community, and others substantive, like his commitment to non-violence. It is important to hazard an attempt at summarizing it, however, because this paper offers a constructive argument for an engaged Christian legal ethics in which the first obligation of lawyers is to respect the law. Given the thoroughgoing critique of liberalism presented by Hauerwas, a conscientious Christian lawyer might be suspicious of any conception of professional ethics that seemed to rely on an obligation of support, obedience, or fidelity to state-constituted institutions such as the law and the legal system. Thus, with not inconsiderable trepidation I offer a brief summary, in part II, of some Hauerwasian themes and arguments in critique of political liberalism.

Although many of his objections are well taken, Hauerwas sometimes treats liberalism as a monolith, as opposed to a term defined more by family

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9. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 1 (1998) ("No social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages.").

10. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 74–79 (1980).

11. Although Reinhold Niebuhr may have had more influence in political ethics in the United States, the impact of John Howard Yoder on Christian legal ethics has been remarkable. *See* RICHARD P. CHURCH, FIRST BE RECONCILED: CHALLENGING CHRISTIANS IN THE COURTS (2008); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981). Although Shaffer is a Baptist, he describes being profoundly influenced by Yoder. *See* THOMAS L. SHAFFER, MORAL MEMORANDA FROM JOHN HOWARD YODER: CONVERSATIONS ON LAW, ETHICS AND THE CHURCH BETWEEN A MENNONITE THEOLOGIAN AND A HOOSIER LAWYER (2002).

resemblances than by necessary and sufficient conditions.[12] Some varieties of liberalism may not be as vulnerable to the objections Hauerwas raises, and thus may not be as threatening to theological ethics.[13] In order to clear some space for a different conception of Christian lawyering, it will first be helpful to see whether Hauerwas's objections to liberalism hold against a theory of politics that begins with foundational assumptions other than deracinated individuals, and assumes that politics is something more than merely a technology to satisfy preexisting wants. The liberal theory offered here assumes, instead, that people have reasons to live together in communities and work out a common approach to living together, while treating one another as equals. To the extent there are good theological grounds for treating one another as equals, this version of liberalism can be understood as a political response to God's presence in the world. A consistent theme in Hauerwas's work is the dependence of values upon communities, traditions, and stories. There does not seem to be a reason why part of a community's tradition and self-understanding cannot be pluralism and the corresponding need for some means of dealing with one another despite empirical uncertainty and disagreement about morality. If a community's history and traditions can be so characterized, then any duties a citizen, public official, or lawyer may have toward the community's institutions, including the legal system, may be understood as a way of expressing respect for one's fellow citizens.

The constructive part of the argument here requires consideration of another approach to theological ethics, and therefore theological legal ethics, which offers its own constitutive narrative about the type of community we wish to build together. A Christian lawyer will still be a bit strange, as Hauerwas insists she should be, but will not be unwilling to use the institutions and procedures of the legal system to help keep our society as a whole, not just the church, in good working order. To be a bit provocative here, I call this position modest Constantinianism,[14] but it is grounded in the tradition of Lutheran political ethics, which sees political institutions as "a realm of divinely ordained authority and law, albeit perennially distorted by sin."[15] Of course no human

12. *Cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 67 (G.E.M. Anscombe trans., 3d ed. 1958).

13. *Cf.* JEFFREY STOUT, DEMOCRACY AND TRADITION 127–28 (2004) (criticizing Alasdair MacIntyre, with whom Hauerwas shares many methodological commitments and substantive arguments for lumping together different conceptions of political liberalism).

14. Borrowing from John Howard Yoder, Hauerwas has used the term Constantinianism to refer broadly to a systematic blurring of the lines between church and state. Politically the term referred to offices such as prince-bishops that no longer exist, but the term (and its related label "Christendom") remains a way to identify, and in Hauerwas's writing to stigmatize, the view that the church and state ought to work together to transform the world according to the demands of God's righteousness. *See, e.g.*, STANLEY HAUERWAS, AFTER CHRISTENDOM?: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS (1991) [hereinafter HAUERWAS, AFTER CHRISTENDOM?].

15. JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION 93 (2002); *see generally* CHURCH & STATE: LUTHERAN PERSPECTIVES (John R.

institution can fully instantiate God's justice on earth, but that does not mean that citizens (and lawyers) cannot work to accomplish justice and peace, as best as they are able, in and through political communities. This alternative is not offered as a bit of confessional Lutheran theology. Not only am I manifestly unqualified to defend it on those grounds, but I hope that the position is appealing to those with different denominational allegiances, as a broadly Christian approach to political ethics.[16] The Lutheran grounding is offered, however, in a Hauerwasian spirit, because Hauerwas emphasizes that one cannot transcend one's history and the stories told within one's tradition.[17] This is part of my story, and the only way I know how to begin an exploration of theological ethics.

The animating ideal of the positive argument presented here is that politics and political ethics are fundamentally about people trying to live together in a society composed of equals. Certain ways of treating each other are ruled out by the idea that people are, by nature, equal to one another in worth. Physical domination, coercion, and deception all manifest an attitude that others are less than equals. On the other hand, people can treat one another as equals, as fellow citizens of a political community, by seeking a means of regulating the affairs of the community that accords respect to competing viewpoints while also recognizing that it may be necessary for there to be rules and principles that stand in the name of the community as a whole. The institutions and practices of democratic self-government, including the ideal of the rule of law

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Stumme & Robert W. Tuttle eds., 2003).

16. *Cf.* Mark A. Noll, *The Lutheran Difference*, FIRST THINGS, Feb. 1992, at 31 (pointing out resources that Lutherans have to offer to Christian thought generally).

17. Hauerwas frequently talks about narratives and traditions as things that are given, not chosen. Consider the example of being a Texan, which for Hauerwas is an important ontological category. He writes of his fellow Texan, H. Tristram Engelhardt, Jr., that "Engelhardt did not use the language of 'choice' to characterize what it means for him to be a Texan. He knows that such language is surely a distortion of the great and good reality that comes from finding one's life constituted by such a land and people." STANLEY HAUERWAS, *Not All Peace Is Peace: Why Christians Cannot Make Peace with Tristram Engelhardt's Peace*, *in* WILDERNESS WANDERINGS: PROBING TWENTIETH-CENTURY THEOLOGY AND PHILOSOPHY 115 (1997). No matter how rich a tradition is, Hauerwas seems to say, if it is freely chosen, it is somehow not authentically part of the character and identity of the person who chooses it. He therefore rejects the view that autonomy is itself a value, as opposed to a precondition for choosing things that are themselves valuable. *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 417–18 (1986) (arguing that autonomy has value insofar as it enables people to have an autonomous life). It is not clear whether this claim is part of Hauerwas's critique of modernity or a theory of value. To me it seems plausible as the former, but too strong as the latter. In this passage he seems to take both positions: "[O]ne of the oddities of the contemporary situation is that what it means to be a person, to be free and/or autonomous, is to be capable of creating or 'choosing' our 'identity.'" STANLEY HAUERWAS, *A Tale of Two Stories*, *in* CHRISTIAN EXISTENCE TODAY 25, 27 (Brazos Press 2001) (1988). Later in the article, however, he suggests a way of resolving this tension. Although he does not use this word, the crucial idea may be a person coming to *endorse* an aspect of his or her identity that initially presents itself as given. Hauerwas cites his identity as a Texan as "the context that makes intelligible the stories of my people." *Id.* at 36. Other people raised in Texas may not see that fact as important to making their stories intelligible. So, too, with the identity of Christian. For some people this may simply be a fact, but for others it may supply the crucial context to making something intelligible.

and the procedures of legal argumentation and decisionmaking, are ultimately justified with reference to the ideal of the equality and dignity of all persons. The interesting further question is whether it is possible to give a theologically well-grounded account of political ideals such as citizenship and equality. If there is an overlap between our identity as Christians and as citizens in a liberal democracy, then it may be possible to give the kind of account Hauerwas demands: a compelling story about our lives together, in which we manifest, however imperfectly, some aspect of the reality of God's kingdom—in this case, that we are all equals as participants in the story of our inclusion in God's grace.[18]

This is not a "lesser evils" argument, as Hauerwas sometimes caricatures Lutheran political ethics,[19] but an ideal that seeks to instantiate a theological truth about the equality of all persons in the relationships we have with others, mediated through state institutions and practices. Humans are created in God's image and therefore are entitled to be treated by others in a way that respects God's creation. Rather than considering the law a lesser evil, I would go so far as to understand it as a positive good for humans insofar as it enables people to treat each other with respect and tell Christian lawyers that they may participate in helping the legal system realize its own characteristic ends.[20] To have any hope of persuading Hauerwas, however, this argument cannot abstractly use terms like "equality" and "rule of law" that are not embedded in a context that includes history, tradition, and memory.[21] Thus, I suggest briefly a story that offers a background rich enough to provide the kind of justification Hauerwas seeks.

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18. *Cf.* STANLEY HAUERWAS, THE PEACEABLE KINGDOM: A PRIMER IN CHRISTIAN ETHICS 27 (1983) [hereinafter HAUERWAS, THE PEACEABLE KINGDOM]. Waldron has offered a political–theological argument along these lines. *See* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT (2002); Jeremy Waldron, *Persons, Community, and the Image of God in Rawls' Brief Inquiry* (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper No. 254, 2011), *available at* http://lsr.nellco.org/nyu_plltwp/254.

19. *See*, *e.g.*, STANLEY HAUERWAS, *A Christian Critique of Christian America*, *in* THE HAUERWAS READER 459, 462 (John Berkman & Michael Cartweight eds., 2001) [hereinafter HAUERWAS, *A Christian Critique*]. I refer to this as a caricature because sophisticated Lutheran theologians are aware that "Christian ethics does not acknowledge this tragic compromise, that on the contrary the commands of the Sermon on the Mount are quite unconditional and make no allowance for the conditioning of all goals by the sphere of means. . . . Man cannot get off the hook of God's unconditional requirement by pleading that the world in which he is set is an evil world." 1 HELMUT THIELICKE, THEOLOGICAL ETHICS 486 (William H. Lazareth ed., Fortress Press 1969) (1958).

20. *Cf.* WITTE, *supra* note 15, at 4 ("It was one thing to deconstruct the framework of medieval Catholic law, politics, and society with a sharp theological sword. It was quite another thing to reconstruct a new Lutheran framework of law, politics, and society with only this theological sword in hand. Luther learned this lesson the hard way in the crisis years of the 1520s, and it almost destroyed his movement. He quickly came to realize that law was not just a necessary evil but an essential blessing in this earthly life.").

21. STANLEY HAUERWAS, *Remembering Martin Luther King Jr. Remembering*, *in* WILDERNESS WANDERINGS: PROBING TWENTIETH-CENTURY THEOLOGY AND PHILOSOPHY 225, 229–32 (1997).

II
HAUERWAS ON LIBERALISM

A. The Necessary Embodiment of Ethics in Narratives and Traditions (Which Presuppose a Community)

In Hauerwas's theology, a political community is constituted by shared traditions that identify and elaborate upon the virtues of its citizens, which contribute to the ongoing flourishing of the community. Principles of ethics for one's own life and the life of one's community are not derived from reason alone, but must be justified in terms of whether they are directed toward the completion of a journey upon which a particular community finds itself.[22] "[T]he most basic task of any polity is to offer its people a sense of participation in an adventure."[23] There is no way to pry apart ethical principles from evaluations of character, or character from the description of a political community.[24] All of these evaluations are embedded in a narrative that continues to unfold as the community encounters new challenges.

The problem with liberal political theory as practiced by philosophers like John Rawls and Joseph Raz, is that it proceeds as though it were possible to abstract principles of ethics from particular communities with memory and history, and to judge from some hypothetical standpoint—an Archimedean point apart from all of these thick, ongoing, enacted traditions, with their characteristic ends and practices.[25] Stated strongly, abstract rules and principles are unintelligible without a narrative and tradition to give them content; there is no deeper mode of understanding of which stories are merely illustrative.[26] Thus, liberalism is incoherent at the level of axiology. It seeks to begin with a foundation of universal, ahistorical values but fails because there is no such thing as values apart from communities, narratives, and traditions. Liberalism also fails to account for the way in which ethical principles are embodied in

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22. *See, e.g.*, STANLEY HAUERWAS & WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY 61 (1989) ("To launch out on a journey is to move toward some goal. . . . Perhaps this explains why Jesus' ethic was so thoroughly eschatological—an ethic bound up with his proclamation of the end of history. Ethics is a function of the telos, the end."); STANLEY HAUERWAS, *Christianity: It's Not a Religion: It's an Adventure*, *in* THE HAUERWAS READER, *supra* note 19, at 522, 523 [hereinafter HAUERWAS, *Christianity: It's Not a Religion; It's an Adventure*].

23. STANLEY HAUERWAS, A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC 9, 13 (1981) [hereinafter HAUERWAS, A COMMUNITY OF CHARACTER].

24. HAUERWAS & WILLIMON, *supra* note 22, at 79 ("[A]ll ethics, even non-Christian ethics, make sense only when embodied in sets of social practices that constitute a community.").

25. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 61–62; HAUERWAS, AFTER CHRISTENDOM?, *supra* note 14, at 93–101; *cf.* AVISHAI MARGALIT, THE ETHICS OF MEMORY (2002) (considering the role of memory and communities in ethics and politics).

26. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 22–26; *see also* STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH'S WITNESS AND NATURAL THEOLOGY 206 (2001) [hereinafter HAUERWAS, WITH THE GRAIN OF THE UNIVERSE] ("Modern philosophers and theologians generally do not think stories can do the work of argument. Yet I agree with John Milbank that 'narrating,' exactly because narration is the 'science' of the particular, is a more basic category than either explanation or understanding.").

practices (in MacIntyre's sense).[27] Ethics is a matter of doing, not just detached reflection, and doing well at any practice necessarily requires a kind of apprenticeship to someone who has already demonstrated excellence in the craft.[28]

A weaker version of this claim is that, to the extent liberalism offers a constitutive narrative with archetypal characters and virtues, it makes for a pretty lousy adventure story. The story offered by political liberalism, as envisioned by Hauerwas, proceeds as follows: A bunch of people without a shared history get together and form a community in which it is assumed that people will act out of self-interest, except to the extent they are restrained by laws enacted pursuant to a constitutional scheme to which the founders of their community have given their consent.[29] Other than the history of assenting to this purportedly neutral framework of institutions and rules, our community's only real story is that each individual is free to make up his or her own story.[30] The failure in this case may be quasi-aesthetic, not conceptual. Under the standards according to which stories should be judged, the constitutive narrative offered by political liberalism is dull, uninspiring, colorless, and shallow.

Political liberals are trying to tell an interesting story around the centrality of autonomy, not realizing that self-created values are either not values at all,[31] or at least are such thin values that they fail to inspire loyalty and commitment.[32] The ironic result is that individuals—who need communities to form their character and identity—lack the resources to construct their own narrative, so they use transient pleasures to anesthetize themselves from the anxiety that would result if they grasped the meaninglessness of their lives.[33] Not surprisingly, if politics and public life are structured around the so-called goods of bread and circuses, the result will be a community that has nothing to offer people who are trying to lead lives aimed at some meaningful end. Moreover,

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27. *See* ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984).

28. Hauerwas frequently cites his childhood experience learning the craft of bricklaying as an analogy with how excellence in general is transmitted and learned, and how crafts and traditions are preserved. *See, e.g.*, STANLEY HAUERWAS, HANNAH'S CHILD: A THEOLOGIAN'S MEMOIR 36–37 (2010) [hereinafter HAUERWAS, HANNAH'S CHILD]; HAUERWAS, AFTER CHRISTENDOM?, *supra* note 14, at 101–07.

29. *See* HAUERWAS, A COMMUNITY OF CHARACTER, *supra* note 23, at 72, 78.

30. *Id.* at 84; HAUERWAS & WILLIMON, *supra* note 22, at 79 ("The goal of this [modern, liberal, Enlightenment] ethic is to detach the individual from his or her tradition, parents, stories, community, and history, and thereby allow him or her to stand alone, to decide, to choose, and to act alone.").

31. HAUERWAS, *Christianity: It's Not a Religion: It's an Adventure*, *supra* note 22, at 524. In secular legal ethics, David Luban identified as a fundamental weakness in the liberal justification of the standard conception the assumption that autonomy was itself a value, as opposed to being merely a pass-through for the underlying values that explained the choices autonomously made by individuals. *See* David Luban, *The Lysistratian Prerogative: A Reply to Stephen Pepper*, 1986 AM. BAR FOUND. RES. J. 637 (1986).

32. *See* CHURCH, *supra* note 11 (expressing the concern that if legal ethics is supposed to be universal and applicable to all lawyers, "regardless of the particularity of the traditions, practices, and places that shape them," then the profession winds up with "shared moral content [that is] razor thin").

33. HAUERWAS & WILLIMON, *supra* note 22, at 63.

citizens in this sort of society will no longer cultivate the virtues necessary to sustain the community.[34] Fortunately, notes Hauerwas, there is an alternative in the radical otherness of the church.

B. The Strangeness of the Christian Community

In contrast with the dreary story offered by liberalism, Christianity promises a real adventure. To go along on this adventure, however, requires subordinating one's autonomy to the authority of a tradition. Being a faithful Christian means that one's story is not self-created, but given. "The Gospels make wonderfully clear that the disciples had not the foggiest idea of what they had gotten into when they followed Jesus."[35] Being a faithful Christian means belonging to a community that is distinct from the world.[36] From this observation springs the objection to the Constantinian accommodation of church and state. By making its claims to truth in language that is either comprehensible or at least non-threatening to those in power, the church tends to dilute the power, clarity, and distinctiveness of its message. In a nice turn of phrase Hauerwas observes that "in the name of being politically responsible, the church became politically invisible."[37] The church is necessarily a strange thing, because it is structured not by the autonomous actions of individuals who are empowered to create their own history, tradition, and meaning, but around an eschatological conception of history, as having already been made to come out right in the kingdom of God.[38] It is not hard to see why a social ethic aimed at witnessing to God's redemption of humanity would seem peculiar indeed to others who believe that they have in themselves the capacity to make the world a better place.

There is a very important implication for political ethics in Hauerwas's insistence on the centrality of narrative and tradition, which can be stated in weak and strong forms. The weak version is that adherents to particular traditions, or members of communities, should not feel obligated to attempt to explain their peculiar practices to outsiders. One of Hauerwas's objections to Reinhold Niebuhr is that he was so eager to render Christian ethics acceptable to the wider society, in general liberal-political terms, that he was inclined to remove all of the distinctive, peculiar, powerful bits from the Christian message.[39] The Christian community has a distinctive ethical stance that may not

34. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 102–03; *cf.* MACINTYRE, *supra* note 27, at 186–87 (identifying characteristically modern conceptions of individual lives—the manager, the therapist, and the aesthete—and implying that these people lead meaningless lives).

35. HAUERWAS & WILLIMON, *supra* note 22, at 49.

36. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 60.

37. HAUERWAS, HANNAH'S CHILD, *supra* note 28, at 160; *see also* HAUERWAS & WILLIMON, *supra* note 22, at 27 (noting that the accommodation of the church to the state enables "Christians to share power without being a problem for the powerful").

38. HAUERWAS & WILLIMON, *supra* note 22, at 86–92.

39. STANLEY HAUERWAS, *On Keeping Theological Ethics Theological*, *in* THE HAUERWAS READER, *supra* note 19, at 51, 60–61; HAUERWAS & WILLIMON, *supra* note 22, at 32 ("[B]oth the

be acceptable to the wider culture, but it would be a mistake to water down Christian stories just so they do not seem so strange and jarring, because it is precisely the strangeness of the stories told by God's faithful people that makes them exciting and compelling. The strong version of this position is that there is no point in trying to explain, because practices and their associated values are unintelligible to those outside the tradition:

> Big words like "peace" and "justice," slogans the church adopts under the presumption that, even if people do not know what "Jesus Christ is Lord" means, they will know what peace and justice means, are words awaiting content. The church really does not know what these words mean apart from the life and death of Jesus of Nazareth.[40]

Ethical principles gain content from the way they are employed in the stories told about virtuous individuals who are members of communities constituted by fidelity to their traditions. On their own, principles are literally meaningless.[41]

It can sometimes be unclear in Hauerwas's work whether he intends the strong or the weak version of the "narrativity" thesis.[42] However, a pervasive theme in his work is the emphasis on the Christian community as bearing witness to an eschatological possibility—a vision of the direction in which God is moving the world.[43] One of his principal objections to the ethics of Niebuhr is that it effaces the eschatological dimension of ethics, stigmatizing it as "unrealistic" or "pie-in-the-sky," when in fact the whole point of Christian

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conservative and the liberal church . . . are basically accommodationist (that is, Constantinian) in their social ethic. Both assume wrongly that the American church's primary social task is to underwrite American democracy."). Hauerwas seems to count it as a fault of Reinhold Niebuhr's position that it influenced Hans Morgenthau, George Kennan, and Arthur Schlesinger, Jr. *See* HAUERWAS, A COMMUNITY OF CHARACTER, *supra* note 23, at 60 n.24.

40. HAUERWAS & WILLIMON, *supra* note 22, at 38; *see also* HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 58 (denying that truthfulness, uprightness, and faithfulness are abstract values to which Christians should subscribe, with Christian conviction simply supplying the motivation to act on them).

41. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 26 ("Narrative is not secondary for our knowledge of God; there is no 'point' that can be separated from the story. . . . [N]arratives are necessary to our understanding of those aspects of our existence which admit of no further explanation—i.e. God, the world, and the self.").

42. Consider this passage, which contains both weak and strong versions of the thesis:

> Notions like "abortion" are not simply given; their meaning and intelligibility depend on a narrative construal. [Strong version.] Indeed part of the problem with the "old morality," particularly in Catholic moral theology, was a concentration on "act descriptions" as representing an "objective and thus universal morality." Those "descriptions," however, were abstracted from the communal narratives and practices which made them compelling. [Weak version.]

Id. at 117.

43. *See, e.g.*, HAUERWAS & WILLIMON, *supra* note 22, at 86. Hauerwas has said he resists the label of "narrative theologian" because he sees in it the urge to reduce the content of a story to something else—generally some kind of value or ideal that is not alien to liberalism. *See* STANLEY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE 135, 136–37 (2004) [hereinafter HAUERWAS, PERFORMING THE FAITH].

ethics should be to point toward a final end for the world.[44] The idea of witness shows that Hauerwas must intend the weak version of the narrativity thesis. That is, it must be possible for the story as preserved and told within the Christian colony to appeal more broadly. The church's social ethic—which Hauerwas has famously stated that the church *is*, rather than it *has*,[45]—demonstrates that love, forgiveness, hospitality, and peace are possible in this world. This is a story that is intelligible to others, even if it depends essentially on God's action.[46]

C. The Refusal of the Church to Compromise its Witness to Curry Favor with Caesar

The first task of Christians is not to make society work,[47] or to make the world more peaceable or just.[48] "[O]ur greatest tragedies occurred because the church was all too willing to serve the world."[49] In its modern, mainstream guise, Hauerwas has used the label Constantinianism to refer to the view that Christians should, on the basis of theological principles, enthusiastically support democracy and use the apparatus of politics and the state to seek to make society more just.[50] Hauerwas makes a number of different arguments against Constantinianism. One is that it causes the church to water down its message in order to appeal to the wider society: the accommodation of the church to the state "leads Christians to judge their ethical positions, not on the basis of what is faithful to our particular tradition, but rather on the basis of how much Christian ethics Caesar can be induced to swallow without choking."[51] Recurring examples in history of institutional churches cozying up to tyrants shows that it is extremely difficult for the church to withstand the temptation offered by power, acceptance, and social prestige.[52] Another argument is that

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44. HAUERWAS & WILLIMON, *supra* note 22, at 87.

45. *Id.* at 99.

46. *See id.* at 92 ("The Sermon, like the rest of scripture, is addressed neither to isolated individuals nor to the wider world. Rather, here are words for the colony, a prefiguration of the kinds of community in which the reign of God will shine in all its glory. So there is nothing private in the demands of the Sermon. It is very public, very political, very social in that it depicts the public form by which the colony shall witness to the world that God really is busy redeeming humanity, reconciling the world to himself in Christ.").

47. HAUERWAS, *Christianity: It's Not a Religion: It's an Adventure*, *supra* note 22, at 527.

48. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 99; *see also* HAUERWAS, WITH THE GRAIN OF THE UNIVERSE, *supra* note 26, at 208 n.4 ("The great failure of Christians in modernity is our willingness to make peace with the world.").

49. HAUERWAS & WILLIMON, *supra* note 22, at 43.

50. HAUERWAS, *A Christian Critique*, *supra* note 19, at 462–63, 467–70.

51. HAUERWAS & WILLIMON, *supra* note 22, at 72; *see also* HAUERWAS, HANNAH'S CHILD, *supra* note 28, at 174 (noting the "Niebuhrian presumption that pacifists were OK as long as they stayed out of the way of the people who had to run the world"); HAUERWAS, AFTER CHRISTENDOM?, *supra* note 14, at 59 (criticizing John Langan for worrying about "the risk of being relegated to the fringes of society and losing influence on the forming of social policy").

52. The Lutheran church in Germany obviously has a lot to answer for in this regard. The notorious Ansbach Ratschlag concludes, "[W]e as believing Christians thank the Lord God that in its

once Christianity became politically mainstream and became detached from an eschatological narrative, it was possible, at least in principle, for all citizens to abide by the church's ethical principles and to evaluate actions in terms of their outcomes. With that development ethics tended to become pragmatic in nature: "Once the course of history is thought to be empirically discernable and the prosperity of our regime the measure of the good, efficacy becomes a decisive test for the moral rightness of our action."[53] Finally, in Hauerwas's theology, sin is living in rebellion against the nature of reality, which is to say living as though we are the authors of our own stories instead of participants in the unfolding of God's narrative.[54] While participating in government, we may tend to lose sight of the fact that we are not directing the course of history but are along for the ride, so to speak, with God making the outcome-determinative decisions.

In this last argument against Constantinianism, the theological concept of sin is connected with the political theory of liberalism. Liberalism encourages us to conceive of ourselves as empowered to self-creation, as masters of our fate and captains of our souls.[55] We are led to violence when we become so preoccupied with our self-protection that we forget that we are not the center of history.[56] Rather, the Christian colony should order itself so that it serves as a "witness to the world that God really is busy redeeming humanity."[57] But everyone has to be clear on what the colony is doing: it is not the case that God is governing the world *through* the apparatus of the state.[58] "The church must

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hour of need he has given our people the *Führer* as a 'good and faithful sovereign,' and that in the National Socialist state He is endeavoring to provide us with disciplined and honorable 'good government.'" THIELICKE, *supra* note 19, at 366. This colossal historical failing can be seen as a *reductio ad absurdum* of Constantinianism. It is likely that no amount of labor by theologians like Helmut Thielicke to recover an authentic tradition that was perverted by the institutional church in Germany will convince critics like Hauerwas that it is possible for a church to be mainstream and also to resist the unjust use of power.

53. HAUERWAS, *A Christian Critique*, *supra* note 19, at 476.

54. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 31; *see also* JOHN HOWARD YODER, THE POLITICS OF JESUS 142 (1972) (identifying the fallenness of "the Powers" as the refusal to "accept the modesty that would have permitted them to remain conformed to the creative purpose" and instead "claim[ing] for themselves an absolute value").

55. Hauerwas criticizes the movie *Dead Poets' Society* for the message that students should learn to think for themselves. "A central pedagogical task," instead, he argues, "is to tell students that they do not yet have minds worth making up." HAUERWAS, AFTER CHRISTENDOM?, *supra* note 14, at 98.

56. HAUERWAS & WILLIMON, *supra* note 22, at 89.

57. *Id.* at 92; *see also* CHURCH, *supra* note 11, at 110 ("Yoder argues that the church lives out this witness by living now in the manner of that coming eschatological kingdom itself."). Hauerwas reports that he has grown weary of denying that he is calling for Christians to separate themselves from the world. *See* STANLEY HAUERWAS, CHRISTIAN EXISTENCE TODAY 1 (Brazos Press 2001) (1988); HAUERWAS, HANNAH'S CHILD, *supra* note 28, at 208–09. Hauerwas says in many places that he is not demanding withdrawal from the world. *See, e.g.*, HAUERWAS, PERFORMING THE FAITH, *supra* note 43, at 26 ("[T]he church's practice of nonviolence does not require the church to withdraw from the world but rather provides the conditions necessary for the church's service to the world."); HAUERWAS, WITH THE GRAIN OF THE UNIVERSE, *supra* note 26, at 220; HAUERWAS & WILLIMON, *supra* note 22, at 41–42, 87; HAUERWAS, *A Christian Critique*, *supra* note 19, at 477. In this he follows Yoder. *See* YODER, *supra* note 54, at 148.

58. HAUERWAS, PERFORMING THE FAITH, *supra* note 43, at 169, 173.

learn time and time again that its task is not to *make* the world the kingdom, but to be faithful to the kingdom by showing to the world what it means to be a community of peace."[59] If the church cannot work through the medium of the state, it would appear to follow that being a Christian lawyer is an extremely fraught undertaking, because lawyers are involved in the implementation of the state's laws.[60]

Hauerwas will not let liberals get away with platitudes about the social contract and government by the people, of the people, and for people, without acknowledging the coercion that is necessarily implicated in governing. He writes,

> I continue to share John Howard Yoder's concern that governments that claim to rule in the name of "the people" are adept at hiding not only from "the people" but themselves the violence inherent in the order they have learned to call "peace."[61]

When Christian liberals claim to be working toward the common good of society, or a more just social order, they fail to perceive that their employment of the mechanisms of state authority is inherently violent. This point was made powerfully by the legal scholar Robert Cover, who argued that all acts of legal interpretation are the imposition of violence upon another.[62] Legal interpretation, for Cover, is differentiated from literary or philosophical interpretation by the necessary involvement of pain and death.[63] This way of talking sounds overblown, but Cover's point is that a legal interpretation necessarily results in something that either will be, or may be done. The practicality of the law means that something will occur in the world that is inconsistent with someone else's conception of what should be done. Most of the time, however, the inherent violence of the law is masked by implicit structures of domination, which cause those who are affected to simply acquiesce.[64] Christian lawyers, then, may inadvertently become parties to the violence inherent in the law.

III
THE SWORD AND THE LEGISLATURE: DIVERGENT VISIONS OF LIBERALISM AND THE IMPLICATIONS FOR THEOLOGICAL ETHICS

A. A Story

This is a symposium on Hauerwas and the law, so one must contribute to it with a commitment to keeping as much as possible of Hauerwas's distinctive

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59. HAUERWAS, THE PEACEABLE KINGDOM, *supra* note 18, at 103.

60. *See* Milner S. Ball, *A Meditation on Vocation*, *in* RADICAL CHRISTIAN AND EXEMPLARY LAWYER 130 (Andrew W. McThenia, Jr. ed., 1995) ("[A] person cannot be a lawyer without being involved in [the law's] fallenness.").

61. HAUERWAS, PERFORMING THE FAITH, *supra* note 43, 19.

62. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

63. *Id.* at 1606–07, 1609–10.

64. *Id.* at 1616–17

theological methodology and substantive commitments. Although I will argue for a modest Constantinian conception of legal ethics, I hope to do so in the way Hauerwas argues all theological ethics must: by telling a story about the relationship between people—in this case, lawyers—and their communities. The story illustrates the claim the legal system makes upon the respect of citizens, even Christian citizens who owe their primary allegiance to God. The ethical obligations of lawyers can be understood in terms of the obligations citizens have to respect the law which, in turn, are given by the value of equality, and the accompanying duty to treat one another with respect. My hope is that the story fleshes out an ethical case for liberalism that I have made elsewhere in more abstract terms.[65]

The story is set in my adopted home of upstate New York, a region that has experienced a seemingly inexorable economic decline in recent decades. Upstate cities such as Buffalo, Rochester, Syracuse, and Albany grew in the mid-Nineteenth Century as the opening of the Erie Canal dramatically lessened freight rates between the east coast and the western United States. Manufacturing and industry developed rapidly in areas with access to navigable waterways. With the decline of heavy industry beginning in the 1970s, however, these cities steadily lost jobs and population. Other important employers in the region, such as Eastman Kodak (in Rochester) and IBM (in Elmira), found themselves unable to adapt to a rapidly changing technological landscape and eliminated thousands of jobs. Given this bleak picture, the discovery of vast natural gas deposits in a formation known as the Marcellus Shale was big news in the region. Much of this formation lies in central and western Pennsylvania and central New York. Estimates of the size of the gas deposits in the formation vary, but it appears that there might be enough gas in the Marcellus formation to satisfy between two and fourteen years of total natural gas consumption needs in the United States. Marcellus gas is particularly attractive in light of low transportation costs to the East Coast. If development of this resource were permitted in New York, exploration, drilling, and extraction of gas would directly create thousands of jobs, and the indirect effects on equipment suppliers, construction companies, hotels, restaurants, bars, and so on, would be immense.

Extracting gas at a cost that makes the wells commercially viable requires a technique called hydraulic fracturing (often referred to as "hydrofracking" or "fracking"), in which water is injected horizontally, at high pressures, into the shale formation to fracture the rock. The potential environmental harms associated with fracking are significant. The process requires enormous quantities of water, which become contaminated with chemicals used in the drilling process and with naturally occurring underground radiation. Toxic chemicals may seep into groundwater used for drinking and agricultural uses.[66]

65. *See* WENDEL, *supra* note 4.

66. Agriculture, including dairy farming and an emerging wine industry in the Finger Lakes region, is an important part of the local economy.

Fracking operations already underway in Pennsylvania have led to methane pollution of water supplies in the town of Dimrock, memorably demonstrated in the film *Gasland* by homeowners setting their tap water on fire.[67] In addition, trucks and heavy equipment used in the drilling process cause damage to existing infrastructure, such as roads and bridges. There has been extensive reporting and public discussion about whether to allow hydrofracking in New York. Public opinion appears to be about evenly split,[68] and the debate continues about the best way to balance the need for economic development in a region that could sorely use jobs with the importance of protecting the environment and the health of citizens. The state's Department of Environmental Conservation considered the available scientific evidence and released an environmental impact statement and proposed regulations governing drilling.[69] No matter what action the state governor takes, lawsuits may be filed by citizens who disagree with his conclusion. In other words, in New York we are living through a typically noisy, contentious example of the democratic process in action.

B. The Circumstances of Politics

With respect to the question of whether to allow hydrofracking, people in upstate New York are in what Jeremy Waldron has called the circumstances of politics.[70] The circumstances of politics arise when people live alongside one another in a community, perceive the need to act together to deal with some problem, and also perceive that, despite disagreeing about what the solution ought to be, it may be possible to employ procedures that enable competing viewpoints to be heard, and that the participants in the debate are to be treated with as much equality and respect as is compatible with the need to eventually reach a moderately stable resolution of the controversy. Imagine numerous interested citizens: an owner of a sizeable parcel of unproductive farmland who could earn significant royalties from leasing mineral rights to a gas company, a high-school-educated resident of a small town who might formerly have been employed in a manufacturing job but now faces a best-case employment scenario of working at Wal-Mart, an organic farmer whose produce fetches premium prices because she is able to guarantee that it is free of chemical contamination, the owner of a construction business who has been struggling to

67. GASLAND (HBO Documentary Films 2010).

68. *See* Celeste Katz, *Hydrofracking Poll: New York Splits*, N.Y. DAILY NEWS, May 18, 2011, http://www.nydailynews.com/blogs/dailypolitics/2011/05/hydrofracking-poll-new-york-splits (reporting that 41% of New York State residents oppose hydrofracking while 38% support it, with 21% unsure. In the upstate region, 47% are against hydrofracking while 37% support it).

69. NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM (1992); NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, REVISED DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM 9–2 (2011).

70. *See* JEREMY WALDRON, LAW AND DISAGREEMENT *passim* (1999).

make ends meet as residents leave the upstate region, the operator of a bed and breakfast whose guests are attracted to the scenic beauty of the Finger Lakes, and anyone who owns shares in an energy company with a significant "play" in the Marcellus Shale.

How should these citizens deal with one another? Each of the characters in our story should see that he or she is a member of a political community, not an isolated Robinson Crusoe. This means that any justification given for an action is necessarily in the first-person plural. For example, the landowner might prefer that government authorities authorize fracking quickly and with few restrictions, so that he can start making money off his gas leases. But when he appeals to the idea that the government *ought* to authorize fracking, this implies that it would be the right thing to do from the standpoint of the community as a whole. Although the term "community" gets thrown around a great deal in political philosophy, if used properly it refers to something more than just an aggregation of persons. It signifies something about the *relationship* among people: a commitment to treat one another as fellow citizens, as rights-bearers, as people entitled to be treated with respect and not simply dominated or coerced.[71] The idea of a community contains an irreducible aspect of "us-ness" that requires everyone to think and act in terms of everyone else's interests. A community is not just "an expedient for individuals,"[72] but a nexus of relationships. This does not mean people must act out of radical altruism. Rather, it means that seeing oneself as a *citizen* requires finding a way to recognize, consider, sum up, and resolve the competing views of everyone in the community about what ought to be done, as opposed to merely trying to get one's way by any available means. Accordingly, citizens acknowledge one another as entitled to respectful treatment, not domination, coercion, or manipulation.

The public institutions in our society, including the media, legislatures, administrative agencies, and courts, provide a means by which citizens can propose solutions to a problem that can stand in the name of the community as a whole. Citizens can debate, protest, write letters to the editor, organize, tweet, make films (like *Gasland*), lobby, vote, and file lawsuits. Indeed, all of these media are being used in upstate New York as members of its political community attempt to discern the best way—considered from a collective viewpoint—to proceed in light of the potential benefits of a natural resource and the environmental and health risks it poses. The fracking example shows that the law is implicated in virtually everything we do in a complex society. There would be no way to develop a natural resource without a scheme of property rights: a construction project requires enforceable contracts and regulations governing labor practices; interferences by neighbors with one

71. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 201 (1986) (distinguishing between a "bare" community and a "true" community); JOHN RAWLS, POLITICAL LIBERALISM xxxix–xl (paperback ed. 1996) (1993) (arguing that a political community is not a mere *modus vivendi*).

72. WALDRON, *supra* note 70, at 4.

another's peace and quiet are governed by common law nuisance doctrines; environmental regulations govern the disposal of wastewater; selling gas requires a system of futures contracts and rules governing the operation of commodities exchanges; a system of taxation is required to maintain roads and bridges. For any other activity, a similar list could be generated of the ways in which the activity is pervasively law-governed.

What I want to suggest, borrowing from a wonderful book title by Stanley Fish,[73] is that our society is comprehensively law-governed "and it's a good thing, too." It's a good thing because 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. Mechanisms like lobbying, organizing, and even litigation allow the voices of individuals to be heard. Indeed, the state must take the voices of citizens into account, which is why administrative agencies must publicize proposed regulations and consider public comment before they are effective. Notice the significance of the metaphor of hearing the voices of citizens. It suggests that the government must respond to *reasons*, and must articulate reasons to explain and justify its actions. In doing so, it expresses respect for citizens as moral agents, not merely as subjects.[74] Hauerwas worries about a thin conception of politics in which self-interested individuals use public institutions as instruments in a struggle to maximize their own advantage but end up with nothing of authentic value. A different conception of liberalism and democracy, however, might emphasize the way in which public debate, lobbying, voting, notice-and-comment rulemaking, and so on tends to reinforce a vision of citizens as bearers of rights. "[T]he right-bearer is one who is self-aware and vigorously conscious of both the extent of and the limits on what he is entitled to demand from others."[75] In other words, we are all one another's equals, and the law gives us a means to express respect for this equality in the way we act together in communities.

Traditional theological analyses of the role of the state talk about government officials ruling with the sword,[76] emphasizing the coercive and even violent aspects of the law. The law is much more than the sword, however. The little story about fracking suggests that the law can be a way that people use to talk to each other. The idea of a *right*—to drill, to have roads repaired, to enjoy clean air and water, to receive a fair wage for work, et cetera—is one that depends on the idea of the rule of law. The rule of law is a concept with a great deal of baggage, but all that is meant here is that there is a difference between raw power and rightful power.[77] The rule of law enables the (relatively)

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73. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO (1994).

74. WALDRON, *supra* note 70, at 221–23.

75. *Id.* at 223.

76. *See, e.g.*, DAVID C. STEINMETZ, LUTHER IN CONTEXT 122 (2d ed. 2002).

77. *Cf.* E.P. THOMPSON, WHIGS AND HUNTERS 258–69 (1975).

powerless to say to the (relatively) powerful, "Hey, you can't do that to me!" Of course, it may also enable someone to respond, "Oh yes I can—here is the right by which I exercise my power." But the important aspect of the rule of law is that it creates at least the possibility of a justification that is independent of interests and power, and rests instead on a process of enactment that treats citizens with the respect due a community of equals. Hauerwas worries that the language of rights is alienating, and that it is premised on a thin conception of individual autonomy as the foundation of ethics. There is a different way of looking at rights, however, which emphasizes equality and mutual respect as the foundation of the rule of law. The story of a political community facing intractable disagreement is intended to illustrate how the law can serve as a framework for peaceful coexistence in a world in which other, thicker traditions have broken down.[78]

C. Christian Attitudes Toward Public Institutions

Yoder argues that it is essential to see public institutions as fallen, but not limitlessly evil.[79] The fallenness of any human creation is related to Hauerwas's definition of sin considered previously—that is, the confusion of who is morally sovereign in the world. Christians must be faithful, and that means understanding that they play a role in God's story, and that autonomous self-creation is an insufficient foundation for a virtuous life. Thus, one must be extremely careful not to regard public institutions as idols that demand unconditional loyalty, and not to acquiesce in the self-glorification of the state.[80] However, one also must be careful not to regard the government and other public institutions as something with which God is not concerned. As Yoder notes,

> [T]he theology of the orders of creation has generally affirmed that Jesus Christ has little directly to do with them, but that rather these several orders (the state, family, economy, etc.) have an autonomous value unrelated to redemption and the church, by virtue of their being the product of a divine act of creation.[81]

Here Yoder cites H. Richard Niebuhr, but the allusion to the traditional theology of the orders of creation suggests that the target of his criticism is

78. Sarah Cravens has suggested to me that a theologian in the Barthian tradition might object that I have posited a human problem and solved it in human terms, only dressed up with lots of language about God. That is different from addressing a problem that arises when a problem is considered from the point of view of what we know about our relationship with God. I have not found a place where Hauerwas says something like this explicitly, but it seems to be a fair reading of his position that political problems must be considered, first and foremost, from the point of view of God's moral sovereignty in the world. As a complete amateur theologian I cannot give an adequate response to this objection, which seems quite powerful to me. An adequate response would have to begin with considerations of the right way we as fallen humans are capable of apprehending God's will regarding the way we live in communities with other fallen humans.

79. YODER, *supra* note 54, at 141–42.

80. *Id.* at 143, 145.

81. *Id.* at 144.

traditional Lutheran doctrine.[82] But the key Lutheran point is slightly different from what Yoder is saying here. The central teaching is not that the family, state, and economy have autonomous value, but that nothing in the fallen world can be salvific. No system of laws can be essential for salvation, because justification is solely by faith. No one can be saved by obedience to the law. In contrast with the church, which is ruled exclusively by God through the gospel, the world is governed by the state through the law. The state is still part of God's government, but in the world, unlike the church, "the state rules through law, reason, human wisdom, and coercion."[83] The state is "an independent sphere of God's governance," but it is still a sphere of *God's* governance.[84] Yoder is correct that the value of state institutions is unrelated to redemption, but not that it is autonomous in the sense that Hauerwas objects to. The state always remains accountable to God, not autonomous as a source of self-created value.[85]

Indeed, Lutheran teaching is no less resistant than Hauerwas to the idea that humans are genuinely autonomous and morally sovereign, because of its emphasis on human nature as simultaneously redeemed and sinful.[86] This doctrine is sometimes understood as positing a public–private dichotomy,[87] but it is really a thoroughgoing ontological claim about the paradoxical nature of humans who are freed by grace but remain in bondage to sin.[88] What follows from this for political ethics is an attitude of humility, recognizing that "precisely when Christians mount their most valiant public efforts for God, they run the greatest risk of substituting *their* righteousness for the righteousness of Christ, and thereby subverting justification by faith."[89] Working within fallen human institutions is not only intrinsically corrupting, because everything created—everything human—is intrinsically sinful, but also intrinsically freed by God's grace. Human laws can never fully instantiate God's law, and human

82. *See, e.g.*, WITTE, *supra* note 15, at 87–117; STEINMETZ, *supra* note 76, at 112–25; James M. Childs, Jr., *Ethics and the Promise of God*, *in* THE PROMISE OF LUTHERAN ETHICS 97 (Karen L. Bloomquist & John R. Stumme eds., 1998). As discussed in this section, all of these authors argue for a position that is more subtle than the view criticized by Yoder.

83. STEINMETZ, *supra* note 76, at 122; *see also* THIELICKE, *supra* note 19, at 371 ("Luther speaks of two 'governments' rather than two 'kingdoms' in order to show that we are not dealing with two spheres but with two modes of the divine rule.").

84. WILLIAM H. LAZARETH, CHRISTIANS IN SOCIETY: LUTHER, THE BIBLE, AND SOCIAL ETHICS 14 (2001) ("Luther's final intention was to demonstrate God's twofold rule of the whole world by law and gospel and not to separate it into two divorced realms of the sacred and the secular."); WITTE, *supra* note 15, at 93 ("All three of these orders, governments, or estates, Luther insisted, represented different dimensions of God's authority and law in the earthly kingdom. . . . All three not only exercised the justice and wrath of God against sin, but also anticipated the more perfect life and law of the heavenly kingdom.").

85. LAZARETH, *supra* note 84, at 71.

86. WITTE, *supra* note 15, at 94–95.

87. *See* CHURCH, *supra* note 11, at 85; THIELICKE, *supra* note 19, at 362–65 (recounting history of this interpretation).

88. WITTE, *supra* note 15, at 96.

89. Noll, *supra* note 16, at 38.

law is helpless to transform sinners into people who are righteous. As subjects of God's law, Christians are in an ongoing state of becoming or transformation, with the telos of this law being God's command of love: "Love is the fulfilling of the law."[90] Because anything human is never fully transformed and always bears the imprint of sin and rebellion against God's will,[91] any citizen or public official should be reluctant to trust in the goodness of any human artifact, including laws and the legal system.

The fact that the legal system is suffused with liberal concepts like rights and autonomy should not be a reason for Christian lawyers to shun most ordinary lawyering tasks. Rather, a liberal conception of legality may be a recognition that we govern ourselves in the first-person plural, articulating reasons for action that purport to be general and stand in the name of society as a whole. The law offers a means of democratic self-government that is, at least in reasonably just societies, responsive to the need to settle contested issues in a way that is respectful of the entitlement of all citizens to be treated with respect, as equals. That strikes me as a significant achievement, and one in which a Christian lawyer, attentive to the imperfections of all human creations, can participate.

IV
CONCLUSION

Many of the participants in this conference pressed Hauerwas to say something good about the law, the legal system, and lawyers. Surprisingly, he was quite willing to do so. Even such a thoroughgoing critic of liberalism as Hauerwas recognizes that there is some value in maintaining a practice of constraining the exercise of power by permitting the powerless to assert rights based in the positive law of a political community. If there is some good in the law, then there is nothing inherently problematic about the idea of a Christian lawyer, provided that the lawyer does not confuse the law with the ultimate source of moral authority. Importantly, however, a lawyer should also not confuse her own beliefs about what justice requires with what justice in fact requires. Christian lawyers should recognize that they are simultaneously redeemed and sinful. Human institutions such as the legal system possess a similar dual nature. Lawyers should therefore be reluctant to assume that the law overlaps with justice, as measured by the standard Hauerwas insists upon, namely God's justice. Hauerwas might suggest that a Christian lawyer must understand herself as playing a role in God's story—not being the author of her own story, with its own set of values grounded in the autonomy to write one's own narrative from the ground up, free from the constraint of tradition and

90. LAZARETH, *supra* note 82, at 75–78.

91. THIELICKE, *supra* note 19, at 366 (emphasizing that there is always at work in history "another factor which is not the providential will of God, namely, man with his sin and rebellion against god's will, and that this sin and rebellion are expressed structurally in the historical nexus and institutionally in specific perversions of family, nation, etc.").

history. One can criticize the implicit idolatry of liberalism while nevertheless preserving a space within a liberal political order for faithful service by Christian citizens and lawyers. Thus, although Hauerwas has not had much to say directly about lawyers and legal ethics, it may be possible for lawyers to respond to the radicalism of God's calling while also remaining faithful to their own professional craft.