A DIALOGUE BETWEEN A THEOLOGIAN AND A LAWYER*

H. JEFFERSON POWELL[1]: Let me begin with a story about Stanley Hauerwas. It's actually about Stanley, not about me, but it won't sound that way at first. The first time I served at the Department of Justice, I had to go through a national security check so that I could be allowed to find out all kinds of extraordinarily boring, but highly classified pieces of information. And one of the end points of that process is an interview with an FBI agent. And one of her jobs is to explore with you any loose ends, anything troubling. I am sure that is exceedingly boring because of course for most people there is nothing there. But the FBI agent that came to me in 1993 was excited because she had something really, really interesting: "Mr. Powell, one person we spoke to about you gave us an answer that caused us some pause. When we asked Stanley Hauerwas whether there were circumstances in which you would be disloyal to the United States of America, Mr. Hauerwas said, 'Yes.' What did he mean?" I replied, "Well, what Stanley was saying is that I am a Christian and therefore if I had to choose between obeying God and obeying the State, I would choose to obey God." She responded, "Oh, it's about religion. Never mind."

This exchange reveals several things that are important about Stanley. First, it tells us something about the person (although the person here is deeply connected with the thoughts). With his characteristic generosity on a personal level, Stanley was assuming, I hope correctly, that I would do the same thing he would do under those circumstances. In a conflict between God and Caesar, I would choose God. One of the problems people have, I think, in pinning down how Stanley relates to the law is that Stanley's thinking goes on several different levels and this personal characteristic, friendly generosity, is intrinsic to Stanley's understanding of the universe. It's from Stanley I learned—although Thomas Aquinas saw it before—that friendship is not just an ephemeral matter—it is part of the constitutive nature of the universe, friendship of God being the ultimate example.

A second insight into Stanley revealed by my exchange with the FBI agent is that Stanley has spent his career trying to make us understand how shocking that agent's reaction ought to be to Christians. As soon as the agent learned

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1. At the time of this dialogue, Professor Powell was Deputy Assistant Attorney General, United States Department of Justice, and Lyle T. Alverson Professor of Law (on leave) at the George Washington University Law School.

that Stanley's reservation had something to do with my religion, that meant it wasn't important, that it wouldn't make any difference. She was no longer concerned. One of Stanley Hauerwas's great gifts to American Christianity and Christianity in general has been to say that it ought not be like that.

A third insight from my exchange with the agent raises a question that I don't think Stanley has truly answered, and part of the point of the dialogue today is to encourage him and the rest of us to explore the issue further. Suppose Stanley had succeeded and the agent's reaction had not been "it's just religion." Suppose she had instead realized that Christianity is intrinsically and entirely and completely in some unique way, political. Should she have been worried by my answer—by Stanley's answer—that yes, I would obey God rather than Caesar?

I am going to take the moderator's privilege and pose a version of this question to Stanley. I am going to first tell you the real form of the question, what it is really about, and then I will ask it in proper fashion. The real question, Stanley, is, can I agree with you mostly and still be a government lawyer? I have been doing this government lawyer thing for a long time. In fact, I was working full-time as a government lawyer when I finished my PhD with you, and so I have been wrestling with this and you have never actually told me "no." But I am not sure you have told me "yes" or how to do it.

Now let me ask the formal question. You say that you are a theocrat, and I think what you mean by that is that there are no areas of life in which Christians do not live under Christ's lordship and that everything a Christian does is, or ought to be, a Christian act by a Christian through and through. Some of your other readers think that it means everything a Christian does has to come with a label saying "Christian" or with the words "Jesus Christ" somewhere in the sentence. If the latter is the correct reading, then no, I can't be a government lawyer, because I can't talk the talk as a government lawyer I need to talk if I am to do that particular role. I think your answer ought to be yes, I can, as long as I remember that my fundamental commitment and my fundamental language is Christian, and that also there are types of languages and commitments that have their own place in the world. But I think that sounds so much like Lutheran two kingdom talk to you that you don't want to say that. So what do you mean when you say you're a theocrat?

STANLEY HAUERWAS[2]: Well, I like saying things that make people nervous. So I say that I am a theocrat as a way to put something in an outrageous manner that hopefully evokes thought. I think it is a question of audience. I write for Christians and I'm trying to challenge the locution you find among some Christians today who say "I believe Jesus Christ is Lord but that is just my personal opinion." It seems to me what produces that grammar is the destruction of Christian speech on the presumption that the last thing that I

2. Gilbert T. Rowe Professor of Theological Ethics, Duke Divinity School.

would want to be caught with is a conviction that I could not back away from.

This relates to the powerful metaphor of "stepping back" that Stanley Fish reminded us of today.[3] I caught on to it early on in Stuart Hampshire's *Thought and Action*, which was dependent upon the notion of being able always to step back.[4] That doesn't mean that you're not able to have a critical perspective on your fundamental convictions, but the critical perspective you have on your fundamental convictions depends on those fundamental convictions. So the very idea that there is some place to be that isn't already inhabiting those fundamental convictions is part of what I am trying to help Christians recover by saying something outrageous such as "I am a theocrat because Jesus is Lord."

That doesn't mean I want the rule of priests. Indeed, that would be the worst possible thing. What we have fundamentally in this country is a rule of lawyers. Now that is not all bad. I assume that elite law practice very much determines some of the limits on our political life that I think is very much to the good. Jeff, you're obviously part of the elite lawyers who serve in the Department of Justice and the question is, can you do that as a Christian? I don't know—you need to tell me. Do you feel that Jesus has called you there? And with whom do you test your answer, because you can't do it on your own—why would you trust your own conscience?

I don't know that being an elite lawyer in the Department of Justice is any more compromised that being a tenured member of the faculty of a major research university; I mean that is pretty compromised. Who knows where your speech has been distorted by the commitments you live out on a daily basis? You are always going to need the testing of friends who hopefully will tell the truth, who might not be part of your same set of commitments.

Theocracy is a reminder of Jesus Christ's lordship that is always going to put one's self in tension with the world in which we find ourselves. The language we speak as Christians forces a reframing of the way challenges are put that doesn't translate immediately into the alternatives that have been shaped by the American polity. And that reframing is what I have spent a lifetime trying to do. It's called casuistry. Take what Stephen Carter says about what I try to do with war.[5] We think of war as a sacrificial system that is necessary for the renewal of the republic to convince ourselves that the sacrifice of the youth in past generations requires the sacrifice of the youth in the present generation to ensure ourselves that the sacrifice of the youth in the past generation was worthy. Now, how we reframe those kinds of arguments depends on recognizing that you are always going to be tempted to engage in other discourses that mimic Christian life. These discourses parody what we Christians think Christ

3. Stanley Fish, Davidson-Kahn Distinguished University Professor and Professor of Law, Florida International University School of Law.

4. STUART HAMPSHIRE, THOUGHT AND ACTION (1981).

5. Stephen L. Carter, *Must Liberalism Be Violent?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 201, 202–07.

has done in ending sacrifice. Another example of a reframing is to ask what it means to know how to receive those that we call the mentally disabled. Those are ways I try to make Christian theology do work because our problem as Christians today is that our language is on a holiday. Our language doesn't do the kind of concrete work that suggests the difference it makes for how we have to live to speak that way.

POWELL: Let me just follow up because I am still not comfortable with your response. One of the things I like about your insistence on community is that it doesn't obscure the fact that people are both in communities and real people. Let me give you a concrete example of the kind of issue on which I think someone might take Hauerwas and bring him to bear on the law. One of the great, although not often noted, struggles within the law is the struggle over what it means to engage in legal talk and meaning. I heard a very distinguished person on a major law school faculty a few years ago say the following, and she said it in the tone and with the air of someone saying something self-evident: "The law of course has no method of its own; it's hollowed out, it's gone, it's just talk."

There is a real struggle in contemporary law between those who hold this belief (and many of them actually teach in law schools) and those who think that there are other forms or ways to be thinking about the law, who insist that the Anglo-American common law tradition has content. I would call that content, borrowing an expression from George Grant, "English-speaking justice": a concern for a certain kind of dignity and avoidance of humiliation, trying to treat people decently.[6] And that's been part of what the Anglo-American legal tradition has been about. It has also been about all kinds of other bad things, but it's had substance. And so if I were to take Hauerwas and try to make your thinking fit into law, does it make sense to think about a legal tradition that is separate and apart from the high-level political liberalism that you often criticize?

HAUERWAS: Let me try to put it in terms of the formation of law students in the first year of law school. I first learned the law—or parts of it—when Tom Shaffer invited me to teach contracts with him at Notre Dame.[7] There was a blind law student in the class who needed cases read to him, and so I read through the first-year curriculum with this blind law student. And through that process I learned that the formation of someone in the law is the learning of a language through which you see the world. The learning of a language gives you power, an ability to exercise skills that are very much like Aristotle's

6. GEORGE GRANT, ENGLISH SPEAKING JUSTICE (1998).

7. Thomas L. Shaffer, Robert and Marion Short Professor Emeritus of Law, University of Notre Dame Law School. For an example of collaboration between Professors Hauerwas and Shaffer, see Stanley Hauerwas & Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME L. REV. 569 (1979).

understanding of the virtues as a second power. That is what happens through the initiation in law school—you learn a second power though which you become articulate in a way to help people negotiate the everyday that gives you a certain way of being in control to help people, and being in control is very important.

Now I thought at the time that lawyers resisted the charge that the law reflects politics or morality as a way to save what they were learning as skills of the law that gave them a sense of identity in a world in which moral identity was very ambiguous. They believed, "The law has an integrity that the rest of my life does not, and I'll be damned to let it be ruined by recognizing that it reflects a community's politics or morality." So the law becomes an end in itself. That will kill you.

So fundamentally, if you are to be able to live out the life of the law you are going to need a more determinative community than the law, and that I worry is very hard to find. One of the temptations will always be to think that you can replace that community with theory. Theory is always a useful, imaginative exercise, but it's not going to be sufficient unless you have a much more determinative set of practices that surrounds the law.

Medical training works similarly in forming people into a particular way of life. One of my ways of putting that—and it works both for the law and medicine—is to observe that a person can come to divinity school today and after a semester or so say, "I'm just not into Christology anymore, I am really into relating, and I'd like to take more clinical pastoral education." And in most divinity schools, they say, "Right, that is really what it is all about—relating—go get your head on right and go do that." Suppose a kid went to medical school and said after a year, "I am really not into anatomy, I am really into relating and I would like to take more psychiatry." In medical school (or in law school if you said you were not into contracts), they would say, "We are not interested in what you think—take anatomy (or take contracts) or ship out." Now that is real moral training. And they are able to do that in medical schools and in law schools in a way they are not able to do in a divinity schools because people no longer believe that inadequately trained priests may damage their salvation, but people do believe that inadequately trained doctors or lawyers can hurt them. So that is the way I think about these matters of how to reclaim and fit into the broader convictions of the Christian community the service that someone who has felt called to medicine or felt called to the law might well be able to perform in that way.

I worry about an abstraction like the law because the law is a many-colored thing and very diverse. There is a passage in Scripture, 1 *Corinthians* 6, that says you are not to take one another to court.[8] Fundamentalists don't quote that one

8. *See* 1 *Corinthians* 6:1–7 ("When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels—to say nothing of ordinary matters? If you have

very often because, of course, they want to take one another to court. Or at least they want to take progressive Christians to court. But what does it mean for you to think of the law as a possible mode of reconciling behavior that Christians can be called to do? Those are the kinds of questions that I just want to keep alive. And I think that as Christianity is losing its social power and status, there is a real possibility we can keep these questions alive because it's going to make a difference if you want to declare yourself a Christian in a way that will create enough distance to ensure that the question won't go way.

How you understand the law, as John Inazu put it, to what extent the law reflects liberal theory, is a very interesting question.[9] I think that it will be answered in many different ways. But one of the things I like about the law, and in particular the common law tradition, is there is no bottom to it. And therefore it gives you language that is often unavailable in other aspects of our lives. So I continue to be very attracted to the moral resources of the law, and it would be a great tragedy to ignore them simply because Christians may have tensions with the law.

Let me mention here one thing that came up earlier today about the civil rights era and Martin Luther King.[10] I haven't written much about these issues, though as a white from the South, I have never been sure to know what to say. But I have recently written a fairly long essay on King that is coming out in a book called *War and the American Difference*.[11] And I have nothing but great regard for King. In my reading in preparing that essay, I became convinced that the great work was Montgomery. And Montgomery really drew on a people who dwelled in Goshen to sustain the patience necessary to confront a struggle that oftentimes seemed unwinnable.

Montgomery was an extraordinary moment of King being drawn into a leadership position that he wasn't sure he was ready for. And the black church was absolutely crucial. By the time you get to Birmingham, you begin a process in which success was crucial to the movement because the movement became the church. King and his advisors were well aware that once they moved from Montgomery, they couldn't count on the people they knew in Montgomery to sustain the movement for the long term. And people like Fannie Lou Hamer wanted to keep raising the question, "Are we moving too fast? Because we don't want to leave the community behind."

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ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against a believer—and before unbelievers at that? In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded?").

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

10. *See* David A. Skeel, *Hauerwasian Christian Legal Theory*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 115, 124–26.

11. STANLEY HAUERWAS, WAR AND THE AMERICAN DIFFERENCE: THEOLOGICAL REFLECTIONS ON VIOLENCE AND NATIONAL IDENTITY (2011).

King and his advisors were caught in a very hard political choice about having to move along constantly to ensure success and it ran his life into the ground. I'm not in any way trying to be critical of him; I am trying to suggest what an unbelievable dilemma he had to live in, in terms of the movement having to be constantly on the move to be successful. And I think we continue to pay the price for it because allegedly Martin Luther King was a success, and now we think: he has a holiday, civil rights worked, and African Americans have everything that white Americans do—they can move to the suburbs, have two cars, three TVs, and worry about Jews moving in. So you get to say, "What is a little slavery between friends?"

How you come to terms with a slave nation I think has still not been confronted—how do you come to terms with something so wrong that there is nothing you can do to put it right? And that continues to be part of the challenge that Christians have something to say about. That I suppose is the kind of reframing that we need to be about as Christians who have the means to confess what it means to be a people who have inherited a history that includes within it actions that are so wrong there is nothing you can do to make them right other than to forgive and not to forget.

GEORGE CHRISTIE[12]: What does it mean to be a Christian? Is it a community of practice? A community of faith that believes in certain things? Do you think you can be a Christian or claim to be a Christian if you really don't believe in the faith but you believe in the community?

HAUERWAS: Well, I'm not one to take my subjectivity that seriously. The idea that I might know whether right now I am exhibiting deep faith in God, I wouldn't have the slightest idea and I don't find it interesting. The question is: What do my enemies think? I always say one of the most important questions you can ask a theologian is "Where do you go to church?" because the liturgy is central to the intelligibility of the language we use. So I am not that impressed by justification by belief. It seems to me that the Protestant focus on thinking that you need to believe very hard that God exists and therefore that makes you a Christian shows a kind of desperateness that fails to indicate that what it means to be a Christian is to be embedded in practices that are so determinative you cannot imagine that God has not redeemed the world in Jesus Christ. And that sounds like a belief, but it is much more embeddedness in a whole language and community that exemplifies the language that makes our lives intelligible. It's not a question of whether the tradition is going to undergo changes; it's obviously going to undergo changes all the time, just like the law undergoes changes all the time. The question is how you account for the continuities, not how you account for change. And that is part of the work of theology and that is part of the work of the law.

12. James B. Duke Professor of Law, Duke University School of Law.

I worry a little about core belief language because of Protestant Liberals. Protestants are more or less formed with the question, "How much of this shit do I have to believe and still count myself a Christian?" Roman Catholics—or at least some of them—have the view, "Look at all this stuff we get to believe." Now, I understand I am using the belief language, but what that means is the idea that there is a core that is absolutely the "stuff" and you might believe stuff like Mary is a virgin, but that's not core. Now I think if I want to be very careful with that kind of language exactly because it is the thickness of the narrative that is crucial and that narrative is always under retellings.

UNIDENTIFIED QUESTIONER: As you watch the current political scene, when moments of profession of so-called faith turn up on the nightly news, how do you view all this?

HAUERWAS: Well, of course it will vary, but that someone has to have a faith strikes me as the cultural lags of Constantinian Christianity continuing to give people legitimacy they shouldn't have. It would just be great if someone could be a public official in America who doesn't believe in God. If only we could reach the political sophistication of Australia. Poor America, our public philosopher was Locke; Australia got really lucky and their public philosopher was Bentham. It makes for a more honest set of discourses. One of my worries with the religious right is that they are so desperate that there just seems so little joy associated with that way of being a Christian. I can't imagine how anyone would be attracted to it other than as a way of saying "I can use God to show why I am right and you are wrong." I just think that's a sad way to have to live. I think that the religious right is a deep judgment on how the church has conducted herself in America just to the extent that people are practicing a form of Christianity that seems so unbelievably stupid.

DAVID SKEEL[13]: I was really struck by the comment Stephen Carter made at the very beginning of his talk when he said that he doesn't think you accept the distinction of the violence of war and the violence of law.[14] Can you imagine law that is not violent? Is there a difference between violent law and nonviolent law, or is it inherently violent in the way Carter was suggesting?

HAUERWAS: I hope that law is not inherently violent. I mean for me, as someone committed to Christian nonviolence, it is a real question whether you call a policeman. And yet at the same time, I want there to be a law against theft. I want there to be a law against murder. I want there to be a law against fraud. I always say the problem with capital punishment is that it's associated with the wrong crime. People say it doesn't deter murder. I agree. But let's put

13. S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School.
14. *See* Carter, *supra* note 5.

up a guillotine on Wall Street and let's cut off the heads of people who have committed stock fraud. I'll bet it will work. Do it on television.

I want to be supportive of my brothers and sisters who may not share my views about nonviolence to see how we can make the law, as nearly as possible, a service into the community in which those called to the police function are more nearly able to fulfill that calling nonviolently. They are called *peace* officers.

There are all kinds of distinctions that I think you can make. Violence is an analogical description. It works pretty well as a description of killing someone, but there may be forms of force that those of us associated with nonviolence can understand as an alternative to more determinative forms of violence. I am not against exploring those as possibilities. Lawyers often help people make contracts—I don't necessarily think that is violence. There are all kinds of ways I think Christians can be involved in the law that would be nonviolent. There are Mennonite lawyers. They tend not to do court work but nonetheless they understand there is a role for the law.

I don't agree with Stephen Carter's suggestion that I don't think there is a place for just war reflection. I am more than ready to enter in. But not when the war breaks out and someone says, "Let's see, looks like we got legitimate authority declaring it, we got it declared, we may have some problems with discrimination, and so on . . . but three out of six ain't bad." That's too late. I want to ask what kind of foreign policy would you need for America to have a just war foreign policy? What would a just war Pentagon look like? If you wait until a war actually breaks out, it's too late. So the question for someone committed to Christian nonviolence is how we start a conversation in this country that would let you begin to think about what a limited war would look like. That's the kind of thing I want to think about.

CHARLTON COPELAND[15]: How might we avoid the shame that can result from being dependent upon the liberal state? If one were to read at least some of your work, there might be the sense of sadness for those whose lives or safety depend upon the liberal state in some important respects. How do we struggle though the sadness and not somehow let it become shame for those who depend upon the liberal state?

HAUERWAS: My problem has never been liberals. My problem has been Christians who are liberals and who don't know it. I expect liberals to be liberals, and I'm deeply grateful for many of the kinds of developments that Stephen Macedo names.[16] It's good that we live in a social order where at least you have some legal recourse if you are arbitrarily arrested. The world as I

15. Associate Professor of Law, University of Miami School of Law.

16. *See* Stephen Macedo, *Hauerwas, Liberalism, and Public Reason: Terms of Engagement?*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 161.

found it is pretty damn good. But I need to name, as part of my service to it, what I take to be some of the profound challenges to our being able to live well together as human beings within the liberal rhetoric of our time.

Take abortion, for example. The real question is whether we as a people are confident enough in our lives to want to pass life on to future generations. Do we have such goods that compel our own lives that we think it sufficient to bring new life into the world, to say we want you to enjoy what we enjoyed? When I used to teach at Notre Dame, they had a course on marriage and family. Parents wanted the course in the curriculum to ensure that their kids would not do what the parents were afraid their kids were going to do when they went to college, but what they had already done in high school. I usually started the course with a question: What reason would you give for yourself or someone else to have a child? Students would answer that children are the manifestation of our love. Or that children are a hedge against loneliness. Or that we have children to please the grandparents. It's amazing how inarticulate we as people are about what it means to have children, which I think can be a very basic moral presumption for any social order. And I think Christians can have something to say about that, and that would be of service within a liberal social order. If you think you are having children for your own happiness, good luck.

PAUL GRIFFITHS[17]: With respect to law and Christianity, we have been talking about these things as if they are extrinsic to one another—what goes on in the law schools and what goes on in the church. But many Christian communities, including the Catholic Church, have not only a law-ordered life, but a code of canon law that they keep on the shelf and consult frequently for some interesting stuff, like when I may have implicitly excommunicated myself, or whether or when I may receive communion in a non-Catholic church. And of course the same is true for Jews and Muslims, and to some extent, some Protestants. So does thinking about the development of use of codified law by Christians help?

HAUERWAS: Absolutely. Rich Church has some great stuff in his book on this subject.[18] 1 *Corinthians* 6 was a pressure on the church to develop a law internal to itself. It's not a question of whether you have law or don't have law. The question is what kind of law you are going to have for any serious community. I think the development of canon law is a great resource for how to think about a community who finds ways to order its life across time for our cooperative way of life for the worship of God, for the church, and for justice for wider society. (I worry about phrases like "wider society" because I think the church is wider than society.) The trick here is James Logan's appeal to

17. Warren Professor of Catholic Theology, Duke Divinity School.

18. RICHARD P. CHURCH, FIRST BE RECONCILED: CHALLENGING CHRISTIANS IN THE COURTS (2008).

excommunication in his reflections on punishment.[19] Excommunication is not about us throwing you out. It's that we've discovered you're out and giving you the conditions for return. Now that depends upon the one who is excommunicated thinking that there is no more important thing in life than to be a member of this community. So there is a kind of calling that makes the law of the church have a kind of aspirational feel that the law of other communities lacks. I didn't choose to be an American, I just got stuck here and I gotta learn to live here. I'm a Texan and somehow I have to live by the law of North Carolina. I don't know that I am all that happy with that, so what good would it do to excommunicate me from North Carolina?

POWELL: Thank you, Dr. Hauerwas.

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19. James Logan, *Healing Memory, Ontological Intimacy, and U.S. Imprisonment: Toward a Christian Politics of "Good Punishment"*, 75 LAW & CONTEMP. PROBS., no. 4, 2012 at 77, 81–83.