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Faith in the Republic: A Frances Lewis Law Center Conversation

Thomas L. Shaffer

Notre Dame Law School, thomas.l.shaffer.1@nd.edu

Stanley Hauerwas

Sanford Levinson

Mark V. Tushnet

Harlan R. Beckley

See next page for additional authors

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Authors

Thomas L. Shaffer, Stanley Hauerwas, Sanford Levinson, Mark V. Tushnet, Harlan R. Beckley, Lewis H. LaRue, Ann M. Massie, David K. Millon, R. Neville Richardson, and O. Kendall White

FAITH IN THE REPUBLIC: A FRANCES LEWIS LAW CENTER CONVERSATION

BY STANLEY HAUERWAS*, SANFORD LEVINSON**, MARK V. TUSHNET***
AND OTHERS****

Introduction

Shaffer: Our principals have spoken elsewhere, and published recently, on compelling modern questions about community—a theme the Washington and Lee University Frances Lewis Law Center and the *Law Review* have addressed in a series of lectures and colloquia.¹ Stanley Hauerwas works from a vivid theology of Israel and of the church as a formative and prophetic community within American society. Sanford Levinson, lawyer, law teacher, and student of politics, notably in his new book, *Constitutional Faith*, writes about an American, perhaps republican, community. Mark Tushnet, who is probably the most lucid and penetrating of the legal scholars identified with the Critical Legal Studies Movement, has lately given particular attention to what he has called the law of religion.

Each of these prolific scholars has noticed and remarked on the work of the others. Tushnet and Levinson often appear together in symposia and panel presentations. Lewis LaRue, the Director of the Law Center, and I noticed last year that Levinson and Tushnet had not yet addressed Hauerwas' singular political theology, and Hauerwas had not addressed their constitutional jurisprudence. We invited them to begin doing so at Washington and Lee. This conversation is the result of their generous willingness and interest in such a project. It contains no formal, central "paper." It is, as it was, a lively, spontaneous conversation. Each of the principals offered to the others recent, focused written work that he believed spoke to a mutual interest in

* Professor of Christian Ethics, Duke University.

** Charles T. McCormick Professor of Law, University of Texas.

*** Professor of Law, Georgetown University.

**** H. Jefferson Powell of the law faculties of Duke University and the University of Iowa, and the following members of the Washington and Lee faculty: Harlan R. Beckley (Religion), Lewis H. LaRue (Law), Ann M. Massie (Law), David K. Millon (Law), R. Neville Richardson (Religion), Thomas L. Shaffer (Law), and O. Kendall White (Sociology).

1. *Colloquium on Law, Metaphor, and Theology* (Milner S. Ball, Frank S. Alexander, Paul Lehmann, Thomas L. Shaffer, Buie Seawell, and Roy Brasfield Herron), 3 J. OF LAW AND RELIGION 141 (1985); *Discretion in Making Legal Decisions* (Keith Hawkins, David R. Novack, Emory Kimbrough, Jr., John M. Thomas, and Peter K. Manning), 43 WASH. & LEE L. REV. 1161 (1986); *Dred Scott and Brown v. Board of Education*, (Robert A. Burt, Milner S. Ball, Thomas L. Shaffer, Peter R. Teachout, and L. H. LaRue), 42 WASH. & LEE L. REV. 1 (1985); Michelman, *Property As a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); *Tensions Between Religious or Ethnic Communities and the Larger Society* (John A. Hostetler, John J. Bukowczyk, and Colin M. Turnbull), 41 WASH. & LEE L. REV. 31 (1984).

questions about community in modern America;² and each is evidently familiar with the scholarship of the others. The conversation was recorded in the Law Center on December 11, 1987.³

* * *

Levinson: I thought I might start by reading two pages from the manuscript of my book, *Constitutional Faith*. You'll see, I think, that there is a point to beginning with this. It is from a discussion of loyalty oaths. It's not an argument so much as a meditation on what we do with notions of loyalty. I quite deliberately never conclude with, "Yes, we should have loyalty oaths," or "No, we shouldn't," though I suppose that most people who read my meditations don't like loyalty oaths. I am certainly a part of the liberal spectrum that grew up in an era where the very notion of loyalty oaths was extremely bothersome.

Of course, I am not really discussing the kinds of loyalty oaths that drew the fire in the 50's and 60's—anticommunist loyalty oaths and stuff like that. But I think generally loyalty oaths have a bad press, so by suggesting that there might be something to be said *for* them, I suppose I make an argument. But there's obviously a certain waffling on whether they are a good thing or not.

I also try to raise the question of whether there is something about *political* oaths that bothers us. Or is the difficulty with loyalty oaths in general? That brings up things like credal affirmations in religious contexts, or marriage vows. Why is it that formal marriage ceremonies remain popular, even among people who would quickly denounce political loyalty oaths? In any case, I conclude by quoting Michael Walzer, which I almost always do in discussions of pluralism, on how pluralism creates notions of contingent commitments, not hierarchical commitments. I believe that loyalty oaths are an attempt to hedge against the Walzerian kind of contingency: the state wants unconditional loyalty, a spouse wants unconditional loyalty, and God presumably wants unconditional loyalty.⁴ There is an obvious problem: What

2. Prof. Hauerwas offered *A Christian Critique of Christian America* (unpublished), presented to the Section on Law and Religion, Association of American Law Schools, in 1986 [hereinafter Hauerwas, *A Christian Critique*]; *Freedom of Religion: A Subtle Temptation* (unpublished), presented in a symposium at Loyola University, in Los Angeles, in 1986 [hereinafter Hauerwas, *Freedom of Religion*]; and S. Hauerwas & D. Burtell, *From System to Story: An Alternative Pattern for Rationality in Ethics*, in TRUTHFULNESS AND TRAGEDY (1977).

Prof. Levinson offered the manuscript of his then forthcoming book, CONSTITUTIONAL FAITH (1988).

Prof. Tushnet offered two law review articles, *Community and Fairness in Democratic Theory: A Comment on 'Shaping and Sharing in Democratic Theory,'* 15 FLA. ST. U.L. REV. 417 (1987) and *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221 (1987) [hereinafter Tushnet, *Religion and Theories*].

3. The recording was made by Thomas Williams and transcribed and copy-edited by Margaret Williams and Kathryn Edgell. Professors Tushnet and Shaffer edited the transcript for publication.

4. M. WALZER, *Political Alienation and Military Service* in OBLIGATIONS (1970).

if those loyalties conflict? (I also discuss in the book Justice Brennan's rather offhand comment that there is no real conflict between his legal obligations and his obligations as a Roman Catholic, because he took an oath thirty years ago to support the Constitution of the United States. That kind of settled it. It seems to me there are problems here.) These are the two pages:

It is not only the family, or the lure of sensual pleasure, that threatens necessary commitment to the polity. . . . Religion itself also makes obvious claims of sovereignty as against other social institutions. The Protestant theologian Stanley Hauerwas has recently criticized an overemphasis in American thought on the formal freedom of religion, by arguing that this freedom has in significant measure been purchased by a diminution of the willingness of believers to present "gospel as truth" and a concomitant weakening of "a church that has a people capable of saying no to the state, or indeed capable of challenging the state." This is obviously not a vision of religion that neatly divides the world into the unantagonistic realms of God and Caesar or, even better, from the perspective of Caesar exhibits the willingness to use religion as an undergirding of the legitimacy of the state. It is the possibility of potentially radical anti-statist religion that draws the fire of a conservative philosopher, Nicholas Capaldi, who apparently supports the toleration by the state of religious "subcultures" only if they are no threat to the legitimacy of the tolerating state. "There is nothing wrong in helping to subsidize religious schools in general, especially given that such schools have produced model citizens. What is not acceptable is tolerating religious groups who refuse to recognize the moral and political sovereignty of the secular community by, for example, refusing to salute the flag." There is obviously a fundamental gulf between the views of Hauerwas and Capaldi, a gulf expressed, among other ways, in the language of sovereignty and creedal affirmation. A staple of political theory following the development of the notion of political sovereignty by Bodin is that there cannot be two sovereigns within a polity. By definition sovereignty is an exclusive status. Yet the major Western religions also celebrate God as an alternative sovereign to the claims of the State, however much the claims are dissipated by doctrines like the Talmudic injunction to follow the local law or by Christian doctrines about God and Caesar. Dissipation does not mean elimination, as revealed by the theology of Hauerwas or the behavior of the Jehovah's Witness children seemingly condemned by Capaldi.⁵

That seems one thing that certainly the three of us have written about. Mark has written very eloquently about religious pluralism, particularly in the piece that he gave at Loyola,⁶ which is very personal as well as eloquent.

5. S. LEVINSON, *CONSTITUTIONAL FAITH* 118-19 (1988).

6. Tushnet, *Religion and Theories*, *supra* note 2.

He and I share the same socio-cultural identification, whether or not it is a religious identification. I certainly not only thought it was an unusually eloquent piece, but I also shared very much the views that Mark was expressing. I assume the rest of the day we can talk about lots of other things, including Protestant and Catholic constitutionalism and all the other stuff that I'm interested in, but I thought this might be a way of getting us started. It's the most immediate consequence of Tom's bringing me into contact with Stan.

Hauerwas: I'd like to hear Mark respond to Sandy. In some ways I have a sense that Sandy thinks that these issues are ultimately resolvable in some way within the constitutional faith, and Mark's view is that they are not.

Tushnet: In framing these issues there are two things that I would like to get on the table. One is that it's very easy to have an image of the attractiveness of religious diversity when the implicit models for the diverse religious communities are what I'll call attractive religious communities—the Jehovah's Witnesses or the Amish in Wisconsin, and the like. I think it's important to keep in mind that perhaps one reason the image is attractive is that we regard these people as so marginal to the exercise of power in this society that they are not threatening. They are rendering unto Caesar from the point of view of Caesar—sure, so long as they don't do anything, it's fine to have them around, it's nice to have them around; you feel good about it. But if they begin to do something, which is how the Jehovah's Witnesses were viewed in the 1940s, then it becomes more troubling. Part of my problem is that it is not easy for me, given my socialization into nice ideas about religious pluralism, to come up with unattractive religions—Moonies, or the Jews for Jesus, or something like that. We've talked about Iran, where from my point of view, an unattractive religion is powerful. Maybe that becomes an interesting way to frame the issue, so that we can then see exactly what's at stake.

The second point is the point that I was framing in the Loyola essay, which is that the stance of Jews in the United States is of a minority facing a regular routine—so accepted as to be thoughtless, not in any invidious sense but just something that goes on without thinking—of the exercise of a Christian religion of some sort. Now Stanley can get us into discussions about what sort of religion that represents, but, from our point of view, it's the other exercising power on the basis of religion. In response to Stan's question, it seems to me that that experience leads me to think that the opposition is permanent, not reconcilable.

Hauerwas: Legally or socially?

Tushnet: I think probably both. Part of my difficulty in that response is that it's awfully difficult for me to separate those domains. That is, I suppose, expressed by my criticism of Justice O'Connor's opinion in *Lynch v. Donnelly*,⁷ in which she has a formulation which says "I, a Christian, am going to look at this from the point of view of reasonable Jews," and doesn't do

7. 465 U.S. 668, 685-693 (1984).

it, and at some level can't do it. The social phenomenon is that she can't do it. That translates into the application of a legal formula that has a certain degree of attractiveness, in an unattractive way.

Hauerwas: Let me try to put the issue the way I see it in terms of the legal and the social—they are, I admit, very hard to distinguish—but how the distinction works in a kind of ironical way. What I'm mad at is not liberalism per se, or liberal political theory and/or jurisprudence, but who I'm mad at is Christians. And the reason I'm mad at them is because they fail to see that the very forms of liberal tolerance they took up, in trying to provide safeguards to stop Christian envy against the Jews from becoming too politically damaging for Jews and other religious groups in this country, ironically undercut the seriousness of Christian convictions that were necessary to form limited states to begin with. So, ironically, you have it work out in all kinds of anomalies in the legal situation, like creches on New England court yards. But this is not the legal system, per se; it's the legal system reinforced by an increasingly self-fulfilling liberal political system that says that religion is what you do with your private time.

As a result Christianity cannot any longer maintain the kinds of disciplined communities that are necessary to keep the state limited. (I don't believe in constitutions keeping the state limited. I think you can do anything you want to with constitutions.) As a result, the political realities and social realities are such that the very means that we used, that we invented in terms of the Constitution, to try to ensure that there would be a so-called religious pluralism, to protect religious pluralism, in fact only undercuts the kind of discipline that is necessary for religious communities to form a people capable of saying no to the state. That's how I see the problem and that's the reason why I find the situation unresolved, given Sandy's way of putting it.

Tushnet: Well, I wonder what your response is to the position Kent Greenawalt is attempting to articulate,⁸ that a disciplined Christian community could act on its, or some portion of its, Christian commitment. This is a social program of liberal Protestantism, motivated explicitly on religious grounds, and defended on religious grounds, not on utilitarian grounds or anything like that, or on general liberal grounds, but on Christian grounds. But one element of the discipline of the community is that the remainder of the Christian program—the specifically Christian elements—would be advanced by means other than use of state help.

Hauerwas: Yes, I'd be sympathetic with that.

Tushnet: So the Roman Catholic bishops' pastoral letter on economic justice⁹ is, without worrying about the theological quibbles about what it is, an okay thing?

Hauerwas: Oh, of course. For example, take the issue of the Roman Catholic bishops' pastoral letter on nuclear weapons.¹⁰

8. K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

9. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: A PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986).

10. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROM-*

There they have the claim, based on just-war grounds, that if we are not moving significantly toward the elimination of nuclear weapons—and it would be interesting how they interpret this recent treaty—then the Roman Catholic faithful cannot any longer have their conscience ordered by the state, or even serve in the United States military. That could be very interesting: Would the United States of America, if the Roman Catholic bishops came to the empirical judgment that we are not moving significantly toward reduction and elimination of nuclear weapons, and so Roman Catholic people can no longer serve in the United States military, be happy with that one? Is that going to be a freedom of religion issue? Now that would be interesting. Of course we know this will not happen. And the reason we know this will not happen is because the Roman Catholic Church has become Protestantized in America. Catholic people, because they want to use condoms when they have sex, now will no longer listen to the bishops tell them that they cannot use atomic weapons. The bishops lost the disciplined community over sex and therefore cannot maintain it over nuclear weapons. I want them to maintain it over both. Partly this is a result of the fact that Roman Catholics have become good American denominationalists, thinking that the church is but another free association, rather than a called, disciplined community. That's what you'd expect to have happened. In that sense, they aren't clearly on the Pope's side. I think that American Catholicism has been deeply out of step with what Roman Catholicism has been about.

Tushnet: I wonder if we could use that example at least to begin to talk about the unattractive faith-community problem.

Hauerwas: I'm trying to make Roman Catholicism an unattractive faith.

Tushnet: Right. I understand that. Again, as I understand it, there are quarrels within the Roman Catholic Church on this issue. But let's take the positions about sex that you've raised as constitutive of Roman Catholicism. And let's take it as a given that, independent of the association of those positions with a faith community, they have almost nothing to commend them. Then what do we do about the faith community that is unattractive?

Hauerwas: My response is, "Who's we, white man?" I think this really goes to the heart of the issue. When people read one of my papers, like the one on freedom of religion,¹¹ they say, "Gee, even if you are right, what are we going to do?" I say I don't have the slightest damned idea. Why do I have to come up with a solution? I mean, I'm just trying to survive. Jeff [Powell] made a nice point after a class I'm teaching in Christian Ethics in America that he's been taking. He said, "Just to listen to how you teach makes a difference. It shows how socialized I am in the law, because in the law you are always wanting to know, 'How can I make it work?'" Of course, religious ethicists were trained in that way for years. I always said that basically what Christian social ethics tried to do in this country was to

ISE AND OUR RESPONSE: A PASTORAL LETTER ON WAR AND PEACE, Publication No. 863 (Washington, D.C., 1983).

11. Hauerwas, *Freedom of Religion*, *supra* note 2.

formulate a social ethic that our kind of secretary of state would use if we finally got power. We can have a Christian foreign policy, and of course we got it in Alexander Haig. But I just don't think that way. When you say what do we do, I don't know who's "we." I'm not trying to think how to make it work.

Tushnet: So there are two ways of formulating the problem. One is that we (that is, we here) could try to imagine a situation in which this—with all the qualifications—this unattractive faith community is exercising coercive authority. You can say it's coercion and take an anti-coercion position generally. The other position is the lawyers' perspective, the legal academic's perspective, translated into a religious context. We are people who attempt to speak truth to power, in some sense. There are people on the margin who, for whatever reasons, listen to what legal academics say and, on the margins, can be influenced by their suggestions. (Where the margin is, is obviously something we can talk about.) But, from the point of view of us, as legal academics, the what-do-we-do question is: We're just trying to survive. I mean it, isn't this true of Christians?

Hauerwas: Mark, you're still trying to form power in a way that I'm not. The law is much more essentially related to power than those of us that are in the theological business, working out of the church, are—even though the church would clearly like the power that the law has, which it traditionally had, but which it has now lost. But now we try to piggy-back it on you as one way of doing it, but it doesn't work very well for us.

Let's do the thing about coercion, though. I think that the whole thing about the Unification Church is brainwashing. I was very unsympathetic with the argument that the Moonies were coercing people. Indeed, a lot of what it sounded like they were doing was like early Christian catechetical formation in the Roman Empire. We were clearly brainwashers and the Romans would have clearly seen that. So I regard that allegation about Moonie brainwashing as the continuing hegemony of a Christian culture trying to resist a new powerful sect which, as a matter of fact, has a very interesting counter-story into which it initiates people. Christians claim Moonies are brainwashing so they do not have to deal with the issue of truth.

I used to teach a marriage course at Notre Dame, and I would read them a letter in it that said, "Gee our kid was doing well—gone to all the right schools—had a bright military career—looked like he could have done well in the political arena. Then he got involved with some near-Eastern sect and he says he doesn't want anything to do with us because we're people of the world. He's never going to marry. He's going to be completely subservient to this sect, and we don't know what to do. We're just heartsick." I asked who'd write that letter or what it was about. Students would say it was from a family writing about their son's conversion to Unification or to Hare Krishna or something like that. It's the letter of a fourth century Roman senator and his wife about their son's conversion to Christianity.

Levinson: My hunch, though, is that most of the "we" that comes from the liberal academy share that toleration toward the Unification Church. With the deprogramming stuff, and the cult, it came naturally to many of

us to say, "Well, they're just like any other religious community—another intense ideology in the community." I don't think they are viewed as an attractive sect, but I don't think most of us in the academic community know enough about them, or have enough experience with them, to have views about anything more than what is presumed to be a political agenda of the Moonies.

I think the best example of an unattractive native American religious group, where there is very high valence, at least among some of the people we know, is the Mormon Church, particularly that wing of unreformed Mormonism that continues to believe in polygamy and educates its children to maintain this. I think many of the people we know find that highly unattractive, and that has triggered a very interesting debate about whether you use the power of the state to smash the unattractive religious group. Certainly I think the whole treatment of the Mormons in American history has been a very interesting problem within the Christian community. I don't know to this day how much Mormons are viewed as Christians by orthodox Christians. Certainly the Mormons had to change church doctrine in order to get even liberal tolerance. What obviously makes the unreformed Mormons so interesting is that they reject the validity of the antipolygamy revelation.

Hauerwas: My view about the Unificationists is that they are Calvinism gone East, transformed by Confucianism, come back to save the West. Because of that I regard them as particularly perverse; and, as Christians, I think we ought to clearly brand them for what they are—heretics—and have nothing to do with them. I think that Mormons are a more complex case insofar as they continue to maintain the validity of the Christian scripture but by deeply misinterpreting it. I think you can maintain a certain kind of discussion with them, but I don't see why the legal system should regard Mormons and Moonies any differently than it regards Christians.

Levinson: A quick answer to that is that the unreformed Mormons come into the legal situation because they wish to violate laws prohibiting bigamy.

Hauerwas: We Christians do not live in a monogamous culture. We live in a culture of serial polygamy. Contemporary Christians do not believe in monogamy. What Christians believe in is that you can be married to more than one person; you just need to do it serially. And this is certainly not what the church traditionally meant by "covenant fidelity in marriage." How the legal system reflects that, I think, is a real issue. Most Protestants don't even know what marriage is about, since most of them have accepted romantic conceptions of what marriage is about that are based upon the false assumptions of liberalism. Namely, that somehow or other, love has to do with marriage in an intrinsic way. I take it that the church has always maintained that people should love one another even *in* marriage, which is a little different perspective. I'm for that but it puts a lot of burden on marriage.

Orthodox Christian views about marriage are so out of sync with the kind of general cultural presuppositions, that Christians think that they hold on Christian grounds, that the issue is very hard for them to negotiate. I cannot see any rationale for this society to maintain strong views about marriage, anymore than I can see why this society should entertain strong

views about suicide. I think there is no reason at all that we should try to prevent suicide, given our natural presuppositions.

Which brings me back to the hardest case of an unattractive religion, and that is, of course, Jim Jones and what was going on in California with that kind of extraordinary evangelical Protestant sectarianism—the formation of those people who ultimately ended up in Guiana killing themselves. On the whole, we gave them freedom of religion. He [Jones] even was courted by the politicians of California and various places. It was very ambiguous, and looked very socially progressive, and that kind of thing. I regard those people in Jonestown as victims to liberal tolerance. We are all ready to condemn Jerry Falwell because he appears intolerant. Liberal Christians can't wait to get on the bandwagon to condemn someone like Falwell. But they just stood back on Jones, not saying anything about the extraordinary perversity of what was going on there, because, you know, he was doing good for poor folks. I regard that as just perverse. But liberal culture has no reason to stop Jones and Jonestowns—does it? We're going to have to grant them freedom of religion.

Tushnet: As a matter of stated law, at least, it is possible to develop permissible legal techniques of controlling what happened there; however, you want to categorize Jonestown, on the model of laws against bigamy, as a method of controlling the unreformed Mormon community. Now, I take it the problem with that is that (with all sorts of qualifications) the liberal principle that authorizes *that* degree of intolerance also authorizes more substantial degrees of intolerance with respect to less unattractive religions. The problem from the point of view of liberalism is not so much that it lacks the resources to authorize intervention in a Jonestown situation, but that the resources it has also authorize other, more problematic interventions.

Hauerwas: You think that there are legitimate interventions that give us the right to say that polygamy is wrong, that we can intervene in that legally?

Tushnet: As a matter of stated law.

Hauerwas: As a matter of stated law, but I'm saying that that stated law is irrational.

Powell: No, I think it's perfectly rational. We have a problem about what we mean about liberalism, but I take it to mean we're describing current liberalism, whatever it is that late 20th-century liberal constitutional lawyers mean by it, not 19th-century liberalism. I think it's perfectly rational, because one of the great accomplishments of liberal constitutionalism is to say that state power is to be invoked on behalf of the rights of individuals; and the rights of individuals viewed from a liberal perspective in a polygamy situation, or in the Jonestown situation, are being violated, and state power ought to be invoked to protect them.

Hauerwas: What right of an individual is being violated?

Powell: The right of women not to be in subservient kinds of situations. I think that is part of what liberalism today means.

Hauerwas: I've read some of the biographies of those families, and the women didn't feel like they were in subservient situations.

Powell: That's not relevant, Stan. That's like asking black people in 1953 if they feel that segregation—if they would say, "Oh, segregation is oppressing

me.” That’s not, in the end, dispositive. The way I would answer the question Stan was posing is, “Yes, it’s deeply correct for the liberal state to intervene and to break up communities which are violating the liberal state’s view of how people ought to relate.”

Levinson: I think what you’ve got, though, is the obvious contradiction between freedom of contract notions and notions of false consciousness as preventing true freedom of contract. So there is a connection. I think there’s a linkage between contemporary liberalism and old-fashioned liberalism. All of it is autonomy-based. I think the most satisfying defense of intervention is just the one you’ve given, that the individuals entering these contracts are [should be] truly autonomous. But if it then is the function of the liberal state to create truly autonomous individuals, who will we then allow to enter into whatever contracts they want? I think that the problem is obvious—in terms of who gets to define what counts as false consciousness.

Powell: The liberal state.

Hauerwas: And of course it does that coercively.

Powell: Yes.

Hauerwas: For example, just on these grounds, it seems to me that the Roman Catholic marriage doctrine is deeply coercive. It is only false consciousness on the part—as feminists will tell us—of Roman Catholic women to believe that they should pledge themselves in marriage for a lifetime. That is coercive; it is non autonomous. They ought to be able to wake up every morning and decide whether they are going to continue this bad marriage. So, for the Roman Catholic Church to suggest that they will only marry people that are willing to enter into this covenant for a lifetime—that is the exact equivalent to polygamy. And they should not have recognition by public law of that. Right? Indeed I would think that women could start bringing wrongful marriage suits against the Roman Catholic Church and get civil damages. Is that right?

Powell: Well, there of course the liberal state hasn’t decided that it disagrees with lifetime marriage officially. If you want to do it for a lifetime fine, if you don’t—it’s not like polygamy.

Levinson: But here we get into the metaphysics of neutrality. By the state offering the option and moving toward no-fault divorce statutes, and trying to make it as easy as possible for bad marriages, as defined by the parties, or indeed as defined by one party, to dissolve as easily as possible, that, against a background of critique of divorce, has to count as relative approval.

Tushnet: We actually know that Stan’s example is right when we examine the *get* cases, which do not quite seek civil damages against a church for maintaining a rule of lifetime marriage, but come quite close to that. They do what they can to undermine, to directly confront, the church’s commitment to lifetime marriage.

Levinson: For those who aren’t familiar with orthodox Judaism, you might explain the *get*.

Tushnet: It’s complicated, but in the context of a divorce in a Jewish family, the divorce is permissible. The former wife is not allowed to remarry

unless the former husband does something, which is to provide a *get*, a religious document. This has created a fair number of problems within the Jewish community in New York. The New York courts developed a rule that in effect coerced the former husband into providing the *get*. The New York legislature responded by imposing a condition that requires the performance of religious duties necessary to dissolve the marriage religiously, so that the husband could not obtain the civil divorce, which quite often he would want, unless he agreed to perform the religious ceremony, which, for a variety of complicated reasons, he might not want to do.

Powell: But that's very close to the model that Stan was worried about.

Hauerwas: My response is to say, "Don't tell me that the liberal state is a neutral state." I regard that—given Jeff's justification—as a state with a regnant, coercive ideology about what people ought to be that fundamentally is about the destruction of religious communities. Jews bought into that liberal state to keep Christians off their necks, for all good reasons, but it seems to me, ironically, that the liberal state is going about the destruction of the Jewish community, along with the destruction of the Christian community, exactly because Christians and Jews don't care about autonomy. And they rightly do not.

Tom and I had a colleague at the University of Notre Dame one time, and I was talking to him and I said, "Isn't it about time for Sam to be bar-mitzvahed?" And he said, "Oh, I'm not going to bar-mitzvah Sam. I'm going to let him get older and make up his own mind." And I said, "Oh hell, raise him to be an atheist. At least that shows you've got some convictions. What's all this autonomy stuff? Make up your own mind! How in the hell can you make up your mind to be a Jew? That's stupid. Here you've had thousands of ancestors willing to die at the hands of Christian persecutors so that you as a matter of fact can continue to live faithful to the community, and you're going to let Sam make up his own stupid little mind. That's stupid. If what I say about the Jews is true, then, by God, you ought to form him in the community."

Shaffer: The next year Sam had his bar mitzvah.

Hauerwas: Jews, on the whole, in America, have been able to survive on the basis of Protestant prejudice. It's been very useful in terms of maintaining intensive group commitment. But the question is whether you'll be able to survive the tolerance sponsored by the liberal state, as it becomes more and more *the* ethic that Jews and Christians alike seize upon.

Tushnet: I don't believe in autonomy either, and so I think that the liberal formulation is ultimately unsatisfying. The strategic question you raise about what is the best way to preserve our religious community is a difficult one. But I'm not sure we're in a position to say a whole lot about that. I am interested in the question raised by a lot of your formulations. Those may be formulations designed for rhetorical purposes. In the formulations, the terms "truth claims" and "faith communities" or "religious communities" have positive value, wherever they are located. And I don't believe that. Indeed I would think that, with qualifications relating to the nature of the scope of the tradition within which the faith community is located, people

in faith communities couldn't believe that. That is, the adherent to unreformed Mormonism doesn't accept the proposition that the Moonies are making truth claims. They are constituting a community around them, but it is a false community, because they are false.

Hauerwas: Right. So is Jones. Why can't I say that?

Tushnet: You can. One of the things that gives your formulations rhetorical power is that truth claims are positively valued. You get the rhetorical power because it appears as if truth *claims* are positively valued *wherever* they occur. And you don't believe that.

Hauerwas: That's right. I certainly don't believe that. I don't believe it descriptively, obviously.

Tushnet: Right, but you don't believe it—well, you can't believe it because, to you, *I don't have the truth*. I make truth claims and I have a community that it's organized around, but they're wrong.

Hauerwas: My community is wrong?

Tushnet: No, mine.

Hauerwas: I believe that Israel is the promised people of God and as such it is a community of truth that Christians could not do without. Therefore, I would certainly validate that, from within my own community.

Powell: Talking about an orthodox Christian view of Judaism is not an easy thing precisely because, from a Christian viewpoint, Judaism is not exactly like just any other religion. The easy one is to say that Buddhism makes truth claims that are simply false. . .

Hauerwas: Well, I don't know.

Powell: . . .from our standpoint.

* * *

Hauerwas: I'm a nonfoundationalist,¹² but I regard nonfoundationalism as a necessary position of a modernity that has primarily been the result of Descartes. Rorty is only possible because of Descartes. The difficulty with Rorty¹³ is he forgot that there is a good deal of tradition prior to Descartes. So I'm not going to give up. I have strong commitments to certain kinds of metaphysical realism that are still part and parcel of scholastic philosophy, which I think has been deeply misconstrued and misunderstood since Descartes.¹⁴ Because I remain a nonfoundationalist within modernity doesn't

12. Foundationalism usually is identified with the project of Descartes to solve metaphysical and epistemological issues by finding a fixed Archimedean point that is absolute, nonrelativistic, ahistorical, and not subject to doubt. For a good discussion of current debates about foundationalism, see R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS* (1983). See Hauerwas, *A Christian Critique*, *supra* note 2. Hauerwas, *Freedom of Religion*, *supra* note 2, discusses Rorty's *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* (M. Peterson & R. Vaughn eds. 1987).

13. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1982). This criticism of Rorty first was made by Alasdair MacIntyre.

14. For a defense of the kind of "realism" I am willing to defend, that is, a realism that requires the acknowledgment that all claims of truth are tradition dependent, see A. MACINTYRE, *WHOSE JUSTICE, WHICH RATIONALITY?* (1988). In particular, see Chapter XVIII.

mean I have to give up on truth claims that, I can continue to assume, have some way of providing us with ways of talking across communities.

I regard foundationalism and liberalism as the result of Christian bad faith. Christianity wanted to show itself to be a universal religion and we thought by being a universal religion that meant that we had the truth that everyone really knew but just had to be awakened to. So natural theology¹⁵ became our mode, and when we went to other societies we assumed that all we were telling them was something that they already knew and therefore they would just naturally respond. And when they didn't naturally respond then we said they must be morally obtuse and rationally unclear and so we could coerce them since, as a matter of fact, this was just the universal truth we were trying to make them live in accordance with.

What I say that does is forget that intrinsic to the Christian faith is the assumption that our truth is a truth that only comes through witness. People forget that witness presupposes that you are telling people something that they *haven't* known. It's not just confirming something they already know. Our truth is something that they haven't known. It is primarily the result of compellingness of lives that puts the world together in that way. My sense of truth is not one that can avoid the necessity of witness in that regard, so I have a nonfoundationalist account which I think is appropriate to the Christian presumption that witness is the only way that the truth goes forward in the world.

And the witness—because of the material content itself—must be non-coercive. It's not because we are just good, tolerant people. It's because, as a matter of fact, the very thing that you are saying about God and God's love as manifest in Jesus of Nazareth means that the only way that one learns to follow this way of life truthfully is through taking it up as a calling, not as something you have been coerced into. But that is the claim about the truth of the way the world is, that you must work in it in that way.

Now then, the problem is separating that account of truth from liberal tolerance. It got confused with liberal tolerance very quickly in this society and liberal tolerance turns out to be very coercive. So, yes, I'm going to talk about truth, and I'll continue to talk about it. I have to. I take it that the difficulty in America is that we want to be a society that never has to raise questions of truth.¹⁶ I would like to hear Mark respond to my account of

15. See Hauerwas, *A Christian Critique*, *supra* note 2.

16. *Hauerwas*: I wondered about Sandy titling the book CONSTITUTIONAL FAITH, and whether that was taking up a peculiar sense of faith that has been with us since the 19th century—namely, faith is arational—in the sense that we really can't show that faith has anything to do with the way things are. Faith is a kind of trust, a fairly good way to go about things, but it doesn't have any relationship to truth. Protestants made a lot of hay on that sense of faith which I, myself, think is perverse. I don't want to have that kind of faith. I don't think Christianity is a faith of that sort. I think faith is ultimately rational. Faith is knowledge. It's just knowledge of a different sort, namely, of confidence in God. And so I was wondering—did you think about what you meant by CONSTITUTIONAL FAITH?

Levinson: It comes from a sociological tradition that discusses civil religion, as Emile

truthfulness. Because I don't want to let him just get away with saying that it is rhetorical power that's there. I want to make you talk that language, too.

LaRue: Would it be too much to ask you to play that record again? The one you just went through. I leaped along with every step you made.

Hauerwas: With the Constantinian settlement,¹⁷ Christianity wanted to try to show that we could be a civil religion, in a way that Judaism could not, because we were a universal faith that could command the adherence of anyone if they just got the right information and thought hard enough about it. Therefore, we sponsored a sense of "truth" that was a kind of correspondence theory—that just said that this is the way things are, and you should be able to come up with it pretty quickly. That was of course against our own best practice, since inherent in Christianity is the assumption that in order to know the truth you must be converted. Christianity grew, not by saying people already believe what we know—we just have to make it explicit—but it grew by witness, and witness is primarily the power of lives. So I'm saying that the kinds of theories of truth we sponsored had a political purpose, namely, to underwrite our attempt to become a civil religion.

The civil religion that we created, coming primarily through western European sources, has now primarily been secularized into forms of "liberal rationality" which no longer have Christian support. Enlightenment liberalism took up the great task of Christian Constantinianism, to try to show that we are all rational people in that way, and therefore that our focus is to be autonomous. And now *that* liberalism has created a new set of heretics that we're beginning to see spring up everywhere—people like Richard Rorty and the deconstructionists, who are calling into question the rationality and presumptiveness of liberalism and liberal epistemologies. I take it the Critical Legal Studies Movement in some ways is delegitimizing liberal presumptions in that way.

It's tempting for Christians to use this dissent from the Enlightenment by saying, "Aha, isn't this wonderful, this makes way for faith again. Since no one knows what truth is, well, hell, you might as well try being a Christian. Or a Jew. This is wonderful. We can all get in a ball and be irrational together." What I was saying was that it's a deep temptation, and it's one I think one ought to resist. The fact that Rorty, *et al.*, are questioning

Durkheim did. "Sociology of religion," as Jonathan Smith suggests, is a study dominated primarily by those who view themselves as outside religion and are interested in how these things work, how they function, what accounts for the rise of them, how you analyze ideas to see them as ideologies, in cultural anthropology and sociology. I can't say that I reflected very deeply about it, but I'm sure that's where it comes from. If people talk about civil religion from this sociological understanding, everything followed from that. I cannot imagine writing something called constitutional truth.

17. By "Constantinian settlement" I do not mean the actual historical point when Constantine became a member of the church, but rather the tendency, that began well before Constantine, of Christians to use state and social power to enforce allegiance to the church. See Hauerwas, *A Christian Critique*, *supra* note 2.

liberal rationality doesn't mean that we should give up, as Christians, on claims that our convictions tell you the way the world is. I certainly want to continue to maintain that.

Reinhold Niebuhr was always fond of saying that, according to *The London Times*, the only doctrine of Christian faith that is empirically verifiable is the doctrine of original sin. Of course that's false. That is deeply false. The fact that people are crappy is in no way equivalent to the claim that we find ourselves, when confronted by the Gospel, to be sinners. Christians believe that—I think they should believe, for example, that you can only be trained to be a sinner. You must learn to discover to be a sinner. Indeed, until the Gospel was preached you couldn't have the knowledge necessary to know what it means to be a God-hater. That's the reason why a pagan who has not been preached to is fundamentally, ontologically different than one who has. So that sin is an ontological claim. It tells you the way we are, but it depends upon witness, and this is an account of truth that doesn't fit into the presumptiveness of liberal rationality, especially since the Enlightenment.

But I don't want to side with the heretics within that Enlightenment tradition of truth either. I think that rationality and truthfulness are always tradition-dependent. Descartes and Rorty don't. And that's where I think the difficulty is, and I want to say that you have to display how it is that you think that truth claims can work *within* a tradition, and then how they can be displayed for their power *across* traditions.

Tushnet: It seems to me one matter of concern which comes up in the Critical Legal Studies stuff and in philosophical discussions around Rorty, is that, in these discussions, the term liberalism covers at least two kinds of things. One is a substantive doctrine about the nature of the good and a notion of rationality.¹⁸ Then there is, independently, a political conception of liberalism as a purely political doctrine. It seems to me that, conceived of as a purely political doctrine, that is, as a way of letting people survive in the world, liberalism does not raise the kinds of problems for Christian witness, or conversion to Judaism, that would make liberalism as a political doctrine incompatible with universalist claims of Christian witness. Although conceptually these domains, these forms of liberalism, can be kept apart, we know that historically there was a dynamic that led from political liberalism to this more substantive construction. The question is, was that inherent or can the distinction be sustained?

Hauerwas: Right. Would you tell me more about what you take political liberalism to be? Is it that we have a lot of these conspiracies out there in the world today and we've got to figure out some way of making them live together?

Tushnet: Basically, that's right.

18. Tushnet: Presumably the notion of rationality could be separated out as well. But for our purposes I guess all of the substantive commitments of liberalism can be lumped together.

Hauerwas: And therefore the Constitution is a kind of liberal political document, articles of peace for how these people can live together?

Tushnet: Yeah.

Hauerwas: But then, how do you respond to Jeff's account of autonomy and Sandy's underwriting it as *the* principle that's necessary to sustain that political compromise?

Tushnet: The argument is that it's sustained not by notions of autonomy but by concern for self-defense—community self-defense, if you want to do it that way. That is, if we don't sign this mutual nonaggression agreement, there are more of them than there are of us, so we'll get smashed. And everybody can see these alliances as working out badly, so it's in everybody's interest—

Hauerwas: How do you avoid a kind of majoritarian coerciveness when you take issues such as abortion, marriage laws, suicide—all those kinds of issues which inextricably call forward normative presuppositions for their resolution within any social polity? The problem is that political liberalism wants to draw back from many normative solutions. So as a result what happens is you get majoritarian imposition. Do you just have to live with that?

Tushnet: It seems to me that, within the political liberal tradition, there are concerted efforts to work out restrictions on majoritarian imposition which have not been notably successful. And it may be that what you end up with is majoritarianism unrestrained by principle, restrained by sociological stuff—and also other things, but not as a matter of principle—as the best we can do.

Hauerwas: So you should have supported Judge Bork. . .

Tushnet: Well, no, because he's wrong.

Hauerwas: . . .because that's his position, isn't it?

Tushnet: Yes.

Hauerwas: No one knows the truth? We just ultimately have to be majoritarian?

Tushnet: I think it's more complicated than that. One need not write off these efforts within political liberalism to define some substantive goals, as he does. His defense of majoritarianism ultimately is not that. If someone had a principle of majoritarianism along those lines, I'd take it seriously, but that wasn't his.

Powell: Mark, I want to suggest why I think that you end up in the position I was taking on the liberal state—that it's going to be intrusive in a way that you seem to be wanting to say it isn't and isn't committed to being. One of the articles of peace that we signed as political liberals is that if D is beating up on E, [then] A, B, and C will intervene. The liberal state is a police officer, and we've got to have some method of enforcing order. Well, D may beat up on E in ways other than literally doing something, for example, by persuading her that living in a polygamous marriage is a good thing, and I think the end result—the logic of the liberal position leads to—

Tushnet: Well, the difficulty is that there are a number of levels to this. It's not clear to me that it's a necessary part of the articles of peace that,

when D is beating up on E, [then] A, B, and C can come take E's side as opposed to taking D's side. Maybe the only necessary article of peace is that D and E will duke it out. And maybe nobody else will come in. Maybe. I'm not sure about that. The second level is the metaphoric extension of this beating-up-on. If we were thinking about the problem, and asking, "Should we include this beating-up-on provision in the articles of peace," we might want to make it clear that we intended no metaphoric extension at all. That is, actual physical violence is all that counts, because the metaphoric extensions undermine—not individual autonomy. They serve individual autonomy (but Stan and I don't think there is such a thing as that)—but they do undermine the continuing existence of community, which is defined by the deployment of metaphoric force. Now that I've said this, I can go back to the first. Maybe what I've been groping for is the provision that says we will not extend the notion of force metaphorically. That's the source of the substantive restrictions on the scope of state authority in political liberalism.

Levinson: It does seem to me that the import of a lot of contemporary philosophies is just to deconstruct that distinction between metaphorical and nonmetaphorical speech, which in turn relates to the possibility of uncontested "true" description. The instance that comes to mind is the surgeon. It assumes a kind of behavioral or physicalist notion, that you can tell what's happening simply from watching physical movements of people, and that, inevitably, if you try to distinguish what a surgeon does from what a mutilating mugger does, you've got to look at internal states of mind, or at consent—at things like that. We wouldn't call this metaphorical. We would regard it as bizarre to say that you could come to a conclusion about a surgeon simply by looking at physical movements. It seems that you would in fact be back into all of the problems of consciousness and false consciousness, and then we would get into some of the sillier tests that we've gone to in certain areas of tort law, where there would have to be some physical movement to justify looking at consciousness. Then people would start writing articles asking why you need any physical movement at all, given that it's so clear that this is a survival from an earlier, highly formalist, and unsatisfactory philosophy. So I can see people negotiating the contract that you're talking about, but I can also see all of this indicating, either before or after the fact, why it's just hopeless to try to draw this sort of line.

LaRue: But that pushes in the direction of the no-state solution to this, that is, the best way to preserve ourselves is not to have a state at all. D beats up on E and whoever is stronger wins because the alternatives are unattractive.

Levinson: It speaks to the inevitable inadequacy or incompleteness of any solution. One thinks of Woody Allen: The lion and the lamb will lie down together but the lamb won't get much sleep. On balance I think I would prefer a state that I am quite suspicious of, in lots of ways, as a lesser evil to no state.

Hauerwas: I don't even regard that as a real choice. I just live here and it's God's state. I don't know how to justify it theoretically. I don't know how to understand it. I mean that's just the way it is, and I've got to learn how to negotiate it.

Shaffer: It's like the weather.

Hauerwas: It's like the weather. It's just here. It seems to me there are a lot of good things about it that are certainly preferable to living in South Africa, certainly preferable to living in the Soviet Union. But I'm not going to generate ultimate explanatory theories in order to justify it. The big dilemma for me, in terms of the way I would put it, is this: We were pressing on whether you can ultimately get away with the distinction between liberalism as a normative theory about the good life, and liberalism as a political compromise. I clearly prefer the latter, and I would like that, if we can pull it off; but I am increasingly suspicious of whether we can pull it off. My kind of dilemma is that it seems to me that what liberalism has tried to produce as a political compromise is a society and a government—democratic theories, interestingly enough, not primarily a theory about government, but a theory about society—and that it wants to show how you could create a society and corresponding state functions that don't need people to be virtuous in order to have a good society. We just need them to be self-interested and autonomous. Then you don't need to know the good. So questions like how do you negotiate questions of abortion, etc., become very difficult, because the assumption is that the state hasn't made any claims about what the good is. Then one of the anomalies is Louis Hartz's suggestion¹⁹ that liberalism works because it continues to be able to draw upon community presuppositions and habits which it cannot justify.

Shaffer: In itself it can only negotiate issues of power—make treaties and so on.

Hauerwas: That's right. Then one of the things that is happening is that it is continuing to undermine the habits that it depended upon to make liberalism work, because it's becoming a self-fulfilling prophecy. The wonderful thing about liberalism is that it always produces people who have too many convictions. As a result of having too many convictions, they can't make up their own minds and they become morally ambiguous. Now, this can sound quite bad, but in some ways it's quite good, because it results in a society that has a lot of trouble going to war, which should be a good idea for us Christians, to live in a society that has a lot of trouble going to war. Ultimately it's good to be able to live in a society with a state that knows that it's not offering salvific solutions to people, because the church offers the salvific solutions, not the state. So this is good. Liberalism is great. It produces people who know that they are fundamentally self-interested, not just descriptively, but as what they *ought* to be; therefore they shouldn't ask anyone else to follow what they themselves believe in. This is great.

The problem is the results. If you just follow our political liberalism, it looks like what you'd get is a society that is humbled. Instead you get people who are hungry for a cause. My way of putting this is there is nothing wrong with America for which a good war won't be capable of providing a solution,

19. L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); L. HARTZ, *Democracy: Image and Reality*, in *DEMOCRACY TODAY: PROBLEMS AND PROSPECTS* (1962)

because American people are absolutely desperate to be able to have something that will give their lives a sense of worth. And that scares the hell out of me.

So, I don't know. We tried to produce a society, and tried to create a society, that prescind from having to say, on a society-wide basis, what we know in common as the true and the good. And so we prescind from having that as an explicit question for discussion. It would seem like that would be good for a church that believes in a limited state, but in fact I'm not so sure that's what we've got. I'm not so sure that liberalism leads to a limited state, because what we get, as we break down societal habits of community, is the increasing necessity for the growth of the huge bureaucratic state, of which the primary priests are lawyers. The deep difficulty is that it does create a deep false consciousness, because supposedly it is a limited state. So that's my ambiguity, as a Christian relating to this. I mean it looks like political liberalism would be my best way to negotiate a society. In fact, the results are quite antithetical to that, particularly when you combine it with the ideology.

Shaffer: To bring that back to something you said before, the reason that the liberal state is not limited is because there isn't anything to limit it.

Hauerwas: That's right.

Shaffer: Or anything anymore.

Hauerwas: Except the law. And that places too great a burden on the law. That's the reason why I have such a stake in having lawyers mess up the system. I regard the law like Franklin Roosevelt regarded the federal bureaucracy. Of course he wanted different agencies having responsibility for exactly the same sets of problems, because that creates a mess. That's what the federal government is supposed to do is to create a mess. The scariest thing in the world would be if Washington ever became efficient. That would be awful. So we want overlapping authorities that have to fight over the same turf. So I find myself in a very ambiguous position in our current situation. I don't know how to solve it at all.

Tushnet: But there are a variety of rather local decisions you make about what you can do.

Hauerwas: That's right. I care about who's mayor of Durham. You can say, "Well, that's a deeply irresponsible attitude, because you're not acting as a good citizen." And I say, "Well, I don't even know what a good citizen is in this society." I don't know what it means to be a good citizen. It's very unclear to me. It seems to me that implicit in Sandy's book is an assumption that we know what a good citizen would look like—or that we should be able to come up with an account of good citizenship, within the society in which we live, and we ought to come up with a reasonable account of patriotism. I do not believe either of those.

Indeed, I think that, ironically, liberalism cannot give you an account of patriotism, because a genuine account of patriotism is one that is dependent upon an arbitrary history that is associated with a geographical area. I know what it means to be a Texan. I do not know what it means to be an American. Texas patriotism makes sense. American patriotism does not.

Because American patriotism always directs you to a set of ideals that are not geographically dependent upon a particular history and are therefore incoherent, not genuinely patriotic. That's an argument I get from MacIntyre.²⁰

So you can say I'm genuinely irresponsible. But I don't have an account of patriotism or good citizenship. I don't think liberalism offers you one. Ultimately I can say that my fundamental membership is in the church, not in America. I've got a deep problem there because I haven't got much of a church either, because of what liberalism has done to it. But what I do have in the church is a kind of normative account. I've got enough shards of memory around that I think I can almost maintain some kind of claim that this is better than nothing.

I take it from what Jeff earlier commented that you are always trying to make it work. What is this, ultimately, for you, Mark and Sandy? Do you stand, finally, in the legal guild, trying to make it work, or do you stand as Jews in the legal guild, using the legal guild to try to protect the Jewish community? The way you are negotiating the situation doesn't seem to be too much different from mine.

Tushnet: I don't think it is. I'm not sure about Sandy's position, but I don't really, substantially, disagree with you about the issue of negotiation of state power—negotiating lives in the context of state power. I want to say a couple of things and then see if it would be productive to turn to the part about patriotism and see what Sandy's response to your statement would be.

In the context of discussions of Critical Legal Studies, the claim of irresponsibility is also made, and it existentially doesn't seem right to me. So I want to come up with some account of what it is that I'm doing that avoids the charge of irresponsibility. It's not clear that you [Stanley] want to avoid that charge. It may not be of interest to you. It seems to me that your description of what you do with your life is, in your terms, a description of witnessing. Although it's from a different tradition, it's sort of how I feel about what I do, too. I just *do* this stuff. It's out there, and people will respond to it, and whatever. But I'm responsible for it, I'm responsible for the stuff that I do, and whatever happens to it and so forth. That's why I have to say the image of witnessing is powerful to me, notwithstanding its location in another tradition.

* * *

On the issue of patriotism, let me preface this by saying that I've thought about this a fair amount and I think that my primary identification is as a Jew. But there is a secondary identification—I insist on using the term "citizen of the United States," rather than "an American," because there are other parts of America. I wonder how I would feel, in terms of my self-concept, my self-definition, if things turned so bad here that I had to relocate

20. Alasdair MacIntyre, *Is Patriotism a Virtue?*, The Lindsay Lecture, University of Kansas (March 26, 1984).

in another country—let me say England, just to make it easy, so I don't have to raise language problems. I have a lot of professional skills that are very peculiarly located in the United States. But I'm not entirely sure. Maybe I could be a tremendous scholar, in England, of the Constitution of the United States. I really don't know, but I have a sense that there is some element that is United States in me. I think that's sort of the context for talking about patriotism.

One of the issues in Sandy's loyalty oath is whether there are forms of public action that have some historical connection to an arbitrarily defined geographic community or geographical territory. . .

Hauerwas: That has a history.

Tushnet: . . .that has a history. Well, the history of the world is continuous, and the only thing that's of interest is how it has been arbitrarily divided up in creating what are thought of as independent histories, but aren't. The history of kingship in West Africa in the 17th-century is continuous with the history of the United States in the 20th in some rather obvious ways that are excluded from consciousness by the arbitrary definition. So the claim about loyalty oaths is that we can remind ourselves of continuities of history, within a geographic territory, by overcoming some of our arbitrary exclusions. How about that?

Levinson: There are several different things. One is that I think the relationship between geography and community is getting more and more tenuous. One thing that I don't talk about in this book at all, but have written about elsewhere,²¹ is theories of representation. In the initial notion of representation, we assumed that communities were geographically located, so that representation by the single-member district was sensible. I think that it is increasingly problematic, which is one of the reasons there is increasing interest in notions of proportional representation. Bruce Ackerman²² has written some interesting stuff on this. It seems to me that what *is* key about the United States, even though it is located geographically, is that it is ideologically defined in very important ways; it may be in that sense more indicative of the modern world.

That's connected to witnessing. Part of the question is whether one can witness to constitutional faith. Martin Luther King engaged in Christian witness, but he also very explicitly engaged in American witness, calling upon American traditions. Michael Walzer²³ has written extensively in his recent work about the notion of prophecy, and critique from within. Since Walzer is really a political sociologist, or cultural anthropologist, this can be applied inside: You don't have to talk about Jonah; you can talk about Frederick Douglass. The question is whether we believe there exists a body of materials that is American or of the United States—though part of the difficulty is to

21. Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why It Won't Go Away*, 33 UCLA L. REV. 257 (1985).

22. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

23. M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

have to talk about those materials that perceive the United States as a legal entity—whether there is a body of materials that do constitute us in some way, and that provide a basis for people bearing witness.

These materials can be speeches but they can also be events. I think again what Bruce Ackerman has done with the Philadelphia Convention is very interesting.²⁴ If you view Philadelphia as separate in its meaning from the written work that was produced there, what are the implications? If that event doesn't in some ways constitute us as members of the United States community, I really don't know what would. Maybe it doesn't. That is an acceptable empirical answer—that this is all a will-o'-the-wisp. But there are certainly people who believe that we are constituted by our stories. I assume all cultures are story telling. Certainly we can all reel off standard American stories that are supposed to be exemplary for our lives. People are supposed to emulate them. Values are there to be emulated.

There is a really delicious paradox in talking about these things at Washington and Lee. The father of our country and a man who may or may not be a traitor. What do you do with that? First of all, do we as individuals around this table believe that any of this material really speaks to us, calls upon us, constitutes us in certain ways? A separate question—though it's undoubtedly linked—is, do we believe that we as a society should do what we can to make sure that this body of materials is being transmitted to the next generation? And that's where the question of civic education comes up. One of the things I've always liked, from outside, about the Protestant tradition is the constant adult education that goes on, at least among the Baptists I grew up with. The Wednesday meetings and the two meetings on Sunday and quite literally God knows how much else of this. One fantasy of mine has been a kind of adult civic education. That would be a sign of our taking this stuff seriously, after all the talk. That's one reason I liked the Bork hearings. I think that at their best they turned into that sort of thing.

LaRue: The Watergate hearings [also]?

Levinson: You mention Watergate and that for me triggers a free association of Barbara Jordan and what we do with her comment about faith in the Constitution. Are we embarrassed by it? Do we identify with it? Do we say that it's the high point? Do we say this is just ridiculous? Do we simply explain that she is a very cagey politician who's manipulating rhetoric that she didn't believe a word of, but that she knew people out there would respond to, that we're too sophisticated to respond to?

Hauerwas: We haven't gotten to Protestant-Catholic interpretation in that. We really want to do that. I think it's very important. I'm really sorry you hit on David Tracy²⁵ to read because I think his position is finally

24. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

25. D. TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* (1981); R. GRANT & D. TRACY, *A SHORT HISTORY OF THE INTERPRETATION OF THE BIBLE* (1984).

wrongheaded. My kind of line is this: If you want to know what happened to Protestant liberal theology, it has died and is in the souls of living Catholic theologians—and Tracy, despite some counter aspects in his work, is squarely in the liberal tradition. For example, this is exemplified by his use of the distinction between event and interpretation.

I don't believe in Philadelphia. There is a certain sense in which I want to say yes to it. It may make sense to say that something happened at Philadelphia that is not equivalent to the written document, the Constitution, in a way I do not believe it makes sense to say that something happened when Moses led the Children of Israel out of Egypt, in a way that that event makes sense separate from the Book of Exodus. I don't believe that Moses knew, or the people of Israel knew, that they were engaged in an exodus. Through the creation of the people of Israel we now know that that was an exodus, but you can't have the Exodus without the creation of the people of Israel, who give us the Book of Exodus. So in a certain sense we don't have Philadelphia without the Constitution—without the people of America who then maintained the interpretive categories that are necessary for fitting that within an ongoing narrative.

Levinson: We also don't have the Constitution without Philadelphia. The two are linked but separable. They carry separate messages.

Hauerwas: That's true. Of course that's the reason why I'm not a Protestant liberal. I really believe that Moses had to lead the Children of Israel out of Egypt. I'm one of the few Christian theologians left who believe that if we found documents clearly showing that Jesus was dragged kicking and screaming to the Cross saying—"I don't want to go, I don't want to go, I just wanted to preach a religion of love and there's been a deep misunderstanding. Is this really necessary? Can't we sit down and come to some understanding on this?"—if we really came up with evidence of that, we ought to give it up. It's just bullshit. You know, it's not true. So I really want to think that these things have to happen in some serious way that is not in deep discontinuity with our reports of them. But I think that the Children of Israel didn't know that they were in an exodus. I think, as a matter of fact, that if the Exodus didn't happen in some ways closely resembling what was going on, then, as a matter of fact, the God we worship isn't true. So we're making strong historical claims about continuity between the people that were created and what they thought was happening in the events of their creation.

A word about patriotism in that regard: I regard the development of the modern nation-state as a fiction. It is a fiction, an attempt to create something that is determined primarily in the interest of peace. It was the result of trying to find a way to stop Protestants and Catholics from killing themselves in the religious wars developed since the Reformation. It was Kant's great vision to try to create the fiction of a nation, that is a consensual community, that is possible between autonomous individuals exercising their rationality, to come to contracts between one another, to create republican governments.

Levinson: I think you are confusing European liberalism with the particular narrative story of this country. I think that the Preamble to the

Constitution has almost nothing to do with Kant, and almost nothing to do with this peace-treaty notion of the liberal state. I think the "more perfect Union," the "establishment of justice," comes out of communitarian Calvinism. It comes out of secular utopianism. It comes out of a number of things. I think that the Preamble would be very, very different if it were peace-treaty liberalism.

Hauerwas: I think that's right.

Levinson: King and others draw on the American story. I think it's also informative that constitutional lawyers either have never known what to do with the Preamble, or simply and utterly have ruled it out as a source. We are spending an ungodly amount of time trying to figure out what the Ninth Amendment could possibly mean. Nobody ever suggests, "Well, just look upstairs, and say that what gives this whole thing point is a more perfect Union, and establishing justice." Therefore the Supreme Court can say, "Go establish justice." People continue to ignore that connection, but I think, in terms of the story, in terms of what explains what they were doing in Philadelphia, and the strength of that American rhetoric, it has meant in terms of the values expressed in the preamble that they are, "for better or worse," part of the essential narrative. And there are times when I think it is distinctly for the worse that it's not been merely peace-treaty liberalism, but it's always been a notion that we have an aim quite separate from peace.

Hauerwas: That's in some tension with Mark's political liberalism. I think you're right, in terms of the historical background behind the Preamble, but my statement on that would say it doesn't make a bit of difference. In fact, political liberalism out of Kant has become the way that we interpret what the "more perfect Union" is going to look like. That's partly because what the modern nation-state has been about is the attempt to increase geographic units in the interests of peace, so we don't get wars between Indiana and Ohio over the headwaters of the Kankakee. This was a great achievement to be able to do that. But it's an illusory achievement because the very ideologies necessary to produce those unions can't give an account of why those geographic units aren't arbitrary.

Germany and France are liberal societies, or at least quasi-liberal societies, that don't want to face up to the arbitrariness of their geographic units. That's one of the things that Rawls²⁶ can't account for in his theory of justice. It's just an anomaly about what geographic unit is going to undertake the principles of justice. You can't come up with an account of what geographic units are going to be doing that kind of bargaining. That's one of the illusions of liberalism, that it is not a limited doctrine in that way, and that's the reason why it has to be inherently imperialistic, because it has to show that everyone will finally accept the two principles of justice.

Levinson: Walzer,²⁷ though, tries to resolve that.

26. J. RAWLS, *A THEORY OF JUSTICE* (1971). See G. GRANT, *ENGLISH-SPEAKING JUSTICE* (1985) (developing this point in a critique of Rawls).

27. M. WALZER, *supra* note 23.

Hauerwas: He doesn't do it very well.

Levinson: But at least he recognizes it and says that liberalism is *our* constitutive tradition.

Hauerwas: That's my point about patriotism. It's always going to be an ideal that says that patriotism is not in principle geographically limited. Except Walzer turns it into a confessional faith. In principle it should not be, *a la* Kant, a confessional faith. That's the reason why I say that it was the peace treaty that was necessary. Liberalism, as the Enlightenment ideology, to establish peace in Europe, became the ideology that justified Western imperialism. I think that was intrinsic in the logic of it. Walzer is a wonderful example of someone who wants to pull back from those ideological pretensions, and just say, "Whoops, our faith is within these geographic units." It's very hard to keep it that way. That's the reason why liberal patriotism always is imperialistic, because it wants to say that everyone should look this way, because it doesn't want to believe that its geographic units are arbitrary. Texans know that our geographic unit is arbitrary, because our history is arbitrary.

Shaffer: Is that why the early civic religion liked to claim that America was God's new Israel? To give it geographical identification?

Hauerwas: Sure, and then to give it a sense of mission for the whole world.

Shaffer: So patriotism is about land.

Hauerwas: A land and a mission.

Richardson: Can your Texan patriotism have a strong critical element in it? If you become aware of serious social injustice, gross suffering of people, would you want to do something about that? And if so, how? Which channels would you use?

Hauerwas: If they are *our* people; not if they are Mexicans. One of the interesting things about Texas is that many of the early Texans were Mexicans. And people forget that Seguire was at the Alamo, on the right side. Matter of fact, he got out. He was one of the few people who got out. He then later became mayor of San Antonio. Then, when we decided that Mexicans shouldn't be mayors of San Antonio, we ran him out of Texas. This is all true. It can contain some critical elements. Yes, it can. And has. I think partly because it knows that it's limited. My view is that it is ultimately an insufficient, limited account.

I wrote an essay once called "On Being a Christian and a Texan, a Theological Entertainment,"²⁸ in which I tried to suggest that I wouldn't ever have known what it meant to be a Christian unless I had been marked by being a Texan, because Texans know that they are a limited community, that we just got stuck with being Texans. We're awfully glad that we were, but, ultimately, we find that we need another community, to find our limits. That's the way you realize that being a Christian is a little like being marked

28. Hauerwas, *A Tale of Two Stories: On Being a Christian and a Texan: A Theological Entertainment*, 34 PERKINS J. 1 (1981).

as being a Texan. Being a Texan gives you a better critical hold on your Christian convictions. I always remember that when I was a kid, growing up, I was driving through Greenville, Texas, on my way to Mississippi, where my mother was from. You drove under a sign on old U.S. 40, if you went into Greenville, that said, "Greenville, Texas, the blackest land, the whitest people." That's what we grew up with. That's the way Texans deal with sin. We turn it into banners and claim it as righteousness. Obviously it's not a very good critical principle. But I think it's better than the United States of America, in terms of *its* liberal pretensions.

Richardson: But how do you go about correcting it, when you want to correct it—as a Texan, or as a Christian?

Hauerwas: As a Christian. You'd do it—you know, the way porcupines make love—very carefully. You take things on one at a time. You don't have big theories for it. You take down that sign.

Shaffer: Again, it's like the weather.

Hauerwas: Like the weather, yes. But in that way it's embarrassing for me. I think one of the things one has to say is that liberalism has done a hell of a lot better than Christians about locating injustice, and doing something about it. I'm quite willing to say that. Then you get the other side of that. The very grounds on which liberalism has located the injustice, and done something about it, ironically, mean that we have to be coercive against the Mormons. I think we should allow them to have more than one wife.

* * *

White: May I use that as an opportunity to return to Jeff Powell's point about Mormon polygamy, going back especially to the 19th-century case? There is a crucial problem that arises with the criterion of subordination that you use. If that's examined in historical context, the Mormon argument, offered by Mormon men and women, would have been that monogamy was more oppressive than polygamy. Ironically, some contemporary feminists, working with Mormon materials, are now arguing that there is a real, legitimate case here. Mormon polygamous wives ran households when their husbands were either away on missions or involved in other activities. They essentially ran the business. In fact, there are data to suggest that in Utah as a territory, throughout that period, women were disproportionately represented in law, medicine, and other professions. In the context of the Victorian era, with the rise of industrialization and the pushing of women back into the household, which monogamy reinforced, polygamous wives had more options than monogamous wives.

The Mormons bought into the sexual stereotype that we talk about now as characteristic of the Victorian era. They saw men as sexually overactive, and women as uninterested in sex. There is even the argument that, having this conception of sexuality, Mormon women were freed from the sexual demands that monogamy imposed, in a way that other women within the society weren't. Mormon women identified themselves as very adamant feminists. There's a bit of irony here, too, in the sense that they had official

support from Mormon leaders, including Brigham Young, endorsing the feminist movement. I don't want to overstate his sympathies. Young had some other good reasons to argue for women having the right to vote. It would double the Mormon vote. He had, as well, good reasons to argue for women having choices that they were losing, or never had, within the American experience, because they could then choose polygamy, if the free choice issue became a crucial one. So there was a sort of patriarchal Mormon self-interest in the endorsement of feminism at that point.

But you can show that there were larger gatherings among Mormon women in support of feminism than other places in the country. Polygamy posed a problem for non-Mormon feminists, but Mormon feminists saw that as a real misreading of their situation. The ideology produced during the period by Mormons argued that women were freer in Utah than they were in the society at large. If the subordination principle is the issue, then you've got to determine what kind of criteria to use: Is this an empirical question? If it's an empirical question, and the Mormons are correct, then you might have to condemn monogamy rather than polygamy.

Powell: The late 19th-century liberal state's explanation of why it's going to tromp the religious community's views was not really subordination, but, rather, the view that these folks were sexually immoral. The state was concerned about the destruction of families.

White: No, I think that was wrong, too, as to why they acted.

Powell: Okay. But I was trying to come up with what a legitimate 20th-century liberal ought to say.

White: If you said that as a late 20th-century liberal, what do you do with the 19th-century case?

Powell: Everything you say reinforces a point I was trying to make in response to Mark, which is that liberalism very definitely has an account of the good, which it will enforce against communities that have contrary accounts. Suppose, in the 19th-century case, they had made the 20th-century subordination argument. And the Mormon feminists responded, as you have said, with empirical data and so on. I think it is perfectly rational and consistent, in the liberal state, to say, "Too bad. We don't care. That's your account; our account is the one that's going to be enforced." I can agree with everything you say, and say that the liberal state will not recognize it, because it has its own account of the good that must triumph. In the end it will use coercion to enforce that—stick it down other people's throats.

White: Well, that certainly is what happened, but I don't think it happened for those reasons. That is, I don't think polygamy was the issue at all. The Mormon denial of the legitimacy of the nation-state is what was really crucial. This empire being set up out West claimed economic autonomy, and political autonomy, and so on. Polygamy became the issue by which you could mobilize New England puritanical types against the Mormons.

Powell: But that's once again saying that the liberal state is not going to tolerate any religious community's self-definition, if that self-definition contradicts the liberal state's major commitments and views.

White: You're making that as an observation about the liberal state.

Powell: Oh, yeah.

White: I may have misread you. I thought you were defending it, in response to one of Stanley's points. Defending it in the sense that you'd identified here, with the subordination of women as a meaningful criterion for the state's intervention.

Powell: I'm defending it in the sense of Mark's attempt to say that you can keep a liberal account that is not going to force things down people's throats. I think the liberal state is going to force its account of the good on other people.

Millon: I think related to that is the fact that liberalism as a set of principles pays lip service to an idea of toleration, as one of the central ideas, but it has, within this set of principles that constitute liberalism, contrary principles that allow intolerance in certain situations to be legitimate. I think that's also the point you are making. Not that any particular doctrinal argument, like the one he posited, is a good one or not. Simply that, within liberalism, these arguments are possible, and we have to keep in mind that liberalism—as we talk about this straw person or this ideal—includes all these contrary features.

White: You chose the Mormon case, though, to bring up initially, because of some of the complexities with that. Jonestown is a little bit easier to deal with. You could deal with Brigham Young, and blood atonement, and all of these things, if you could have documented them, and have a different kind of case, I think, from the one you'd have in this instance.

Beckley: Jonestown is a tougher case for Stanley.

Hauerwas: Yeah.

Beckley: Precisely because people were getting killed.

Hauerwas: Sure. Right. It is a tough case. I think that the liberal state did not fail in Jonestown; I believe the church failed. Those people were martyrs to liberalism. What I mean by that is that they were the kinds of people that liberalism inherently wants to create—basically rootless people in California who are desperate for a sense of community. Jones gave it to them. Jones created a fascist community for them that gave them something worth dying for. Trained them for it. There was a lot of admirable stuff that was going on there. They cared for one another. They were liberal martyrs—I would rather say victims—because they had not been schooled sufficiently by the church to give them a critical ability to stand against that kind of community when it offered salvation. They were being given a false salvation. One of the interesting questions about descriptive claims is those who killed themselves said they were martyred; we, that is, we liberals want to call it suicide. My own view is that we are right in imposing our description, suicide, as Christians. But they were right to call it revolutionary suicide. Of course the way the liberal press wants to do it is to say isn't it terrible that Jones is able to manipulate these poor ignorant people into doing this terrible thing, because, as a matter of fact, they should have been good liberals; they should have understood that there is nothing worth dying for in this world. And of course, as a Christian, I want to say you ought to be ready to be martyred. There's a lot worth dying for, and therefore we ought to honor

their assumption that they were revolutionary martyrs, the difficulty being that the god that they allowed themselves to be martyred to was a false god. Therefore their deaths are terrible deaths.

White: Now where do you go with your claim then that we are justified in calling that suicide?

Hauerwas: We're only justified in calling it suicide from within the Christian community, because we are pretty clear about what suicide means. Suicide is when you allow your life to be taken from you, or you do it by your own hand, in an unjust manner. What an unjust manner means is that you rob God of God's proper power over your life.

White: What do you do with Jonestown? Is it just a tragedy?

Hauerwas: Yeah.

White: And that's the only thing that can be done? Or can you intervene?

Hauerwas: I don't think liberal society can intervene.

White: I think it can. Oh, sure. If it can intervene in polygamy it can surely intervene here.

Hauerwas: On what grounds would it intervene?

Levinson: A liberal society probably wouldn't use the language of "false consciousness;" it would, however, use the language of "brainwashing." But intervention there would take place. I think part of the problem with the implications of liberalism is that there are very, very few libertarians of the kind you are using as typical of liberal, for better or worse.

Hauerwas: That's right.

Levinson: You can find lots of people who view themselves as good liberals who will intervene where the Hare Krishnas are concerned.

Powell: Take your own statement, Stan, that a good liberal knows that there is nothing worth dying for. Okay, that means that we know that those people are not making rational choices when they go follow this guy, and that means that they are not acting autonomously, and that means that the liberal state—which has an admirable, liberal, moral obligation to enhance people's autonomy—has to step in.

Hauerwas: That is the way the logic of the argument would work. And that's going to be really very coercive.

Tushnet: It occurred to me, when you, Stan, were talking about Jonestown and its relation to liberalism, that you want to say that Jonestown was the product of the success of liberalism in creating people like that, but also the product of the failure of liberalism, in refusing to intervene when, in other situations, liberals have not quarreled about whether intervention is appropriate.

Beckley: Who's a liberal? Are the authors of the Catholic bishops' letters liberals?²⁹ William Galston?³⁰

Hauerwas: I assume we are all liberals. I don't believe anybody who is working within the American context can avoid the habits of liberalism. I'm trying to slowly think my way out of it.

29. See *supra* notes 8-9.

30. W. GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980).

Beckley: But sometimes you talk as though the only liberals are those who have desires, or self-interests, without any conception of the good; and sometimes you talk as though liberals had conceptions of the good. It seems to me that liberals have all different kinds of conceptions of the good. Rawls is different from Nozick,³¹ and both of them have conceptions of what is good, and the Catholic bishops are different from that, and so on and so forth.

Hauerwas: Well, as a political theory, liberalism at least claims that. Someone like Rawls, if you take him as a paradigmatic liberal theorist, wants to say that we can have a social agreement in a way that prescind from any agreed upon material goods of what we want as a society.

Beckley: He sometimes says that, but that's not the way he makes his moves. He does have a commitment to equality and freedom. Those are goods that he wants to preserve.

Hauerwas: Which he has a lot of trouble giving any substance to, exactly because he prescind from any kind of narrative construal necessary to give them substance. Sandy has a commitment to egalitarianism, too, but Sandy's commitment to egalitarianism is necessary as one of the preconditions for continuing the discussion about how to interpret the Constitution. Sandy's egalitarianism is kind of along the lines of A. D. Lindsay's old argument,³² the one that shows that at least the beginnings of democracy come out of the Puritan congregation, insofar as what is necessary for maintaining the modern democratic state—A. D. Lindsay's modern democratic state. Egalitarianism isn't an end in itself. It's the precondition for maintaining the discussion, for the community's discovery of what the goods are. I'm very sympathetic with that point of view.

I know that liberalism comes in many shapes and sizes. I tend to try to make it live up to its most consistent expression, because I agree that most liberals aren't consistent. I mean you are quite right, Sandy. We know they want to educate five-year-olds with something. I think it's quite unclear that they know what they're doing when they do that. But, nonetheless, I think that we are increasingly becoming a consistent liberal society, and I try to figure out what the implication of that is going to be. I think Rawls is a perfect exemplification of that. Even the incoherences within Rawls's account help us find this. The deepest incoherence in liberalism is the failure to recognize that it is a tradition, and therefore has a contingent starting point within the Enlightenment. The false consciousness created by the denial that liberalism is a tradition, I think, accounts for why liberal societies are so violent. The irony is that liberalism, in the name of being an antistate position, has given us the most powerful bureaucratic state that the world has ever seen.

Tushnet: Well, not quite.

31. J. RAWLS, *supra* note 26; R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

32. A. D. LINDSAY, *THE MODERN DEMOCRATIC STATE* (1962).

Hauerwas: The Soviet Union. I regard Marxism as a form of liberalism. My sense of this, of course, is a very global claim, but I think that the two greatest Christian heresies we have ever seen are now regnant in the world; one is called the U.S.S.R. and the other is called the U.S.A. And they are both fighting over who's going to determine the meaning of human history, in terms of who's going to finally find the way to unleash the new creation of the autonomous human being. These are regnant things that are at war. And they are liberal states.

Tushnet: I have a series of thoughts that are connected with Harlan's concern that liberalism is being used badly in this discussion, and also to Stanley's juxtaposition of Exodus and Philadelphia. It seems to me that what you've said so far doesn't take account of the ongoing, always ongoing, reworking of the narratives that constitute the tradition.

As I understand it, the current political theory is precisely to recapture the understanding of liberalism as a tradition that emerged in response to a particular set of problems, and when these people tell the story about liberalism in that way, they are recreating, transforming the tradition within which they are working, not simply recapturing something that existed. When you say you want to think about the most consistent working out of liberal presuppositions, and that turns out to be different from what people who identify themselves as liberals today say that they are contemplating, one possibility is that *you* are working out the implications of a set of presuppositions of a tradition, not a tradition to which they don't adhere, but which they are transforming.

Hauerwas: Well, then you just have to say, "Give me a different account, and let's see how you justify that kind of account." One thing we haven't mentioned: We've been talking about liberalism primarily as a moral and political theory, but of course it's an economic theory. I think that that's increasingly becoming worked out, consistently, in terms that we are beginning to see. More and more of our lives are open to the market. I regard the *Baby M* case³³ as a nice working out of the moral implications of capitalism. The fact that people are shocked by it is odd. Soon we'll see that there really isn't any reason to have laws against prostitution. There really isn't any reason to have laws against suicide. There are no economic grounds for such laws. There is not any reason, if someone wants to insure their family's future by saying, "Yes, I'll sell all five of my major organ systems, even though I'm thirty-five." There's no reason to prevent that.

Tushnet: Wouldn't the alternative say that your perception of the incredible ambivalence about *Baby M* as odd—doesn't that perception indicate that you haven't described where the liberal tradition is now? Milton Friedman regards the ambivalence as odd, but the phenomenon in the liberal society is of a great deal of ambivalence about this—resistance to the extension of market norms. Sure it has gotten quite far, but there's some resistance to those—

33. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Sup. Ct. 1987).

Hauerwas: On what grounds is the resistance?

Tushnet: Well, I don't know.

Hauerwas: That's what's interesting. On what possible grounds is the resistance?

Beckley: That's a question that ought to make any liberal nervous. But there are some possible grounds.

Hauerwas: Well, give them to me.

Levinson: Well, you're smuggling in a lot of foundationalism here. You're asking—

Tushnet: But it's pre-Enlightenment foundationalism.

Levinson: Well, whatever it is. Sometimes you appear to be a non-foundationalist, or an anti foundationalist, but you want liberals to come up with the rock-bottom foundation, and if they don't—

Hauerwas: That's no reason.

Tushnet: It's their tradition. It is their tradition that they have to provide the reasons, and Stan's saying you can't operate within that tradition without doing what he's asking.

Millon: There are a couple of reasons within the tradition. One would be that the mother of Baby M was under duress when she made the agreement—no freedom of contract. Another would be that there is a certain category of things to which market concepts don't apply—individual physical autonomy or—I don't know how you define it. There are means within liberalism that you can use.

Hauerwas: Of course the former one would mean that we have to be more careful about how we draw up the contracts, and under what conditions they are drawn up, but there's nothing inherently wrong with them. So that doesn't speak against surrogate parenting at all. It just says that you have to be better at it. The second one—then you'd have to show if, empirically, people really are doing that. I mean: Are they subjecting their bodies to wrong use? We allow people to sell their blood.

Millon: But my point is that, within this set of principles we call liberalism, there is room for this kind of dialogue. There is nothing necessary about liberalism, as a core of principles, that dictates any of these results.

Beckley: And there's room for the notion that there is a public good that would be threatened if you allow certain kinds of sales such as blood transfusions. I think a liberal can argue against the public sale of blood on those kinds of grounds.

Millon: The judge would just say it's against public policy and that would be it.

Hauerwas: But then I think that what you are going to get into is the problem of majoritarianism and how you establish what those public goods are. It's just what the majority agrees upon.

Beckley: But there could be evidence here. We can see that over the long run that kind of market will destroy the supply of blood and what that would do to the community. If you have a notion of people being highly interdependent. . . There are so many forms of liberalism. That is all I want to say. You could include those who determine the public good on majori-

tarian grounds and the Catholic bishops as well, or, say, John Ryan, who participates in the American democratic experiment, and so on. They are just quite different from Robert Nozick.

Hauerwas: Well, I agree. The Catholic bishops are probably personally liberals, but in terms of Catholic theology and political theory they certainly are not liberal—within their tradition and how it is worked out. And I think that's the reason why they have so much trouble finding a voice. I do think that the convoluted rhetoric of rights in the economic pastoral letter is partly convoluted because it's so hard to make rights language work within Catholic economic thought.

* * *

Shaffer: Sandy suggested four possible places to begin this afternoon. They are civic education, patriotism, Abraham Lincoln, and Sandy's Protestant-Catholic analytical categories.³⁴ I can't fit the fourth into the other three, but you could cover the other three with Abraham Lincoln, I think. It strikes me as an intriguing place to begin.

Levinson: One of the things I have realized in reading the manuscript of *Constitutional Faith* for copy editing is that Abraham Lincoln plays a key role throughout the whole manuscript, and that Lincoln is one of the two or three most important single figures in the American narrative. One question that I would like to throw out is what one does with Lincoln. That question in turn can take a number of forms. One is very personal. What do *you* personally do with Lincoln? Does the Lincoln Memorial resonate with you? Do you view Lincoln as a key figure in a narrative that is important to you, etc.? If there is such a thing as civil religion, then presumably Lincoln is a character in it, and one would assume that he would resonate in a way that James K. Polk doesn't.

Other questions can be less personal and a little bit more distant: How should Lincoln be taught? How did he err? Or should Lincoln be taught to the young as part of civic education? Why is he on the five-dollar bill? Why do you have the Memorial? What makes him such an important figure? Is that something the young in our society should know, so that when E.B. Hirsch gives the next round of cultural literacy tests they would know

34. See *Constitutional Faith*, *supra* note 2. In *Constitutional Faith* "Protestantism" . . . refers either (1) to an emphasis on the exclusivity of written Scripture or text as the basis of doctrine, or (2) to the legitimacy of individual (or at least relatively non-hierarchical communitarian) interpretation as against the claims of a specific, hierarchically organized, institution. 'Catholicism' . . . refers either (1) to the legitimacy of unwritten tradition in addition to Scripture, or (2) to the authority of a particular institution, hierarchically organized, to give binding interpretations of disputed aspects of relevant materials."

Regarding the Constitution: "As to source of doctrine, the protestant position is that it is the constitutional text alone, while the catholic position is that the source of doctrine is the text of the Constitution plus unwritten tradition. As to the ultimate authority to interpret the source of doctrine, the protestant position is based on the legitimacy of individualized (or at least non-hierarchical communal) interpretation, while the catholic position is that the Supreme Court is the dispenser of ultimate interpretation."

something about Lincoln—more than that he was a president at some time. And then if the young should know something about Lincoln, what is it they should know? Should he be taught as a great constitutionalist, and indeed as a preserver of the Constitution, or should he be taught as Father Abraham in a quite different sense of smashing the idols, and knowing when to let the 1787 constitution go and engage in quite ruthless behavior to organize a new covenant and a new understanding?

Among the frightening possibilities is what he himself suggested in a well known speech in 1838 about lions and eagles, and this is what he said: Let respect for law be the political religion of our nation. Part of what was going on was his trying to come to terms with the Founders who did not have respect for law, and he was very well aware that to emulate the Founders could be to disrespect law and to engage in a refounding. One of the things that makes Lincoln of such interest to the Straussians, among other communities of students, is that he has claimed to be a genuine founder himself, by engaging in transgression. So: Do we build a monument to him as a transgressor carrying the message that we too can transgress, so that there is a line from Lincoln to Martin Luther King? You could have much less attractive bloodlines than from Lincoln to Martin Luther King. Or do we teach him as a man who preached reverence for the law? And that's what the young should know, that's the part of Lincoln they should emulate?

LaRue: I can talk about that because I do teach Lincoln in constitutional law. I'm one of the few people in constitutional law who teaches the *Dred Scott*³⁵ case. I spend several days on it. I teach Taney's majority opinion, Curtis's dissent, and what I call Lincoln's dissent, that is, his speech at Springfield that kicks off the Lincoln-Douglas debates. I think that his speech at Springfield is the most important opinion in constitutional law, which is why I teach it. Taney and Curtis debated the question of the historical understanding of citizenship and all of those sorts of things, and Lincoln in that speech at Springfield, and in the rest of the Lincoln-Douglas debates, trumped the Constitution with the Declaration. That was the move. He said *the* Constitution is the document of 1776. When he said "four score and seven years ago" he was dating from the Declaration, and that was not a cliché as it is today, to date the country from the Declaration. It was a contested question of what *is* the founding document of the country, what is the date.

Now, Lincoln says—he didn't put it this way, but from the point of view of a constitutional lawyer you can say—the Constitution itself is a set of compromises. Anybody that says anything about the Constitution and its drafting and its history knows that. So what's fundamental? Is it slavery that's fundamental, and we've made a compromise with freedom, or is it equality that's fundamental, and we've made a necessary pragmatic compromise with slavery? What's fundamental? His position was that it was the Declaration that was the trump.

35. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

So at Gettysburg, when he declares the nation to be dedicated to the proposition that all are created equal, he is repeating then, in the context of the war, the proposition that he had advanced throughout the Lincoln-Douglas debates, and since that speech at Springfield. And I think he's right. That is to say that if you are to explain the positive law of constitutional law you cannot do so on the grounds that the document of 1787 with its amendments, including the Civil War amendments, is the Constitution. You can't explain *Brown v. Board*³⁶ on that ground. You can't explain *Baker v. Carr*.³⁷ You can't explain *Roe v. Wade*.³⁸ You cannot explain what defeated Bork, because if you think the document of 1787, with its amendments of 1789 and 1867, is the Constitution, Bork is right; but Bork is wrong, and Lincoln is right.

Hauerwas: Do you take that to be a Protestant or a Catholic interpretation?

LaRue: Actually I think it's a Talmudic one. I think when Sandy states his position at the end of that section of his book, combining the Protestant and Catholic interpretation, and said this combination is the position I rest on, he in fact asserts the Talmudic position.

Levinson: That's clearly correct. Protestant-Catholic is used for two reasons, one of which is simply that I assume that my audience will be much, much more familiar with the gross categories Protestantism and Catholicism than with any other gross categories one would use. The second answer is very, very appropriate to Stanley's point this morning, and that is that, as a Jew raised in Western North Carolina, I *know* more about Christianity in some ways than I do about Judaism, because my friends included a Baptist, a Methodist, a Presbyterian, a Catholic, and an Episcopalian, and we would argue endlessly. So, unlike most of my own students today, I have some sense of the difference between a Baptist and a Presbyterian. I do not have a nuanced sense. I must confess to you and to others that I've never really understood what Methodists are about.

And it is in fact that only over the last five or six years that I have begun studying in any serious sense Jewish materials. What I find attractive in what I call the Protestant argument is also in the dominant Jewish tradition: only minimal institutional authority to speak of, plus multiple sources for doctrine.

Hauerwas: Yes, multiple sources but yet still a continuation of a community of testing, which always is going to say that the interpretation must do justice to at least some classical document, the Torah.

Levinson: Yes, but there are no criteria at all of what counts as doing justice, and remarkable things have been done in the name of fidelity.

Hauerwas: But why should they continue to assume that the Torah has overriding status?

36. *Brown v. Board of Education*, 347 U.S. 483 (1954).

37. *Baker v. Carr*, 369 U.S. 186 (1962).

38. *Roe v. Wade*, 410 U.S. 113 (1973).

LaRue: Because of its continuous revelation.

Levinson: Let me read one other paragraph that's been added to the text since the version you got because it's clearly relevant: "One recent writer has described rabbinic authority as including the creative ability to 'reshape the Torah, to determine its official meaning, and to set aside even explicit rules as the interpreters see fit.'" Interestingly enough, in light of our earlier discussion of Lincoln and other founders, what legitimizes rabbinic creativity seems to be a matter more of character than of following any specific rules of interpretation. If a creative act "is carried out by one whose intention is to establish his own systemic primacy over that even of the Torah," the act is illegitimate. "If, however, the action is motivated by a real concern for the preservation of the primacy of the Torah itself within the halachic system, and if the situation is such that this preservation can be accomplished best through the abrogation of one of its dictates, the action is legal. In other words, the assurance that rabbinic legislation abrogating the Torah is secondary, not primary, is dependent upon the personal virtues required of the authorities of the system."³⁹

I am trying explicitly to tie this with Lincoln. There are no formal arguments that can say Lincoln was an interpreter rather than an inventor. Ultimately you have to decide what you think of his character, what you think of the values to which he was committed. But abstract rules of interpretation are almost no help in coming to terms with Lincoln, or coming to terms with the great rabbis, or presumably great religious leaders in other traditions, and they all become essentially contested figures for that reason. I guess part of what I am curious about is whether Lincoln is essentially contested, or whether people don't think of him much one way or the other, that he is treated as merely the guy on the five-dollar bill.

Hauerwas: In terms of your original questions, apart from the interpretive thing, when I go back to Washington, D.C., I go to two places. I always go to the Lincoln Memorial and I go to the Vietnam Memorial. I regard the Vietnam Memorial as our great piece of national sculpture, and I go to the Lincoln Memorial to read the Second Inaugural. And I read the Second Inaugural as a Southerner, because I think that it articulates well the South's tragic sense of the war. I always pray that somehow that might become part of our national consciousness, which it is not. The way that Lincoln is read is not in light of the Second Inaugural, nor even in the options that you lay out in the book in terms of overriding *habeas corpus*, or what Lash [LaRue] has suggested in terms of Lincoln's making the Declaration of Independence the primary text. Lincoln is read primarily within the American context as a winner, because the story that is told about Lincoln is this grim determination to win the war. He did win the war, and that's what we believe Americans are about—winning through determination and power on the side of righteousness and good.

39. S. LEVINSON, CONSTITUTIONAL FAITH 153 (1988).

As a result, we lose entirely the sensitivity that Lincoln himself had about the tragic character of the war, and why it was a genuine struggle, and why he knew that the decisions he was having to make at that time were matters of judgment which were creating something new, that was absolutely necessary in order to preserve the Union. So I value Lincoln deeply, but I value Lincoln primarily because I think he was an extraordinary person. I think he was one of America's great theologians, but he has been misread so deeply it only confirms my view that America doesn't have the kind of ethos sufficient to sustain the reality of what Lincoln was and what he was about.

Levinson: I find it a little bit surprising that you value him so much because preserving the Union can easily be put within a framework of idolatry.

Hauerwas: Oh, absolutely.

Levinson: He "shot" certainly as much as anybody at Fort Sumter and some would say more. He chose to go to war. There is no portrayal of Lincoln which makes him a plausible pacifist.

Hauerwas: Oh, he's not that at all. I think one of the difficulties about being a pacifist is you are always put in such a minority position that you think that everyone else's willingness to go to war is because they are morally perverse. I do not think that people go to war and participate in war because they are morally perverse. I think most people never even have the choice to think about it. I don't think Lincoln ever seriously considered what it might mean to have a nonviolent alternative. Pacifists care more about conscientious participation than those in the war do. You get so few people conscientiously participating.

The reason why I value Lincoln, as I said, is because I think that he articulated a public sense of the tragedy of the war, in the Second Inaugural and many other places, that could really help us as a people if we could own that history. To appreciate what it means for a mature polity to have a discourse that associates its history in a way that its citizens can be working on a common project without it turning into idolatry. For example, how does Lincoln mean for us to handle the continuing problem of blacks in America? Supposedly they've got civil rights, so now we try to deal with the continuing problem of how to remember we were a slave nation by saying, What's a little slavery between friends? I mean, you, too, have the same rights that we do—have two cars, live in a nice suburb, three TVs, and worry about Jews moving in. Blacks now get to have the same disadvantages that we currently have in terms of what makes our lives seemingly worthy.

So I find Lincoln's sensitivities on these points to be quite important, if we could own them. I don't say it would be great. My problem is that even if we could recover some sense of "civic republicanism" within the liberal democratic system it would still be armed. So even if America could become a virtuous polity I would still be worried. But Lincoln's sense of virtue in this tragic sense—I think that is a sign of a mature polity that would be better than the narrative that we place him in, namely the narrative of our ongoing victory, where slavery is no problem anymore: We got rid of slavery; we fought this terrible war; we got rid of the final products of discrimination that was part of slavery, supposedly, so we are on our way to being a just

society. I think that is just all false. That is the history that we read Lincoln in.

LaRue: I still don't understand your total response to Sandy's point in terms of your reference to your saying, "It would still be armed."

Hauerwas: Republican virtues are always armed. They are armed virtues. Courage is armed.

LaRue: I mean, you're not going to be able to claim Lincoln as an ally with that. You can't do it with the Second Inaugural.

Hauerwas: No, no, that's quite right. I think that the virtues, when they're armed, if they're coupled with the kind of sense of ambiguity and tragedy that you find in the Second Inaugural—at least they don't kill quite so readily.

LaRue: Well, I'm still going to fight with you that the Second Inaugural is an account of ambiguity and tragedy. The statement that's made in the Second Inaugural is that if for every drop of blood shed by the lash there must be another life lost, then we must recognize that the judgments of the Lord are righteous.

Hauerwas: That's right.

LaRue: Now, what I want to say is that the thing that's attractive to me about Lincoln is the Old Testament sense of that.

Hauerwas: Right. Your reading is probably more closely correct than mine. Boys in gray pray, boys in blue pray. They pray to the same God.

LaRue: Yes, pray to the same God and the same God is punishing both.

Hauerwas: Right.

LaRue: And his judgments are righteous and we cannot complain about this. I think he's right. And, second, on this peaceful alternative, I think it's positively silly to say that there was a peaceful alternative.

Hauerwas: I agree. That's what I said. I don't think there was. And that's the tragedy.

LaRue: And to take up another of your comments before. If there are things worth dying for—I do also think there are things worth killing for.

Hauerwas: Well, the reason why I think Christians turn out to be such enthusiastic killers is because originally they were such enthusiastic diers. That's exactly the move that I think is natural and wrong. The fact of your willingness to die doesn't translate into willingness to kill, but you are quite right in the moral logic of that. But I do think that the more serious question is, even if Sandy is right in terms of how Lincoln is being interpreted, that's not how Lincoln works in the main story of America, if we're going to locate verities. I mean it works primarily as we won; we were successful.

Shaffer: It was a cause worth dying for.

Hauerwas: And it was a cause worth dying for—right—and worth killing for. That sense of judgment that you see in the Second Inaugural we just don't have, because we won. It would be nice if we could get Sandy's Lincoln into the story. I'm not so happy with getting the other part that you suggest in the story, namely that the Declaration of Independence is the real Constitution. Because I don't like the Declaration of Independence. I always say that America is the only country that has the disadvantage of being founded

on a philosophical mistake, namely the notion of inalienable rights.

Levinson: From another perspective, Gary Wills doesn't like the Gettysburg Address because it's propositional and, if that's the proposition, then we get in very quick fashion to loyalty oaths again, or a test of attachment to the Constitution, with the notion that we know what that means, so, "Here's a proposition: yea or nay."

LaRue: Again, Lincoln gives you a reading of the Declaration, one which Gary Wills happens not to like but one which I think is a very good one. On the thesis, he says that the proposition of the Declaration is equality, but he also says that people aren't equal in everything. In the Springfield address he specifies what people are not equal in; they are not equal in, among other things, as he says—a surprising proposition—their moral worth. He says they are equal in the rights to life, liberty, and the pursuit of happiness. That is the way that you found a polity of a certain sort which, by the way, seems to me a rather better way to have found it than the particular history or the particular geography.

Then I'll have to go to something else. Another piece of history I heard asserted today is one that seems to me absolutely astonishing. That is that the Puritan imaginations of equality, and the Calvinist thing, and all like that, were part of the fundamental founding of America. I think, historically, it is almost easy to establish that the Puritan communities of New England were atypical for the American colonies. Most of the American colonies were more like the English homelands. Puritan New England was self-consciously and substantively different, and it's a further fact that New England is marginal to American politics until 1830. It's no accident that we had a stream of Virginia presidents; it's no accident that certain places were chosen as central locations—Philadelphia and New York, and then later the banks of the Potomac. The political and moral center of gravity of the United States is in the Chesapeake area, and the Chesapeake area generally runs the country for its first four decades or so. And that's a group of people who are not Puritans. If you look at the iconography of the early republic it's all classical emphasis with very little of Calvinist concepts.

Hauerwas: You don't think that Sandy's construal of the Preamble is correct.

LaRue: I don't think it's a Calvinist proposition. I don't think it has anything to do with Calvinism. The only way you can do that is to read the intellectual hegemony and moral hegemony of New England, circa 1835, backwards, and say it was always that way. The point is that the United States from 1776 to, say, 1836, has its intellectual and moral center of gravity well south of New England. The reason people write histories that start off with and pay so much attention to New England is because it's the only part of colonial America you can write a history about and not talk about slavery, and so you write histories that shove all of that under the water.

Hauerwas: That's interesting. I've never thought of that; it's fascinating.

LaRue: Well, it's of course a fact that the histories that were written were generally written at Harvard and Yale. The great historians that start us off, say 1835 and forward, are New Englanders, in the New England

universities. There's no doubt that New England establishes its intellectual and moral hegemony in the nation, but it does so I think way too late in the game to identify it with a founding document. One of the things that's interesting about Lincoln is that he's one of the guys that makes the assimilation. He's the guy that somehow manages to combine Jefferson and Emerson in a dazzling *tour de force*, and thus in that sense he's a founder.

Tushnet: This last discussion suggested to me how to get a handle on why I don't find Lincoln a particularly interesting figure in my narrative. Let me start by picking up on Lash's observation that he's one of the few people who teach Lincoln in constitutional law. What that says to me is not that there is a standard story of Lincoln, but in the legal tradition he is just absent. It seems to me no accident that Sandy, with his interest in Lincoln, has a Ph.D. in political science, because the political scientists appear to be interested in Lincoln. But not lawyers, in general.

Levinson: Just American-thought buffs and the political scientists.

Tushnet: Let me sort of translate this a little. The narrative about the Constitution shared by the legal profession in general, as educated by legal academics who don't have Lincoln as part of their universe of discourse, is yet again different from the different ones that are being articulated here. Then what I am led to think—but I'm not sure what you, Stanley, would say about it—is that it's wrong, incomplete or something, to identify a narrative that constitutes *the* community. It seems to me then there are two obvious routes—maybe more—but two obvious ones. *The* community is constituted by multiple narratives, which are drawn upon in shifting ways, and it would be interesting to think about why they were drawn upon and under what circumstances, and so forth. Or, alternatively, each of these narratives constitutes a different community, and each one is, in its imagination, imperialistic with respect to the other.

Levinson: One reason Lash may be one of the few people teaching Lincoln is because he doesn't appear or didn't appear in any of the standard casebooks. If you assume that most people who teach are by and large at the mercy of what's handed them, part of what's interesting is what we hand them. Both Mark and I are involved with casebooks.⁴⁰ Mark's has become, I think, the most widely accepted and most important one. Now yours, Mark, is historically oriented as casebooks go, particularly because of Cass Sunstein, and I think what's interesting about Cass is that he's up to his neck in the Federalist Papers, and a certain version of the republican tradition—but my impression is that Lincoln doesn't play any role in your book.

Tushnet: Well, we have the statement about the *Dred Scott* decision, but that's all.

Levinson: But in the next edition of ours, Lincoln is going to be a main character by anybody's criterion. And I remain relatively uninterested in *The*

40. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1986); S. LEVINSON AND P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (2d ed. 1984).

Federalist Papers. I read some of them on occasion, but I have never brought myself to get all that involved with *The Federalist Papers*. I don't see them as a particularly privileged kind of wisdom. Whether it's conscious picking and choosing within the narrative, or it's just worked out that way, that we are looking at different people, and those people who choose either of our books will find themselves perhaps teaching more history than they had been doing before, if they had used Gunther's book.⁴¹ But they'll be teaching decidedly different histories.

Hauerwas: I think that Mark's point, though, is well taken for those of us trained in Christian ethics. For a long time the assumption was that you were being trained in something like American studies at the same time. We were all brought up on Perry Miller⁴² and Ahlstrom⁴³ and all that kind of thing. That was part and parcel of my training, and it was part of my training because the assumption was, as I have said time and time again, that the subject of Christian ethics in America has always been America. We thought we were theologians in order to make America coherent, to make America work. That's what Christian theology was about.

You were interested in social ethics. So Lincoln became part, at least, of my discourse. He probably forms a different story than he does in constitutional law, and plays a still different story within some aspects of American political science. What we have here is a melding of different academic cultures. I don't teach Lincoln anymore. And I don't have my students do much American studies either, except as a negative case. So it does denote a difference of academic cultures now, and what that means then for communities—I don't think communities have to have one story, but I think they have to have a shared sense of what stories are important, that will give them the kinds of lively arguments that are necessary for them to remain coherent.

That's MacIntyre's account of tradition, namely, tradition is that which will give you a recognizable argument across generations. Obviously MacIntyre is thinking of two things—really three things. I think he thinks that the only communities which exemplify that account of tradition are Judaism, the development of the doctrine of Christianity (which includes Plato and Aristotle), and science. I think he thinks contemporary science is still a lively traditional activity. I don't think MacIntyre would regard the United States of America, for example, as a community in any interesting sense. And exactly for that reason MacIntyre doesn't think that you've got much of a stake in saving it, one way or the other. All you've got is fragments; you don't have anything enough. I expect that people in constitutional law react negatively against that because, on the whole, you think you're telling a story. It's like Talmud. You go ahead and spell out the different meanings of this

41. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (11th ed. 1985).

42. P. MILLER, *ERRAND INTO THE WILDERNESS* (1956); P. MILLER, *THE LEGAL MIND IN AMERICA* (P. Miller ed. 1962); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965).

43. S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1972).

within that. That's one of the reasons why I think the law has been trying to protect itself against other disciplines informing what you do, because as long as you're a lawyer you can tell such a coherent story. You start mixing it up with political theory and economic analysis and it becomes a good deal messier, and you can't preserve the law as that kind of coherent story.

Shaffer: You're using MacIntyre to make that point. It may be significant. What do you do with the simple fact that these patriotic liturgies—and Lincoln has often been a part of them—move Americans. You watch a baseball game start with *The Star Spangled Banner*, and they all stand there, and if a couple of the players talk to one another during *The Star Spangled Banner*, we disapprove of it. And we say the Pledge of Allegiance. When you go to public meetings, Stanley, do you say the Pledge of Allegiance?

Hauerwas: No I don't. Nor do I sing *The Star Spangled Banner*.

Shaffer: You stand up though.

Hauerwas: I do stand up.

Tushnet: Why? Let me not make this about you. Direct it towards me, and just let me give my example, which is going to the university convocation services, which are religious services.

Hauerwas: I wouldn't kneel if I were you.

Tushnet: No, I don't kneel. There's no kneeling. But there's a portion where the standing is a part of the service, and I do it.

Hauerwas: I do it because, one, I want to honor the people there. I respect the people who are doing the singing, and I don't want to show them disrespect. Also, if I thought it was important to make a significant protest gesture in those contexts, I might well do so, but I don't see any reason that that would be necessary. So those would be the only two reasons that I do stand, and also you don't want to call too much attention to yourself. Let me say that Jeff Stout argues in his book, *After Babel*,⁴⁴ that we've got practices around that we can still sustain as ethics of the virtues, that we can maintain a kind of moderate liberalism, and one of the practices that he likes very much is baseball. He doesn't think it has yet been corrupted thoroughly by the institution. I'm a big baseball fan, too. Indeed, I say that today the only kind of working criteria I can give to someone who might make me think it might be worthy to engage in some kind of defensive strategy to save America is if you can show me how there is a necessary relationship between saving America and keeping Carolina League Class A ball going. I've given up on the major leagues, but I don't want to lose the Durham Bulls. When people ask me, "What will happen if the Communists take over" my answer is, "Well, will they make it impossible for us to play Class A ball in Durham?" If they don't, I think saving America is still a viable possibility. I think this is a narrative that I'm interested in saving.

* * *

Levinson: Let me raise a hypothetical that I mentioned to Tom as we

44. J. STOUT, *ETHICS AFTER BABEL* (1988).

were walking back over here. What if it were proposed to drop the constitutional oath that lawyers need to take? I assume that each of us who is a lawyer has signed this loyalty oath if he is a member of the Bar. It's a stance pretty much that tracks the presidential oath; it's not a "I'm not a Communist and I will never be one," but it simply says I promise I'll support, protect, and defend the Constitution of the United States—and of California in my case. You're probably committed to the Indiana Constitution. Is that right?

Shaffer: Yes, and to never refusing a case for filthy lucre's sake.

Levinson: What if someone said this is either silly or offensive and let's rationalize our practices and drop the oath. Would you as a member of the laity, in this context—would you applaud us for doing that?

Hauerwas: Yes, I would. I think it would be great.

Tushnet: Is that because you, in this present context, agree with MacIntyre that there is no viable constitutional tradition sufficient to support the dialogue across generations?

Hauerwas: Yes. I don't believe that we are a viable political society.

Shaffer: Would you go to a mechanic to get your car fixed who didn't adhere to sound principles of internal combustion?

Hauerwas: I might well do it, not knowing any better, I mean from what I know about a car.

Shaffer: Or a doctor who didn't believe in scientific medicine? It seems to me there is a connection there to lawyers making some sort of commitment to the stuff that they deal with, which you're buying from them.

Hauerwas: Well, I assume that that's done within the profession.

LaRue: I don't know what that has to do with an oath.

Levinson: Let me offer a solution. I think we can, and many of us not only can but do, treat the lawyer as a rhetorician, in a platonic sense. We are skilled in manufacturing arguments, and we're trained to know how arguments work, and just as I want somebody who knows how internal combustion engines work to fix my car, I want to go to a lawyer who graduated *magna* from an institute of rhetoric to manufacture arguments that will help me prevail. But this has almost literally nothing to do with supporting, protecting, and defending the Constitution of the United States. The question is to what extent the role of a lawyer in some significant sense is linked to membership in a constitutional community, where one asks about the implications of one's actions in terms of that constitutional community, as opposed to being a good neutral technician for sale to the highest bidder.

I don't think getting rid of the oath would in the least require us to shut down the law schools we now teach in. Presumably one of the arguments for getting rid of the oath is that it would simply bring our practices and our theory closer together, because we make no real effort to discuss with our students what it means seriously to commit yourself to a life of supporting, protecting, and defending the Constitution of the United States. That's certainly not what goes on in most constitutional law courses, including my own. It certainly doesn't go on in the general curriculum, where constitutional law gets fewer hours than commercial law, for example, which is the important stuff of the law school.

Hauerwas: I think that's right. I just don't see how a drop in the oath would make all that much difference.

Powell: Not everybody looks at teaching constitutional law that way, of course, Sandy. There are naive believers among us.

Levinson: I wouldn't say that no one does. I'm simply saying that as a descriptive practice I don't think that the constitutional law course elicits from students, or forces upon students, which may also be the right word, serious reflection about whether you want to get married to the law in essence—the old cliché from the Harvard Law School of law being a jealous mistress, and the idea that the oath is transformative in some sense, and that you do take on real responsibilities. If you teach this, more power to you. We don't have an argument. But I'm simply asserting as a matter of sociology that this isn't the subject matter of most constitutional law courses.

Shaffer: I think that's because constitutional law is too frail a subject to bear it. I think if that subject is talked about at all in legal education it's talked about in ethics.

Powell: Or contracts. I talk about it—I teach contracts, and that's one of the things I talk about. We were talking about it at breakfast, the question about how much one can succeed in doing this, but one of the things I conceive myself to be doing is getting my students to understand what it is, and whether they want to be what it is, that a commercial lawyer is. You may be right as a descriptive matter, although I think that is an empirical assertion.

Shaffer: I think that's true for a very important reason, and that is that those subjects cannot avoid dealing with relationships.

LaRue: I think you also have to recognize part of this in terms of what the oaths would stand for and not stand for are the discontinuities within the profession itself. It's fairly routine to say, and I think reasonably accurate to say, that there is not a single *esprit de corps*, a single group of people you call lawyers, nor is there a single activity that you can call lawyering. Sandy mentioned the making of arguments of the rhetorician. We spend an enormous amount of time on that in law school, but it's not that big. I was a litigator; that was the heart of my practice when I was practicing, so of course I did spend a lot of time doing that. But even as a litigator this particular function was not the main function. Negotiating settlements, particularly since I was a criminal lawyer, and most of my clients were guilty—it was of course the proper thing that one did. That's not making arguments; of course, in negotiation you argue, but not in the sense in which Sandy I think was alluding to. The subject of rhetoric is one of the things which one does teach in law school. But once you move over into the commercial world, the making of arguments, I think, is a smaller part. Drafting is a huge part; counseling is a huge part. As Tom says, you are dealing with relations here; you are structuring these other things. There is not a single thing.

Levinson: But the oath—it's not a Hippocratic Oath that we take. I mean one can imagine a lawyer's version of the Hippocratic Oath, in which we promise to be of service to our clients, and never inflict unjustified suffering on adversaries, and to negotiate fairly—

Powell: North Carolina lawyers take such an oath.

Levinson: They do?

Powell: I pledged myself truly and honestly to practice the law, to the best of my knowledge and ability.

Levinson: But there is a separate oath to support, protect, and defend the Constitution. It's very different from promising to be a competent lawyer. I think it is a political statement, so we can now get into two different conversations. One is whether it would be a good idea for the A.B.A. to work up a version of the North Carolina oath, or something else, a Hippocratic Oath for the modern lawyer. And then the second question would still be what to do with this specific oath of *constitutional* fidelity. Keep it or drop it? And if we keep it, why?

Tushnet: When Jeff was talking about the naive people like him who do teach this, and about your ambivalence, but nonetheless, it seems to me, commitment in the book to the idea that there is something to the oath—

Levinson: There's a "there" there.

Tushnet: There's a "there" there, right. I have to say I recoil from that, because there's a level at which I want to say you can't seriously want people to commit their moral being to *that*, where *that* refers to the body of stuff that is the constitutional tradition.

Powell: Of course. You've just reformulated in significantly different terminology what everyone else is saying. And, yes, if I let you reformulate it, I'll say no I won't; no, I can't seriously want to do that.

Tushnet: So what is the key reformulation that I did? Committing your moral being?

Shaffer: Yes, spell that out a little bit.

Tushnet: I take taking an oath to mean assimilating a commitment to that thing to which you are taking an oath into your sense of your own being. It's not the only thing, it's not the only commitment.

Shaffer: And if that's what you mean by the Constitution, you mean something more than the text.

Tushnet: What I mean is all of that stuff. And all of that stuff, on the whole, strikes me as not terribly attractive. If it is an oath to support, defend, and protect the good things about the world, I'll take that, but to call that the Constitution, or to call the Constitution that, seems to me overreaching.

Powell: Why? How?

Tushnet: There are two versions of it. One is that the Constitution as tradition is much more than that and, therefore, much less attractive than all the good things in the world. Or, alternatively, which is I think why I tie this initially to Stanley's mention of MacIntyre, there is no viable constitutional tradition, and so the oath is the form of assimilating something into one's being without the reality.

Powell: But Mark, you've clearly got, I think, an implicit notion about what is and is not within the constitutional tradition. You just said that doesn't exist. You were implying an aspirational view—what the Constitution is at heart is the Declaration of Independence or some other set of aspirations, the Preamble or whatever, and you wanted to say that it is overreaching to

define it that way. And then to accept that as a moral value would be overreaching. And that is because you have an implicit notion of what lies in and out of the tradition. If not, I don't know how you make the judgment.

Tushnet: That's fair enough. And, as I said, these were alternatives. Either it is a tradition that has some stuff inside and some stuff outside it, that's unattractive; or it isn't, in which case it's a fiction.

Powell: Or, as Barber would say,⁴⁵ no, there is a third possibility. There is a tradition, and the truest training of tradition is in the aspirational things that are attractive. The other stuff is deviations, values—

Levinson: That's what I call the happy ending view. That, it seems to me, is to remove all the elements of tragedy and get rid of the notion of a tradition and the burdens of a tradition, because by definition it becomes only that which you like for extrinsic reasons. But one can imagine playing with different forms of oaths, and it is obvious that this is something I enjoy doing. I often ask my students who take umbrage at my attack on judicial supremacy, "Okay, you don't like my notions, and think that the Court really is something special, how about amending the Constitution to have the president say 'I promise to support, protect, and defend the Constitution, as interpreted by the Supreme Court,' " and quite amazingly almost no student has ever endorsed that amendment. Some will say that's kind of what it means already, and there's no need to spell it out, but there's also something that suddenly bothers them about going *that* route.

But one can imagine the standard oath and then a clause limited only by overriding moral precepts, so this saves you from what I think we all agree is the fatal problem of committing your soul to an enterprise that could lead you down an immoral path. But that could, if you take oaths seriously, still have real bite for lawyers—in terms of simply selling your rhetorical services to the highest bidder, or a number of other things that mean you still might be constrained in the performance of your role. Or some people might think that you would be constrained in the performance of your role in a way that you wouldn't be if you simply promised to help your clients get whatever they wanted and to treat them with compassion, and stuff like that. Would that satisfy your concerns about oath taking? I would like that kind of oath because it would force you to grapple with serious moral questions. A double oath to two important things would be even better than a single oath to one important thing, if you believe oaths are at all desirable, ever.

Tushnet: I guess I'm hesitant here because I see problems in each of the alternatives that I identified before. I would not want to take an oath formulated so as to define important overriding moral concerns as outside the Constitution. That's at least something that ought to be contested within the framework of the Constitution. And, on the other alternative there's no tradition, so that taking an oath is not a coherent thing to do. I guess I'd be inclined to think that, when formulated as "overriding moral concerns,"

45. S. BARBER, ON WHAT THE CONSTITUTION MEANS (1984).

there's probably no tradition there, either, as we haven't added anything to it. You have nothing to begin with, and you haven't added anything. I take it that Stanley would say that if the second clause were "support, defend, and protect the Constitution subject to Christian ethics" that would at least bring it into the framework of an intelligible thing to do. The first part would be meaningless, but at least the second part would have some meaning, and you could do something about that.

Shaffer: It would make it unnecessary, though. Why would you have to take an oath like that?

Tushnet: Indeed, you can't take an oath like that. You can just live like that.

* * *

Hauerwas: Let me make a more general kind of comment about this discussion. I told Jeff—when I read Sandy's book, and I know that Sandy meant this, probably—that I got the distinct impression that these are the issues we used to debate in theology and still do. They don't make any difference now in the seminaries—but now the law schools have become the place where the more important theological issues in society are thought out. In the nineteenth century, in the Anglican Church, there was a famous debate over whether one had to agree to all thirty-nine Articles in order to be ordained. No one would think about getting that serious today, I don't think, within the Church, because we're just happy to get somebody that will still hang around. I wonder if all the questions about oath taking—the seriousness, apart from the issues of whether there is coherent constitutional tradition—really have to do with maintaining the integrity and importance of the law for our society, as a place where the serious matters of the society get debated out. Why it is so important, for example, that law schools today still seem to offer moral formation of the students, whether negatively or positively, but it's still some kind of moral formation. So the question of oath-taking is really a kind of religious question and not just a question within the constitutional law about oath-taking.

Shaffer: I think that's absolutely right. I've found in the things that my ethics students wrote recently a number of students who said that a lawyer should never disobey the law. And I got tired of writing in the margin, "Nobody with a conscience would ever say that."

Hauerwas: The law becomes the new Bible. And Sandy's quite right: You've got your fundamentalists within the law and you've got your liberals within the law. You are recapitulating what people used to think were *our* significant debates.

Tushnet: Although there are a couple of things that occur to me. One is that if your proposition about law schools as a locus for moral formation is right, then the oath is just a metaphor for legal education as a whole.

Hauerwas: That's right. That's what I'm suggesting. And the preserving of legal education is a way of having integrity, significance, and importance. I interpret the rise of legal positivists, where you want to separate the law and the meaning of the law from any determinative moral community, to be

a response to the moral anarchy of our world and a way to secure the continued moral coherence of the law. So the law has a kind of logic in itself, that gives us a sense of how to go on. Sandy's book tells a story of how these kinds of arguments within the law give us a narrative that is much more coherent than we have as the narrative of wider society. You've got a community that you can debate. That's what you don't have if you step out into any of the other academic disciplines within the university today. The law is surprisingly, wonderfully coherent, and legal positivism saves it.

Tushnet: I think you've said things like that before, and I think maybe that's the way it looks from the outside, from somebody whose discipline used to have that, who is nostalgically longing for that again, looking around. But from the inside of the law school. . .

Hauerwas: It doesn't feel that way.

Tushnet: . . .it doesn't feel like that. That's putting it a little more strongly than it should be put, but, given my identification with Critical Legal Studies, what I can say is, whether or not people have bought the Critical Legal Studies line on this stuff, it has shaken a lot of people up. The sense that they have been confronted with powerful arguments from within, that the coherence that they thought was there isn't there. That's part of the reaction to it. Now my view is that it's just not there, that these critical arguments are correct.

Levinson: I think you are also right that the oath argument is a proxy for an argument about legal education. I think a recurrent argument in law schools is education for "citizenship," to what degree that is part of what law school ought to be about. One of the things we were talking about at lunch was the fact that Washington and Lee has just made a course in civil liberties required. I assume that the rationale is because you want to train citizens. I assume that most of your students are relatively unlikely to practice civil liberties law.

LaRue: A reasonable prediction.

Levinson: It's not valuable skills training that you're after. This is a debate at our law school which I must say I've lost. I would like to require not only civil liberties but also criminal procedure, which is, at our school, not a requirement. You take either criminal law or criminal procedure, but you don't have to take both. It seems to me scandalous that a lot of our students graduate knowing nothing about the actual operations of the criminal justice system. I don't think you pick it up by studying criminal law. But the debate is very clearly a debate between citizen education and skills training. The empirically correct argument directed against me is that our students aren't going to practice criminal law. Those who will practice criminal law take the criminal justice courses the same way that those who want to practice tax take tax courses. It also goes back to what we were talking about this morning—the willingness to intervene and impose substantive values on people who would choose otherwise.

LaRue: Did you debate the issue of requiring a civil liberties course at any length, or was it simply something that the community spoke on with one voice? Ann, weren't you involved here at Washington and Lee?

Massie: What did we debate? I think it kind of started before I even came. I remember someone quoted me in a faculty meeting for my phrase “legal literacy.” Because I guess I have a sense that there is a coherent story, perhaps—although you say you don’t think so. I thought it was important that that be passed on. There was some debate, but I don’t recall very much of a position to the notion. I think there was a kind of sense that it is deplorable that the students haven’t acted to acquire this for themselves, and, since they haven’t, we think—

Levinson: We’re distinctly more libertarian in Texas.

LaRue: My memory is as yours, Ann. The historical detail is that we had a constitutional law course in the first year that taught structural parts, and then a civil-liberties, upper-class course and it was elective. And we changed the focus of the first-year course and we increased the number of hours in the second-year course, and made it required, so that now there is a package of about seven hours of required public law offerings, as the package is described.

Levinson: We’ve got a package of six. And the first term is structure—commerce clause and stuff like that—and then students get to choose what their advanced constitutional law course will be. I just finished teaching one on equality. Doug Laycock will be offering one next semester, on a survey of civil liberties. But what this means, among other things, is that a very significant percentage of our students will graduate knowing nothing about *either* the race narrative or the civil-liberties narrative, as conventionally defined, because we don’t require it.

Shaffer: Does it add anything to your notion, that that sort of thing is education for citizenship, to say that this is not just *any* citizen? It seems to me the notion of the “republican” vision that’s behind that is the special-citizen notion: The lawyer takes on the burdens of leadership in the society, rather more than other people.

Levinson: It’s not “republican,” because I don’t applaud the fact that lawyers take on these roles; but I think as an empirical matter they do. And we ought to be responsible for that foreknowledge—that for better or worse our graduates are not a random group, and they are likely to be in leadership positions. The “republican” vision saw this as a terrific thing, and I don’t want to affiliate with that strand of republicanism.

Hauerwas: This helps me say why I think that the constitutional tradition is finally not coherent. It’s not that I think it’s not coherent within itself, because I think there’s a lot of coherence within it—in how the law developed, in terms of the conversation, from one set of cases to another. It strikes me as extremely odd to say the law school is a place where you train people in citizenship, just as it’s just as odd, but is also the case, that divinity schools have increasingly become places where we train people to be Christians. Supposedly we train people to be ministers, presupposing the vitality and viability of the church. But as a matter of fact, since we can no longer presuppose that vitality, in effect many of our students come trying to discover not whether they are going to be ministers, but whether they are going to be Christians. They in the process oftentimes decide both to be

Christians and ministers, but these are not necessarily related. Sometimes they decide not to be Christians but to be ministers anyway. Literally, there are four possibilities.

I'm very serious. It's a very odd situation, which connotes that seminary education has become problematic exactly because we cannot any longer presuppose the kinds of practices that make it intelligible for people to be called into the ministry to begin with. After all, the fact of a profession being coherent means that it must be how people are called out to be specialized, in a way that the community understands, that these are goods that it's important to have people specialized in. Now, the law, I take it, has those kinds of goods, too. They depend upon being able to depend upon a civic republic of some kind or the other. That gives the law coherence. It's just about as absurd to say the law schools today are about training people in citizenship as it is to say that seminaries are training people to be Christians—or Jews. I would think Judaism is in no better shape than we are on some of this. Therefore, the incoherence is that the constitutional tradition isn't any longer recognized as dealing with matters that matter for the general public, in a way that they see it as really their goods are involved. That's the reason lawyers today have become esoteric, just like theologians are esoteric, or physicians are esoteric.

Shaffer: No, I would say the opposite. I would say that lawyers have become esoteric because of a failure of training in citizenship. I don't think Sandy can avoid the republican tradition that says that it's training not just for citizenship but for leadership. I just don't see how you can avoid that. What you can say is that you don't like it. Maybe there is an analogy there, but I don't think you have quite described it. In the Roman Catholic tradition the training of the clergy involves the notion of formation, and I take it that the notion of formation was to produce a model believer.

Hauerwas: No, I don't think that's right. It's a little like saying to someone, "You're going to be set aside to do nothing but spend all your life being around sick people." That's a very dangerous thing to do to somebody, because sick people are really rather disgusting to be around all your life. To always be about helping people will really screw you up. I mean the ministry is involved in this kind of thing, too. And so you need to give physicians special moral training, to be able to stand the demands of being so screwed up, in terms of having such a narrow range of things to do. The same is true of a professor. I'm set aside, supposedly, because the community says that we value the fact that I will spend my life studying and trying to know better what our culture has thought about the good, the true, and the beautiful, so it wants me to spend most of my life reading books. Well, that will screw you up. You'll need special formation to be half-way decent at having that vocation. I take it that the same is true of the law. Namely, the law sets aside people to do very specific things for a lifetime. You need special formation.

Shaffer: In "constitutional faith."

Hauerwas: And in the practices that are associated with that, and the ministry is the same way. The Catholic priest was the same way. It wasn't

just the kind of formation that is true of every Christian; it's the kind of formation that's true of those people you set aside specially to do nothing but study scripture, serve the sacraments, etc. And the Catholics were quite right to have done that. It is very hard for us anymore to say anything like that, since no one believes in the kind of calling that is associated with being so specialized. The goods that the different professions are to serve are no longer agreed upon within the general culture, and that makes the very notion of profession unintelligible.

Richardson: Presumably the Christians who arrive at seminary should have learned their Christianity in the church. What would be the equivalent institution for teaching good citizenship before law school?

Massie: The schools. The schools, I should think. But I remember when I first went to law school I was continually struck by the notion that everyone that got a good and decent education ought to learn these things in order to be a responsible citizen. I really kept thinking that, and I thought it's a tragedy that they don't, and I still do.

Levinson: If I could push that point back to the beginning of this particular conversation: What would you want your kids to learn about Lincoln, if anything at all?

Hauerwas: Lash, what would you give as an answer? That he reasserted the significance of the Declaration of Independence, as the constitutional interpretation?

LaRue: Well, that's in fact what I've been teaching, so I have a vested interest in it.

Levinson: Let's assume right now that we are talking about a ninth grader taking a standard U.S. history course.

LaRue: I guess if I were doing it I think I would want them to read some of the things that you might describe as "the collected works of Abraham Lincoln," certain of the speeches. And the reason that I would do so is that I would hope that the student would assimilate, unconsciously or consciously, enough of that rhetoric so that it could become formative of the way that the person looked at the world. That is, it would change the eyeglasses, to use that metaphor, about what you would see. It would alter the imagination.

Levinson: Would you want them to read the *habeas corpus* letter⁴⁶ where Lincoln asks why should one law be obeyed when all the others aren't?

Shaffer: That's the problem with Lash's answer. They can handle that if they first learn about Lincoln as a virtuous person. In fact, what my generation of Americans heard about Lincoln was that he walked ten miles to take the change back when he was given too much money. Stories like that, which it seems to me every culture has, which fit in with Sandy's saying Lincoln is a rabbi in the constitutional tradition, and that the rabbi is respected because of his character. First of all, I know, somehow or other I know, that Rabbi Joshua was a person of virtue, and then I respect him as

46. IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 1860-1861 (R. Basler ed. 1953).

a teacher. My kid can handle the *habeas corpus* cases if he first knows of Lincoln as a virtuous person.

Levinson: Including walking through the snow.

Shaffer: All the little stories—I just buy it. I go down to the public library and get the book, “Lincoln for Seven-Year-Olds,” or whatever.

Levinson: So the question has to begin not with what do you do with the ninth grader, but what do you do with the first grader and the second grader. And you tell those stories. George Washington chopping down cherry trees, and all that kind of stuff.

Shaffer: True stories, though.

Hauerwas: Well, better they be true. And then by the ninth grade one would hope that they are ready to understand why that person would take that view of—

Levinson: Right. And why it would be all right for that person to break the law, though not for Colonel North, say, or Jeff Davis.

Hauerwas: Surely it’s break *a* law, not *the* law.

Levinson: A nice distinction.

Richardson: Well, what about when the citizenship taught in the schools is bad?

Massie: Bad in what sense?

Richardson: Like it is in South Africa. When they push a set of values down the kids’ throats and you know the whole thing is morally rotten. It’s racist.

Levinson: I think that’s what makes most people fearful about the notion of citizen education and it’s scarcely the case that citizenship education in the United States would be without corruption. I think that most of us would be very fearful. It’s like sex education in a real way. We are not likely to be in control of the curriculum, and many of us would make a pragmatic choice that it is better not to teach this at all, because there is a sweetness-and-light aspect to it. Presumably the kind of citizenship education I have in mind would in fact go at least through Martin Luther King and that would be a very, very different model of citizenship from the one most likely to be accepted. But there I think, do you get into incessant struggles on the curriculum, in which you are constantly fighting over what is going to be taught in history courses, because you recognize this as absolutely central to the formation of the culture and to its perpetuation? As Stanley might say, and for all I know might have actually said, “He who controls the stories controls the culture.” Or do you try to construct the notion of education that Mark may be alluding to, where the schools really don’t do very much, and it becomes a lesser evil sort of thing. It’s just better that they not say anything at all about citizenship than that we take a risk of losing the struggle.⁴⁷

47. *Hauerwas:* Mark, do you support public education?

Tushnet: Yeah.

Hauerwas: Why?

LaRue: I would say, to return to the Lincoln question, I think the one way not to do that is exactly that which has been proposed, which is to tell the silly little stories about walking ten miles in the snow and so forth. That really seems to me an appalling way to educate. If that's what you mean by character, and what you think about teaching Lincoln's character, then I either don't agree with you about character, or I don't agree with you about teaching. This seems to me a wrong way to go.

Levinson: What do you do if a student says, after you have given whatever Lincoln materials you have given, if you don't include the ten-mile walk or something similar to that, the student says, "Gee, Professor LaRue, this sounds just like Oliver North. Now, I heard you denounce Oliver North. Aren't these really the same?" Can you really choose between them on any grounds other than you like Lincoln's values and you don't like North's? Would you even talk about the character of the two men as relevant to your assessment?

LaRue: I guess again it goes to what you mean by character. But it seems to me that Lincoln is distinguishable from North on character, but he's *not* distinguishable from North on character because he walked ten miles through the snow to return a dime, because we know that that's exactly the sort of act that a North will do. You've picked out the ludicrous part of the Lincoln story to say that that's what you mean by character and so you wind up with character defined in a Norman Rockwell sense, which I think is really corrupting. Character is displayed in these circumstances by various public performances and the public performances had to do with the humor, the link between the humor and the intelligence, the way those are displayed

Tushnet: Because it's the great melting pot. All that sort of stuff.

Levinson: That is, the kids sit next to one another. But how about in terms of the substantive materials.

Tushnet: Oh, well, you know—part of my response is—it's like the weather.

Hauerwas: I really believe that we are coming to the point that public education is over in America and people are going to have to face that. How are you going to adjudicate questions about public education in America, where some people are saying you can't read "The Wizard of Oz" because it's got good witches in it, and other people are saying you can't read "Macbeth," because it is an inherently patriarchal narrative that is destructive of women? How in the world are you going to negotiate that kind of issue for American public education? As a result, American public education is going to become increasingly bland and distorting to any sense of classics. Wouldn't we be better off saying, "Okay, let's give up on public education, and let's start moving into different dissenting academies, or you won't even have anything to dissent from; they'll just be different, and we'll let you use your tax chits to buy the kind of education you want your kids to have"?

Tushnet: I don't have strong views on this, one way or the other. I guess I do have a historian's qualms about saying "increasingly bland," and so forth. That is, my hunch is that if you look at the universe of nine-year-olds in 1910, and the universe of nine-year-olds in 1987, you're not going to find a higher concentration of blandness today than in the past. It's just that the kids who were in schools in 1910 were a smaller proportion than the kids who are in schools now. So, overall, I'm not sure there's been this sort of decline in whatever it is that's happened.

Hauerwas: You may be right. It's an empirical question, but it does seem to me it's going to be very hard to maintain coherent public education in this country.

in certain forms of texts, the way they lead to certain judgments, and so forth. Now it seems to me, if you are talking about a character worth teaching and worth emulating, one of the things you can say is look, Ollie North never wrote anything that looks like the Springfield speech, or the Gettysburg Address, or the Second Inaugural. And why not? The reason is that mind is not separate from character, and it is not separate from emotion. You don't want to, I think, start a ground of educational pedagogy that sees those things as separate. And I don't think that the reason that Lincoln's argument about suspending habeas corpus, or those kinds of things—whatever he had to do—is because there is something separate that we call character, and we're happy about that, so therefore we trust this other act. I know my judgment of Lincoln is not based on that kind of dichotomizing. And I certainly don't want to teach it that way. I don't want to create a Norman Rockwell Lincoln that we then suddenly spring the Second Inaugural on. That seems to me an implausible notion.

Shaffer: Right. But the way you know character is in small things. The fact that you can't distinguish North and Lincoln because of small acts of honesty that would be told about them doesn't mean they are not distinguishable. It just means you've got to distinguish them some other way. Think of the ordinary stories. How do you know people in the story are admirable? It's because the writer shows you those people doing small things well.

LaRue: No, I think in Lincoln's case you'd see him doing big things well.

Levinson: You'd look at humor, and virtually none of the humor involves anything great. It's in pulling the leg of someone at the cabinet meeting. The cabinet meeting may be great; the joke was probably small and sort of off-color. And I agree with you on the influence of the humor as one side of the complexity of the man; it's very important, but you are going to illustrate it by small stories.

LaRue: It gets very sentimental at that point and, therefore, false.

Hauerwas: I think character education is done primarily through examples, and of course the examples depend a lot on the teacher who's doing the examples, I think—in terms of character education, rather than just about Lincoln.

* * *

I want to ask Mark a question, as someone who has been identified with the Crits. Take the analysis of the problem of education and citizenship that we confront today, and its possible implications for the ability to sustain the law as an enterprise that can really help us as a people. As Sandy says, "The model of Protestant interpretation that I have in mind is not to isolate individuals joined in anguished communication with their personal God but rather the community joined together, basically in egalitarian discussion of the meaning of man's relevant material." If you want to make that sense of the law normative, as something very important for us to do, and increasingly hard to do, given our very difficult problems sustaining civic education and civic virtue—as a Crit, how do you feel about that? Is that good or bad?

Tushnet: At least the first cut at it is that it's not bad to show that the resources of the legal conversation can't sustain that kind of dialogue at that point. For me the reason is that that way of talking about law glosses over the lies, obscures from view its association with coercion, and its core form. We talked earlier about metaphoric extensions. Metaphoric extensions of the idea of coercion indicate that things outside the core are also problematic. But you don't have to do any of the extensions to take as the model of a conversation about law a Supreme Court decision that ends up saying it's okay to kill you. Now, I have some ambivalence about the death penalty. But it's real hard to keep up the image of law as a conversation when it ends with somebody being killed as a result. And I just can't get away from that. So that showing that the conversation within law can't be sustained seems to me a good thing to do.

Shaffer: You make it sound like a theological debate in *The Name of the Rose*. If you lose the argument, you lose your head.

Tushnet: Well, somebody does. For me, that has to be the core of talking about law, that when the conversation ends, somebody walks away and somebody is left on the ground.

Hauerwas: Do you then have a stake in maintaining something called the legal enterprise?

Tushnet: I don't think I have a normative stake in maintaining the legal enterprise. Now of course there is all of this stuff about how I have these specialized skills that would be very difficult to redeploy in some other field, and in that sense I have a stake, which I alluded to earlier when I talked about moving to England. To that extent, yes, I have a stake, but I don't think it is a normative stake. At least I don't feel it. I don't think I feel it. That gets back to my concern about the oath.

Let me repeat this so that there'll be some publication in which this occurs because I liked it and it never did appear. In Sandy's work he has this "do you sign the Constitution?" article which he did last year.⁴⁸ He asked me how I would respond to the question, "Would you sign the Constitution?" when it was presented as the scroll that they were displaying in Philadelphia, that people were asked to sign. My first reaction was, "Well, I don't know. Probably not." But then I thought about it and it occurred to me that I could, because the Constitution doesn't really mean anything, or it means whatever I want it to mean. It occurred to me that that was even more dramatically driven home by the fact that I was being asked to sign a blank piece of paper. The thing that was going to be put in front of me was a blank piece of paper: So, sure, I'll sign that. Now, it's in that sense that I'd say I don't have that kind of stake in the enterprise. It is partly because I don't think there is an enterprise. This is the second of my alternatives: There is no coherent, viable tradition that is sufficient to sustain the conversation across generations.

48. Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113 (1987).

Hauerwas: How do you respond to that, Sandy?

Levinson: I certainly think that might be the case. And I certainly disbelieve in what appear to be the standard ways of talking about a constitutional tradition—that is, Supreme Court cases as the sacred repository. I think the central difference between Mark and me may be more simply personal: I feel myself caught up in this question in a way that I don't think Mark is. I'm not being critical. I think it's a statement simply of the different biographies of the two of us. I am driven by certain questions and one of them is how I stand in relation to this stuff and what the consequences would be of really and truly coming to agree with Mark that there is no *there* there. I certainly teach that as a very strong possibility, and I am certainly skeptical of the various moves offered by the people who are confident that there is a *there* there. That is, they say, "Just read it, or find out what James Madison said," or use the variety of standard approaches that I know I don't believe in. Then the question is how do you construct something out of everything else, including what's written down, and what James Madison said, and lots of other stuff besides. Does that end up as anything more than highly partial, highly idiosyncratic? If it's not a completely individual reading—I don't believe in individual readings—is it a reading confined to my little subcommunity but in no plausible way a narrative that would speak to anybody outside of that tiny subcommunity?

I got originally interested in all of this at the time of Watergate, quite specifically as a result of Barbara Jordan's comment, and not knowing what to do with it, not knowing what to do with all the articles written by very eminent liberals on the rule of law, knowing that there was a discontinuity between the kind of legal realism that I was educated in as a graduate student. Not in law school, but at Harvard as a graduate student—not taking the rule of law very seriously as an operational ideal, being much too sophisticated a political scientist to believe in it—and then suddenly there was this outpouring of articles. I have always remembered one, Arthur Schlesinger writing somewhere—*The New York Times*, *The Wall Street Journal*, it doesn't matter; Sam Ervin emerging as a constitutional hero; and then Barbara Jordan with her faith in the Constitution, and I trying to figure out for myself what to do with this stuff. I certainly approved of bashing Richard Nixon, but I wasn't sure I approved the argument by which he was bashed, because he or James St. Clair was smart enough to evoke the Lincoln analogy. And nobody took it seriously. Rightly or wrongly, nobody took it seriously.

LaRue: There's a chapter in my forthcoming book⁴⁹ about not taking it seriously.

Levinson: It's not that nobody took it seriously, in the sense that they said, "Yes, Nixon, you're right," but I didn't even see any discussion about it, and that was really the beginning of this whole enterprise. One question I continue to have is how idiosyncratic this feeling is, of being caught up in this problem. I'm sure I'm not unique, because I don't believe in uniqueness,

49. L. H. LARUE, *POLITICAL DISCOURSE: A CASE STUDY OF THE WATERGATE AFFAIR* (1988).

but is this really a very small subgroup, or will this in fact speak to a wider audience who will say, "Yeah, you know I find myself thinking about these things too; you have made certain inchoate thoughts choate"? Or will they say, "Why are you interested in this? Grow up"?

Tushnet: In your enumeration of ways out of the problem, I think it's important to include the sort of aspirational constitution which Barber alludes to⁵⁰ and why that's not a solution to these difficulties. What is your response to someone who says, "Wait a minute. Of course you could have an unambiguous commitment to the aspirational constitution. There's nothing to be ambiguous about there"? What do you say?

Levinson: Well, I'd say two things, one of which is shockingly textual, and that's simply that the aspirational constitution has problems with the 1808 clause, and whether a conscientious lawyer could believe that Congress could stop the international slave trade prior to 1808. It seems to me that, in terms of any sort of orthodox legal analysis, we can make certain moves that would present an argument. But I think orthodox legal analysis would say that it would be unconstitutional to do so. So that aspiration has its limits at that point. That's where tragedy would enter.

Tushnet: Wait a minute. I think the response to that is the aspirational constitution means the best that can be done at any particular time, so that—

Levinson: The view I'm trying to present is the most respect-worthy view of the Constitution you can come up with, recognizing there's always the possibility that even the best you can do is going to leave you gasping for breath and wanting to move to something else. That *is* the view that I've ended up taking. If I am asked how do I view the constitutional enterprise, that is the way I view it. Now the obvious problem with that second point is the pluralism of values. My aspirational constitution would so clearly be different from other people's aspirational constitutions. This simply gets us back to old debates that we all participated in, and many of us may be bored with by now, which is, who gets to win when there are competing aspirational visions? What's the basis of the aspiration? What do you do if somebody says, "Well, I look to the Declaration," or, "I look to the I Have a Dream speech," or whatever, as a more authentic source of constitutional law? We all know those debates. So the aspirational constitution can serve as a method of sorts, for a given interpreter, but it seems to me wildly unlikely to serve as the source of social cohesion that some people are looking for out of constitutional theory.

Tushnet: For individuals, the aspirational orientation can be achieved by a whole slew of things other than calling it an aspirational constitution. Walt Whitman and I don't know who—Jane Austen—other people—would be sources of those kinds of aspirations.

LaRue: Walt Whitman wrote, by the way, that the Declaration was *the* Constitution.

50. S. BARBER, *supra* note 45.

Hauerwas: Let me put a problem to you both in terms of my situation today and how it relates to your context. I think it's different from both of you. I teach in a divinity school that is training people for the Methodist ministry, to serve a church that I think basically is dead, or will soon be dead, and probably should be dead. The Methodist bishops, for example, recently drafted a pastoral on nuclear war in defense of creation, and said the reason why we have to do away with nuclear weapons is because they threaten to destroy God's creation. Paul Ramsey and I pointed out to them that this was not theologically a possibility, that you might destroy the world but you could not destroy God's creation because then you would destroy God.⁵¹ But our bishops, not being subtle, did not get the point.

One can have a lot of despair about that, but I am sustained by the fact that I can hope that God is going to do something with that church, and God knows I continue to teach and train people for the Methodist ministry even though I have a lot of empirical evidence that it won't mean much. I mean that, after twenty years at Duke, if I have half of the Methodist ministers in North Carolina feeling guilty for not serving the eucharist every Sunday—I know they won't be doing it, but I want them to feel guilty about it—well, that's the height of my ambition. This is what I want to have done. That's what I'm about. At least I have a basis for hope in that. What keeps you going, training people in the law school?

Shaffer: Could I ask you a question about yours, before you switch us to ours? How can you think of that in institutional terms?

Hauerwas: Like what?

Shaffer: My answer about lawyers is I don't train people to keep America going. I train people to help people.

Hauerwas: Because the ministry isn't about helping people. The ministry primarily helps people through preaching the word, serving the sacraments, building up the Christian community for moral good and sanctification. That's the reason why you can still be shy and be in the ministry. This is good. It refers to a task that you've been given to a specifiable institution.

Shaffer: That seems to me a betrayal of the New Testament.

Hauerwas: I appreciate that. I think there's something to that. If the church doesn't have empirical form it ain't nothing, though, Tom. Your answer is, "Well, real people helping real people is the empirical form," but nonetheless the ministry isn't a general helping profession. Neither is the law. You are going to help people in very specifiable ways. The ministry is meant to do that. The institution that gives structure to how you help people in various specifiable ways isn't a very viable institution. I just wonder how you sustain the activity of training people in the law. What keeps you going doing that?

Tushnet: Let me answer that with a series of observations in a descending-order of importance to me personally. I say that because I want to stress

51. P. RAMSEY, SPEAK UP FOR JUST WAR OR PACIFISM: A CRITIQUE OF THE UNITED METHODIST BISHOPS' PASTORAL LETTER "IN DEFENSE OF CREATION" (1988) (with an "Epilogue" by Stanley Hauerwas).

that it may not sound serious when I begin, but it really is serious at the beginning point. The first three things go together, which are that I've invested a lot in gaining a certain kind of skill, and I'm very good at it, and it's fun. I like doing this stuff.

Massie: Why did you make the investment?

Tushnet: Well, it could have been a mistake. I'm willing to say that twenty years ago I made a mistake, but this is where I am now.

Massie: Why did you make the investment when you made it?

Tushnet: Because I didn't understand that there was no *there* there. I thought there was a *there* there. I found out, over the course of twenty years' thinking about it, that there isn't. That's an overly strong characterization, both of my present position, and of why I got into it; but I'm willing to accept the proposition that it was a mistake at the outset. But it's built up, and it's fun. I think less important is Tom's proposition that some of the people, a very small portion of the people who I teach, will help other people in a better kind of way for my teaching them than for somebody else teaching them. But the reasons I start with are it's fun, and I've got this investment in it. I don't think that if I took the marginal influence that I have on this very small margin of students—I think of it as two or three students a year—I would find it difficult to make that the basis for what I was doing. You were shaking your head. I don't know whether that's skepticism or what.

Hauerwas: Well, I think fun is a lot. I particularly like my own work. I tell graduate students any time what you're doing ceases being fun—quit. I love my work and what I do because I think ultimately it's part of the conversation that's necessary for Christian people to know how to live more faithfully. It's very important for me to feel like that's part of my vocation and that I have real people who say this helps. It's very important that Tom Shaffer thinks, every once in a while, that something that I do helps him in that regard. I couldn't go on, I don't think, if it were just fun. So the reason I was shaking my head is that I was marveling at your ability to do it.

Tushnet: The second part of the last part now doesn't sound that much different to me from your presentation, because teaching some people so that they will be better at helping other people in sustaining a morally attractive form of life, not connected to the Christian tradition, or to the Jewish tradition, but morally—

Hauerwas: I suspect it's attracted to the Jewish tradition in the sense that it's wonderful to knock the big guys down some.

Tushnet: Okay. I'll accept that. That's fair, and I think that's right. That is, the way I formulate it is that I'm only interested in providing a resource to resist the drift to the right in law schools, on behalf of a few students on the margin who my presence will help resist the drift.

Powell: Mark, where does your scholarship fit in? Is it solely under "it's fun" or does it come under the second alternative?

Tushnet: Oh, I don't know. I guess there's something that I didn't say in the other things because when I think about teaching, I'm not sure that it's motivating. The scholarship is saying true things and that seems to me a worthy thing to do.

Shaffer: With considerable influence on people who read it.

Tushnet: I could psychologize about myself, and when I do that I don't think the influence is important because, when I do the psychologizing on myself, I don't think that I'm influential. Deep down, I don't think that. Superficially, I think it, but deep down I don't.

Hauerwas: People call me one of the more influential Christian ethicists in America and I say that that's a little bit like being the best two-bit whore in a Saturday night whorehouse. It doesn't amount to much.

Tushnet: My position is that any sense I have of being influential—I mean, your characterization is, “Yeah, in an unattractive setting it's influential,” but my characterization is that it is an illusion that I'm influential.

Powell: But even if you decided that you weren't, the fact that you're saying truth is itself—

Tushnet: Yes, that's right.

Hauerwas: Is that an aesthetic category, “saying truth”?

Tushnet: Oh, God, I don't know. It's the kind of thing you just like to look at, because it's beautiful and it's self-satisfying. I don't know. I don't know. I think it's more than that. I think there's something true about truth, rather than, in addition to, the merely attractive.

Levinson: You're a closet realist, capital R.

Tushnet: Yeah, well, there is that.

Hauerwas: How about you, Sandy?

Levinson: I tried to cover my own approach to teaching in Chapter Five of *Constitutional Faith*. I think that Mark and I have fairly similar stories to tell, though mine is complicated by the fact that I went to graduate school first and took a Ph.D. in political science at Harvard. (My dissertation, though, was on Holmes and Frankfurter.) I began teaching political science at Ohio State in 1968 and quickly realized that I had no desire (and perhaps no ability) to be a mainstream political scientist. Like many people at that time, I was also greatly upset by what I saw in the university in general and seriously doubted that I wanted to be an academic. Thus I decided to go to the Stanford Law School, helped along by a fellowship from the Russell Sage Foundation. I should admit, though, that I probably assumed that law school would be an exit from political science and maybe even from the academy as well. (Had that in fact happened, I hope that I would have felt under an ethical obligation to return to the Foundation the money they gave me to go to law school.)

After graduating from Stanford, I clerked for a federal district judge and, unlike Mark I believe, ventured into legal practice, working for the Children's Defense Fund. Whatever my initial intentions, though, that practice lasted less than a year, and I went to Princeton to teach in the Politics department there for four years before moving to the University of Texas Law School in 1980. I have, in fact, thought a lot about why I teach in a law school instead of in a politics department, because there are aspects of educating students to be professional lawyers that I find disturbing. I don't know that I have any very good answers as to why I teach law instead of politics. (Some would say that I do not in fact teach “law instead of politics,”

but instead teach politics at a law school, but that is another matter.) Before going on to those answers, I do want to mention one point simply because it would be gross bad faith to ignore it, and that's the fact that law schools pay much more than do departments of political science. In addition, no one who has taught in the regular university can ever fail to be less than overwhelmed by the sheer level of assistance available at a law school, ranging from computer facilities to travel budgets.

I would like to think that more than income maximization explains my remaining at law school, though. What I focus on to justify my teaching law students rather than graduate students is my ability to participate in a complex process of citizenship formation being undergone by law students, who I assume will be playing a variety of leadership roles in their post-law school lives. I want them to think about certain things that I am firmly convinced they would not be called upon to think about if they were taught by some—not necessarily all, but at least some—of my colleagues. I think it's politically important, so I view the teaching as a form of political activity. More so than teaching undergraduates, even though many of them would be going on to become lawyers. Certainly teaching graduate students would take a very different form, because their interests are presumably a much more abstract, "disinterested" approach to the material, and undergraduates are somewhere in between. But that is the way, by and large, I try to justify staying within a law school context.

But I think that it *is* very problematic to train lawyers. There's a great deal of tension in that course, invariably, because this brings us also back to Paul Carrington.⁵² I cannot come in and make a very wholehearted presentation on behalf of the legal profession. It's morally perilous. I spend a lot of time looking at perils. Now I don't think that it *must* be morally corrupting. I think if one did have *that* view of lawyering then there would be no defense for staying with the enterprise. You ought to blow it up. So, for whatever reason, including simply serving to justify my staying around and enjoying the salary, I think that it is possible, though not inevitable, that a good person can be a good lawyer and vice versa.

Hauerwas: How do you feel—how does Tom, for example—when the law, as Jeff was reminding us earlier, is inherently coercive and deals with really putting people under very extreme violence for political and legal purpose? I mean, isn't your view that you are training people to help people through that law, through that mechanism, too simple?

Shaffer: It seems to me most of what lawyers do every day doesn't involve coercion that clearly. Most of what lawyers do every day is fix things for people, with a certain craftsmanship. One of the things that none of us said anything about—there are some other law teachers here, maybe one of them would have—is that craftsmanship, that whole idea of craftsmanship, might itself be, as MacIntyre said, a source of internal good. A lot of it has to do with that and that probably covers most of what's done in law classes,

52. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

and it probably is one of the things that keeps our gaze averted from the violence. I find the violence quite disturbing, as a matter of fact. Even most of litigation is simply getting something settled so people can quit fighting about it; most of what litigation does is not litigation. All kinds of lawsuits covering the whole spectrum—ninety-five per cent of them—are settled. That's what litigators do most of the time. . .

LaRue: They make deals.

Shaffer: . . .they make deals, and there are some good deals and some bad deals, and there are some deals where the balance of power is very one-sided, and so the coercion and violence is there, but, by and large, I think it probably is a good thing to make deals for people.

Levinson: I think it does matter what one teaches. The substantive area of constitutional law is a curious part of the curriculum, for a number of the reasons we've talked about. Most of our students aren't going to practice it. I'd be curious—I don't think anybody's done any empirical study to see if constitutional law cases are settled at the same rate as contracts cases. My hunch is no, but I don't know what the data would show. This also dovetails with the required-course question. It is hard to know what to do with constitutional law in the curriculum. It doesn't fit very well in the function of law school, of lawyering as you're describing it. I know that Langdell, in the 1870 curriculum, didn't include constitutional law. I think you could take constitutional law in your second or third year, but it wasn't one of the great subjects that you needed to learn the first year. I would feel quite scared, I think, if I thought that my students might actually go out and practice this discrete body of law with a living human being instead of a class action.

Hauerwas: So you've remained an academic.

Levinson: Oh, in that sense, sure.

Hauerwas: You really don't want to change your students' lives?

Levinson: In what sense?

Hauerwas: Oh, I mean when I teach students I don't want them to ever be the same again. I want them to be thoroughly messed up from one of my courses, in a way that I've changed their questions, how they think about Christianity, what their ministry's going to be about. I want to change them. I want to decisively change them.

White: It sounds to me as if Sandy's marginalities still give him a certain sense of calling that has that emphasis on change, unless I'm not reading him correctly. Do you feel a sense of mission?

Levinson: "Mission" is a bit too grandiose. I would like to believe that this is the way I remain faithful to certain visions of the 1960s, so that I am not merely an academic in the pejorative sense that led me to go to law school in 1969, thinking that I was leaving the academy. But "mission"? I would feel queasy using that word.

White: Prophet?

Levinson: No.

White: But you're a critic?

Levinson: Oh, yeah. And I certainly want students to think about things in a way that I suspect they haven't thought before. The difficulty is I really

don't know what I want to happen as a result of this. The problem is that I don't have a program to sell them.

Tushnet: But Stanley's said this several times now. He starts and maybe he ends with saying he wants to leave them messed up. That is, he's not troubled by not having a program. He just wants them messed up.

Hauerwas: I want them to be like me.

Levinson: The image that often comes to mind is this: Would I like my students to end up like me, or to have a Woody Allen notion, to end up as neurotic Jewish intellectuals, but not looking for anything at all?

Hauerwas: It's too liberal. I don't like that.

Levinson: Well, that is right. My liberalism would show itself. I can lay out a variety of problems, and I might suggest at times certain paths we shouldn't go, but I'm not very confident in the path they should go. In part because I think there is an ethical question. If I advise them to go certain paths that I haven't gone—I mean, if I think practicing legal aid law is so terrific, why am I not doing it? This is the objection I have when Duncan Kennedy⁵³ promotes the notion that practicing law can be fun. Now, Duncan simply doesn't practice law and—

Shaffer: Never has?

LaRue: He actually has.

Tushnet: Well, sort of—

Levinson: With an asterisk.

Powell: But in fact he didn't.

Hauerwas: I don't want him as my lawyer.

Levinson: That is not to defeat my objection. The fact is I am a very well paid, very secure legal academic, and so this is where I feel very, very queasy telling people how they should lead their lives, because I also am certainly liberal enough to believe that I have a variety of ways that I could lead my life, if I wanted to. I suspect I could be hired by a number of legal aid clinics tomorrow. That's why I feel these tensions. It's a combination of a lack of a systematic program and simply knowing the way I'm leading *my* life.

Hauerwas: Right. I'm a Christian, and I get paid pretty well, too, even in seminary. Let me ask you another question. It's interesting that we're all about the same age, all came out of the 1960s, all came through some of the same philosophical developments. We may all have been influenced by antifoundationist arguments, may all be different, qualified forms of realists. All of us have been influenced by a lot of the same kind of political theory, I think. And we all, on the whole, don't have a lot that's constructive to say to anyone. It's mainly a critique. Is there something we're missing about what has made us this way? Are there arguments that we should be attending to more closely, that might provide an important critique of us, that would provide a more positive stance? I think it's not unimportant that you are both Jews, and that somehow I found my way into a rather different form

53. D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

of Christianity than what I came out of educationally. I'm part of the Protestant mainstream. I've found myself associated with much more determinative communitarian forms of Christianity than I came from, and I just wonder: How do you account for these kinds of developments that are going on? We may just be a blip on the screen.

Beckley: I want to ask you something about your own self-assessment. I thought you said you didn't have a positive constructive position.

Hauerwas: Well, I do. I do, very strongly, theologically.

Beckley: I think I can tell you what it is.

Hauerwas: The reason why you and Gustafson⁵⁴ keep calling me a sectarian is I don't have a very strong positive account of what I want the church to do in the world.

Beckley: No, but you have a positive account of what you want the church to do.

Hauerwas: That's right, that's right.

Beckley: You want it to form character, so that we will be disciples of Jesus Christ.

Hauerwas: And I even think that would be important politically, if we could get it going. I think all that's true. But nonetheless that's still pretty general. I think I can say more to *that* community than I think Mark in particular can say. And Sandy says a little more. Right. I think that's true, and I think I'm saying more than they can say on that, and that's because I've got a community I think I can address. But nonetheless I just wonder: How do you account for this, this kind of development? How do you account for the Crits, the kinds of developments in philosophy represented by Rorty? MacIntyre is certainly counter-cultural to the mainstream, though he is quite different than Rorty. In some ways he's much more conservative than Rorty, socially and politically. I just wonder: Do you have any hunches about how to account for it. Is it the 1960s?

Tushnet: Well, I think that is part of it. There was a moment of communitarian vision that opened up, which we all sort of recollect in some curious kind of way, and, yeah, we can put all sorts of qualifications on it and so on, but it's part of our common experience.

Hauerwas: I have a thesis about the Vietnamese War. If it hadn't happened we would have had to invent it, because the sense of community that many people had discovered, which they had never had before, through the civil rights campaign— Once you had almost achieved what you wanted to, you could no longer sustain a sense of community, because you'd won, and you were to disperse, and instead what you discovered was that you could fight the war. You could keep that sense of community going in that way.

54. Gustafson, *The Sectarian Temptation: Reflections on Theology, the Church, and the University*, in PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY 40, 83-94 (1985); cf. J. GUSTAFSON, 1 ETHICS FROM A THEOCENTRIC PERSPECTIVE (1981); J. GUSTAFSON, 2 ETHICS FROM A THEOCENTRIC PERSPECTIVE (1984).

It's very interesting to watch Hayden and Davis. They shifted from civil rights into the antiwar movement. I'm not in any way denying that they were equally committed and serious about each, but what was important was that this allowed them to maintain that sense of community that they discovered through the civil rights campaign.

Tushnet: I think that's right. Although there's a curious problem of the relation of whites to the civil rights movement. . .

Hauerwas: Yes. Oh, no question.

Tushnet: . . . which Freedom Summer⁵⁵ sort of nurtured. But I also think, apart from the location in the history of politics, there is also a location in the history of thought. These kinds of statements always make me very uncomfortable because I'm certainly not qualified to defend them; but it sure looks to me as if, in all sorts of areas, the Enlightenment project of rationality played itself out. It doesn't work on its own terms. It's been pursued on its own terms and found inadequate. And that's on an intellectual level, on this account, why all this stuff is bubbling up in all these other areas. And why in some ways there can't be anything we're overlooking. What we'd be overlooking would be some account of rationality on which the inductive evidence isn't available. But, that's a real global claim, about different areas. You say MacIntyre says Judaism is a coherent project. What was the second project?

Powell: Science.

Hauerwas: Yeah. Judaism, Christian theology, and science.

Tushnet: Judaism, Christian theology, and science. My own hunch is that science is out, too.

Hauerwas: It certainly has maintained itself in a more morally coherent fashion in the contemporary university than the humanities have. They still know how to initiate students within a tradition in a way that those of us in the humanities do not.

Tushnet: Only because they haven't appreciated what the philosophers of science have said about their enterprise.

Hauerwas: Well, they don't need to, because they exemplify in practice what the philosophers of science say you ought to be doing. Scientists are notoriously bad at describing what it is they do, and so in effect they in many ways display tradition-bound forms of a rational mode that they articulate through foundationalist epistemological schemes.

Tushnet: Okay. I think that's right.

Hauerwas: You got any hunches, Sandy?

Levinson: I think that we would be the worst people in the world to ask what we ought to be listening to, because if we knew we'd be listening to it. One of the other ways in which I betray my liberalism, or pluralism, is that I think it is important to have multiple voices to push people to listen to things they'd just as soon not be aware of. I think people listen to those voices they think at any given time are worth listening to, and we don't read

55. S. BELFRAGE, FREEDOM SUMMER (1965).

the horoscopes, or any of the other things that we think are nonsense.

Hauerwas: They don't listen to the Ayatollah Khomeini very much either.

Levinson: Right.

Hauerwas: Mark, you don't agree with that, do you? What Sandy just said?

Tushnet: I'm willing to listen, but you can tell from my tone of voice that I'm skeptical.

Hauerwas: I mean you're not for multiple conversation partners, per se.

Tushnet: Not per se. I lack sufficient self-confidence to believe that it will *never* be the case that somebody will come up with something that would refute all these positions I've taken, but I am skeptical about it. Because I'm not so self-confident, I'll listen. There's also a strategic reason for listening and entertaining these things. I lack social power. I know these things are going to be said, and there'll be other people who'll be listening to them, and I ought to be in a position to start explaining why they're wrong, as I presume they will be. So it's important for me to entertain, to participate in, the dialogue—both because—who knows?—it might turn out to be right; and, even if it doesn't turn out to be right, it's strategically important for me to get it.

Levinson: It's very clear to me, in reading your work over the years, that, whether you would say you're doing it strategically or otherwise, you are considerably more willing to defend liberalism than would have been the case six or seven years ago. I think you are turning slowly but surely—or not that slowly but certainly surely—into a very important critic of republicanism. And one of the things that is important about that is that it's some of our mutual friends who are the republicans. I think that five years ago, if people had been asked to predict where Tushnet would line up, it would have been with the republicans, and so you in fact listened to—

Tushnet: But I can identify that with being Jewish. That's pretty straightforward.

Levinson: I realize that. But that too is a part of yourself that you weren't expressing. . .

Tushnet: That's right. That's right.

Levinson: . . . six or seven years ago. So in fact, simply because we do live in a kind of pluralist universe, whatever our ideal political theories might be, lots of communication does take place, and, even if we assume that a lot of stuff isn't going to be very enlightening, we find ourselves shifting views and taking certain things seriously that we would not have anticipated taking seriously. I also agree with Mark that a lot of stuff that we expected to be worthless is.

Hauerwas: But in fact you two still represent very much a minority within the legal profession, in terms of academics, don't you? And I certainly represent a very small way of viewing how one does theology.

Shaffer: But you're influential.

Hauerwas: I do like to think that influence is not that you have people agree with you. It's that you can set the terms of the debate, and I'm beginning to do that.

Tushnet: In your case, that's not easy.

Hauerwas: But I mean you all are still very much a small minority within the—

Tushnet: I think that's right.

Hauerwas: That's because the law is such a powerful establishment tool.

Tushnet: Before going further, I want to say that "minority" is true. I understand the tension between my saying that and what appear to be the epistemological positions that I am otherwise committed to. I understand the tension, but I don't quite know what to do about it. But at least I know there is a difficulty. I start by saying that, so it doesn't matter.

So we're a minority. So what? Having said that, it is, I think, the case that in the law a lot depends on, at some level, what happens in politics, in the next election, to put it in the crudest terms. At the moment the struggle for defining the terms of the debate is basically between the right-wing, law and economics people and the left-wing, Critical Legal Studies people, and because of politics, and the relationship between law and politics, a lot has happened. The structure of the debate has been defined over the past decade largely by right-wing law and economics. But I don't think that's inevitable. I think the votes are still out.

Hauerwas: Even if the Democrats win, I don't think you're going to be appointed attorney general.

Tushnet: But I think the issue will then be what do left-liberals, the Yale Law School folks, do? How did they respond to their being in bad faith about their commitment to the law? And they can move either way. Currently at Yale, they're moving to the right, but they don't really want to do that, deep down, because of their political commitment. If the political space opens up for them to start exercising the kind of power they want to exercise, they may resolve the problem of bad faith by moving to the left, which is where *our* stuff is defining the issues. That's a very rosy scenario and I want to emphasize that the more important thing is the first.

Levinson: The only thing I would add is that it's a strange sort of minority, because in fact it is very, very well represented at several of the elite schools. Stanford. . .

Tushnet: Two out of the four.

Levinson: . . . has a dean now—Paul Brest—which among other things also disconfirms the proposition of the Harvard Law School that having Critical Legal Studies people on the faculty inevitably leads to chaos. I think that's the statement of the Harvard Law School. Be that as it may, that's a separate argument.

I think it is significant that Mark's casebook has become the leading one. It's not a Crit casebook. On the other hand, it certainly presents more of that perspective than Gunther,⁵⁶ so a lot of people who don't identify at all with Critical Legal Studies, or are not identified—maybe they secretly identify without being identified by others—for some reason are choosing to

56. G. GUNTHER, *supra* note 41.

expose their students to, and themselves to start learning this stuff, about republicanism—what you have plugged into—and it's also coupled with the fact that some people have not gotten jobs because they are identified with Critical Legal Studies. Where do you have much more of a classic majority oppression of minorities? But it doesn't fit your classic definition of a minority.

Hauerwas: One of the things that I picked up from what you were saying, about what sustains the business, is that you still have a very strong sense about what it means to have the vocation of the intellectual, and how that gives you a certain sense of vocation—that you are going to go forward, irrespective of influence or success.

Tushnet: I think that's right. I don't often think of myself in those terms, but I think it is true that the best description of me would be as an intellectual.