

1999

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Recommended Citation

Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?*, 51 Stan. L. Rev. 903 (1998-1999).

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Should a Christian Lawyer Sign Up for Simon's Practice of Justice?

Thomas L. Shaffer*

[T]he baptismal imagination of the New Testament is so peculiar and so particular because Christians are always odd men and women come together in odd communities and congregations, always at odds, always at risk, always in the presence of large cultural empires that want to dissolve our oddity for reasons of state We are forever reimagining and retelling and reliving our lives through the scandal of Friday and the rumor of Sunday. We, like Jews, devise signals of oddity, the notice of new life, the bread of brokenness, the wine of blessedness, and the neighbor—always the neighbor—who is for us a signal of the love of God.

—Walter Brueggemann¹

In *The Practice of Justice*,² Professor William H. Simon describes justice in a way that differs from the way the Bible describes justice. The big difference is not so much what justice requires (although there is some difference there) as (i) how people decide what justice requires, and (ii) who the “people” are who decide what justice requires. Some of us Christians claim to understand “justice” as the Bible understands it.³ It may make a difference that, for biblical people, “justice” is righteousness, and righteousness, the Torah teaches,⁴ and Rabbi Hillel teaches,⁵ and Rabbi Jesus teaches,⁶ is

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1. Walter Brueggemann, *Preaching a Sub-Version*, 55 THEOLOGY TODAY 195, 204 (1998).

2. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998). Hereinafter, all references to *The Practice of Justice* will be made by citation to page numbers without additional identification.

3. It appears to me that Jews understand “justice” biblically as well, particularly if, for that purpose, “biblical” can be read to include the Oral Torah.

4. See *Deuteronomy* 16:20 (exhorting the Jews to follow “that which is altogether just”); THE PENTATEUCH AND HAFTORAHS 820-21 (J.H. Hertz ed., 2d ed. 1987); WALTER BRUEGGEMANN, *THEOLOGY OF THE OLD TESTAMENT: TESTIMONY, DISPUTE, ADVOCACY* 736 (1997) (characterizing the Lord as an agent for justice advocating “the complete reordering of power arrangements on the earth”).

5. See *OUR MASTERS TAUGHT: RABBINIC STORIES AND SAYINGS* 51 (Jakob J. Petuchowski ed., 1982) (relating a story in which Rabbi Hillel says, “What is hateful to you, do not do to your neighbor”).

6. See *Luke* 10:25-28 (proclaiming love of God and love of neighbor as the key to eternal life); *Matthew* 22:36-40 (proclaiming love of God and love of neighbor as the two great command-

practice following upon love of God and neighbor.

It may also make a difference that biblical justice is not derived from conventional morality,⁷ while cultural sources of justice come from what Christians call "the world."⁸ Unlike Professor Simon's justice, biblical justice is not derived from "the rule of law";⁹ legal order is what St. Paul refers to as "authorities and potentates."¹⁰ Biblical justice is not derived from fealty to the modern nation-state, which is analogous to what the New Testament calls the Beast.¹¹

Those understandings of what justice is are not, however, the most evident differences. The most evident differences between Professor Simon's justice and biblical justice do not turn on principles, but on processes. Among Christians, biblical justice includes all of the moral implications of undertaking to follow Jesus, who acted in company. People in company tend to bump into other companies of people and tend to impinge on one another; and so biblical justice can often, no doubt, resemble what Professor Simon

ments on which "all the law and the prophets" hang); *Romans* 13:9 (commanding the Christian to "love thy neighbor as thyself"); Carlos G. Valles, *The biblical word for the good person is "just,"* 14 LIVING FAITH 7, July-Aug. 1998.

7. Professor Simon appeals for his understanding of what justice is to "values solidly grounded in the public culture of the society and the legal system" and to "contextual norms." Pp. 17, 198. I read this and similar phrases in his book to invoke conventional morality, although he at one point denies that his position depends on convention. See pp. 158-60.

8. As in: "Peace I leave with you, my peace I give unto you: not as the world giveth, give I unto you." *John* 14:27 (N.E.B.).

9. "Justice," Simon says, "is not an extra-legal concept." P. 9. "'Justice' here connotes the basic values of the legal system . . . I use 'justice' interchangeably with 'legal merit.'" P. 138. Compare JOSÉ PORFIRIO MIRANDA, MARX AND THE BIBLE: A CRITIQUE OF THE PHILOSOPHY OF OPPRESSION 204-05 (John Eagleson trans., 1974) (arguing that Paul viewed anything short of breaking "definitively with all law and with all the human civilization that is supported by the law" as "nullify[ing] Christ's work and . . . frustrat[ing] completely the entire Gospel"), with Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089, 1095-98 (1998) (arguing that the Bible conflicts with law because law is the tool by which the government enforces the inequitable *status quo*). At the other extreme is a view of social and legal ethics that finds little use for any view of justice that is not consonant with the efficient management of the capitalistic nation-state. For an explanation of this view, see Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 15 (1998) ("If we move along this path, even if we cannot and should not attempt to reach its final end, which would be a transformation of law into a goal-oriented policy science consecrated to the perfection of instrumental reasoning, we shall be joining a great and beneficent . . . national movement.").

10. See *Ephesians* 6:11-13 (N.E.B.) ("Put on all the armour which God provides, so that you may be able to stand firm against the devices of the devil. For our fight is not against human foes, but against cosmic powers, against the authorities and potentates of this dark world."). William Stringfellow's phrase was "principalities and powers," which he defined to mean "ideologies, institutions, and images." A KEEPER OF THE WORD: SELECTED WRITINGS OF WILLIAM STRINGFELLOW 194 (Bill Wylie Kellerman ed., 1994) [hereinafter A KEEPER OF THE WORD]. One of these is the state. Stringfellow wrote that death "is the final sanction of the state and it is the only one." *Id.* at 226. Another of the principalities and powers is the law. See *id.* at 242-44.

11. See *Revelation* 13:1-4; cf. M. Eugene Boring, *The Theology of Revelation: "The Lord Our God the Almighty Reigns,"* 40 INTERPRETATION 257 (1986).

means when he talks about justice. The difference I would underline is this: Biblical justice is the product of moral discernment (ethics if you like) among those who gather for the purpose of deciding what biblical justice is.¹² Where it differs most from Simon's justice is that biblical processes are communal; they invoke and seek a "communal quality of belief."¹³ That is, they invoke both belief and community. One New Testament example occurs when St. James, spokesperson for the first set of Christian leaders, tells gentile Christians under what circumstances they are bound to follow Jewish Law. Before he announces the relevant rules, he tells them how the leaders' decision was made: "It is the decision of the Holy Spirit, and our decision . . ."¹⁴ The authority he claims depends on the facts that (i) God had been a party to the communal deliberations of what the church later called the Council of Jerusalem, and (ii) the decision had been made communally.¹⁵

I. ADOPTION BY GRANDMA

We talk in the legal-aid clinic where I practice law about the recurrent case of a grandmother who wants to adopt her grandchild because the child's mother (the grandmother's daughter) is going off somewhere—in a couple of cases to the Army, which does not allow recruits to take their children to basic training. The child's mother is willing to sign away her "parental rights" entirely, to put her own mother in her place, no longer—in the eyes of the law—to be a mother at all. That is the arrangement Grandma wants. These two women, who are in agreement, need a no-cost lawyer to draw up the papers, set the adoption for hearing, and get their plan made official. Neither of them is interested in their lawyer's suggestion—the product of consulting "applicable background values"¹⁶—that there are less permanent ways to accomplish what they want.¹⁷

12. Biblical justice is Judaic, not Greek. Nonetheless, this point about process is rather like what Socrates told Thrasymachus: "[I]f we proceed in our enquiry as we lately did, by making admissions to one another, we shall unite the offices of judge and advocate in our own persons." PLATO, *The Republic*, in I THE DIALOGUES OF PLATO 591, 613 (B. Jowett trans., 1937).

13. The phrase is the late John Howard Yoder's. See JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* 12 (1984).

14. *Acts* 15:28 (N.E.B.).

15. A recent cartoon makes the latter point with irony when it shows a bookstore clerk checking availability on his computer, and telling the customer, "The Bible. That would be under self-help." See NEW YORKER, July 6, 1998, at 33 (cartoon by P. Steiner).

16. P. 39.

17. For example, lawyers can probably achieve the women's goals with a piece of paper signed by the child's mother, for medical providers and, if need be, the welfare office. If the child is in school, we may have to add a letter from our office to the school principal. It could be that we will have to go as far as guardianship in Grandmother, but that is a legal status that can be undone, as adoption cannot.

If the conversation with the client (or clients¹⁸) is to continue, the lawyer here needs to decide with what moral argument he will explain his suggestion. Simon's route to moral argument is individualistic judgment, made by the lawyer (alone), disciplined by moral values implicit in the law,¹⁹ and disciplined, beyond that or within it, by contemporary American *culture*.²⁰ All of those sources, in Simon's view, support the lawyer's being imperious about using lesser methods of giving Grandmother custody while Mother goes, say, into the Army.²¹

In episodes of narrative display, biblical justice—from King Solomon's threatening to cut the baby in two²² to Jesus, as he died, giving particular instructions for the care of his mother²³—esteems motherhood. Biblical justice, as principle, might come out in this case with the same substantive morality that Simon's justice would, perhaps (children belong with their mothers). But to depend on a principle is to say nothing about how the lawyer goes about deciding what justice is *in this case* and then on how he and these two women go about deciding what their lawyer is to do.

A couple of years ago, I put the Grandmother Adoption case to an adult Sunday School class in a Presbyterian church in Pennsylvania. I did this in order to seek communal discernment on a question of legal ethics, which is to say that I asked them to discern the working of biblical justice in this situation (so that I could then come to my client[s] with some comfort in the use of my lawyer's moral authority).²⁴ An indicative concern in that group—

18. Simon, a Brandeisian on questions of conflicts of interest in serving multiple clients, would, I think, favor the plural. See pp. 126-37, 230 n.23.

19. See note 9 *supra*. This case, discussed from a comparison of biblical justice and justice as understood in natural-law jurisprudence, is in Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURISPRUDENCE 1 (1995). Legal authority cited and discussed in that essay reveals the reluctance of judges to part with the idea that children belong with their mothers, notwithstanding the emergence of the recent "gender-blind" domestic relations doctrine. See *id.* at 5.

20. Simon's work contains numerous examples of this dependence on American culture. See p. 106 (what "the culture accepts, and occasionally exalts"); p. 17 (asserting that legal ethics are dependent on "values solidly grounded in the public culture of the society and the legal system"); p. 39 (noting that even categorical rules are based on "the values . . . of society at large"); p. 62 ("some sense of the meaning of justice," which "[m]ost people have").

21. In some cases the mother has abandoned the child and, except for agreement to the adoption, is not in touch with Grandma. The "ordinary morality," p. 45, that argues for an alternative to adoption is then that the mother may change and want to resume her "natural" position in her child's life.

22. See 1 Kings 3:24-28.

23. See John 19:26-27.

24. The experiment is described in Thomas L. Shaffer, *The Christian Lawyer—An Oxymoron?*, AMERICA, Nov. 23, 1996, at 12-17. It persuaded me that an ordinary Sunday morning gathering of a Christian congregation can operate as the discerning community Yoder described. See YODER, *supra* note 13. I have argued, and I believe, that work-related or school-related groups of believers also operate that way. See Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant; If Not . . .*, 27 TEX. TECH L. REV. 1345, 1353 (1996).

a concern I thought at the time rather stern and Calvinist—was whether the two adult women in the case were willing to submit their arrangement and their lives and the life of their child to the Lord. Were the people in my law office willing to follow Jesus? If so, the concern implied, the church could figure out what their lawyer should do. (I suppose my presence as teacher that day was sufficient indication that I had submitted my legal practice—or at least the apposite part of it—to the Lord.) Point: Biblical justice does not necessarily or maybe even often differ from what Professor Simon wrote about in its rejection of the adversary ethic. It differs radically, though, in the way it discerns how justice works, and—according to the stern Calvinist discovery I made—that way implies membership in the discerning community, which is not the same as membership in Simon's America.

Which is to say that communal discernment of biblical justice is not a town meeting. It is informed not so much by notions of equality and freedom as by centuries of pondering scripture together, of learning together from theology (what Dietrich Bonhoeffer called the "memory of the church"²⁵), and of communal formation in good habits—formation influenced by generations of believers (a room full of them present with me that Sunday in Pennsylvania).²⁶ All of this ethical substance depends on and is sustained by distinct membership and by ostensible, common commitment among those present.

II. COUNTERCULTURAL INFLUENCES

As *analysis*, something Professor Simon is uncommonly adept at, biblical justice is disciplined, as is Simon's notion of justice, by contemporary culture and by the rule of law. Biblical justice is also disciplined by conscious memory of radical forms of countercultural witness from its history. The most significant countercultural witness for Christians is the moral example of an imprudent itinerant rabbi named Jesus who got himself killed by the government.²⁷ Consider three radical understandings of Christian moral example left to them by this rabbi, each of which is remembered by Christians as a direction for faithful discipleship and each of which, in my observation, disturbs Christians who propose to practice justice.

There is, first, an *economic* reading that subverts all forms of business and of property ownership in favor not of equality, but of distribution to the economic underclass. The early Christian church lived under a vivid understanding of the Gospel mandate to surrender property to feed the poor; it

25. CLYDE E. FANT, BONHOEFFER: WORLDLY PREACHING 27 (1975).

26. "Formation" implies that the virtue of justice begins not in choice but in training. For an elaboration on this point, see ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 113-14 (1988).

27. In confronting lethal legal power, Jesus followed the example of the Hebrew Prophets.

lived under a system of common ownership; its politics was the politics of radical redistribution of wealth. The claims of the underclass to dignity and to material sustenance were understood as demand for the return of what had been taken from them, rather than (as in later centuries of Christianity) as claims in charity.²⁸ The later Christian church sidelined radical economic and political Christianity into such institutions as the monastery, as it also turned radical insistence on the meaning of the Gospel into heresy and focused its attention not on economic sinfulness, but on civic rectitude and rules about sex.²⁹ The modern American church has almost—but not quite—accommodated itself to capitalism, to the hegemony of the managerial elite,³⁰ and to what President Bush called a “thousand points of light.” But Christians sometimes remember and are sometimes reminded of their radical economic and political roots—this despite the “unmitigated praise” of economic and legal “reason” that

forces on us a disregard of the power of evil in the world, of the terror of injustice, even while the parade of victims streams before us, some very close to home. This necessary seductive doxology nurtures us not to notice—not to notice neighbor, not to notice self, not to notice hurt, not to notice healing or its costs—not to notice³¹

There is, second, a radical *legal* reading of Christ’s example that subverts all forms of coercive power—not that renounces the law, or renounces obedience to the law (any more than Jesus did), but that declines the lethal power of the law. Christian legal subversion refuses what the sixteenth century Swiss Anabaptists came to call “the sword.”³² Legal power, the late

28. See *Acts* 4:32-37 (describing redistribution of wealth in the early church); JUSTO L. GONZÁLEZ, *FAITH AND WEALTH: A HISTORY OF EARLY CHRISTIAN IDEAS ON THE ORIGIN, SIGNIFICANCE, AND USE OF MONEY* 71-91 (1990) (observing that all of the church members’ property was held in partnership); MIRANDA, *supra* note 9, at 14-22, 92-96 (stating that fathers of the early church saw private property as theft); see also MEIR TAMARI, *THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY* (1995) (“Sanctity is achieved not by contracting out some of one’s rights to others but by doing or sharing with others, irrespective of the utility of reciprocity.”)

29. See MIRANDA, *supra* note 9, at 160-99 (arguing that organized religion tends to distract attention from the scriptural condemnation of economic injustice, focusing instead on behavior that is more accessible for control, such as sexual behavior).

30. The “liberation jurisprudence” of Robert E. Rodes, Jr., advocates the theory that the “ruling class” of Marxist critique has, in both socialist and “democratic” economies, come to be made up of bureaucrats (corporate and governmental) and lawyers, rather than the capitalists of classical Marxist analysis. See ROBERT E. RODES, JR., *LAW AND LIBERATION* 20-21 (1986); ROBERT E. RODES, JR., *PILGRIM LAW* 34-36 (1998). For an elaboration and discussion of Professor Rodes’ teaching in what I believe was a discerning Christian community, see Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 *NOTRE DAME L. REV.* 737 (1998).

31. WALTER BRUEGGEMANN, *ISRAEL’S PRAISE: DOXOLOGY AGAINST IDOLATRY AND IDEOLOGY* 128 (1988). Brueggemann writes elsewhere about “modes of knowledge that have too innocently yielded certitude,” and “[m]odes of power that have too readily granted control.” BRUEGGEMANN, *supra* note 4, at 60.

32. See Shaffer, *supra* note 9, at 1091.

Professor Robert Cover reminded us, is about death.³³ (It is interesting to me that Professor Simon, who is severe on lawyers defending criminals,³⁴ does not take up American law's settled devotion to capital punishment.) In the first three centuries of the church, civilian Christians did not accept legal office, and did not join the army; and converts who were already soldiers did not kill people.³⁵ Anabaptists who reminded early Protestants of this heritage, and of the fact that it had been lost when the state became Christian, were put to death for opposing capital punishment.³⁶ The mainline church in modern America sometimes seems to remember its pacifist past;³⁷ it pays some attention to the modern effectiveness of nonviolence, nowhere clearer than in the American Civil Rights Movement.³⁸ If, despite such prophetic modern leadership, it remains the case that Christians are as ready to kill for the state as anybody else is,³⁹ American Christians seem, now and then, to be discomforted by the pacifist examples of their saints.

Third, there is a radical *political* reading of Christ's example that subverts patriotism. Throughout the history of biblical Israel and of the church—from the time when Israel, despite God's reluctance, demanded a king, so that it could be like the other nations,⁴⁰ through the Book of Revela-

33. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613 (1986) ("Because legal interpretation is as a practice incomplete without violence . . . it must be related in a strong way to the cues that operate to bypass or suppress the psycho-social mechanisms that usually inhibit people's actions causing pain and death."); see also A KEEPER OF THE WORD, *supra* note 10, at 226 ("Enumerate the usual prerogatives of the state and it becomes plain that each and every one of them embodies the meaning of death Whenever the authority of the state is exercised . . . the moral basis of the authority remains the same: death.").

34. See pp. 170-94.

35. See Tony Korec, *The Early Church on War*, CATH. WORKER, June-July 1998, at 8. For a discussion of the academic debate about the extent of pacifism in the early church, see John H. Yoder, *War as a Moral Problem in the Early Church: The Historian's Hermeneutical Assumptions*, in THE PACIFIST IMPULSE IN HISTORICAL PERSPECTIVE 90 (Harvey L. Dyck ed., 1996).

36. See Shaffer, *supra* note 9, at 1091 (quoting WILLIAM R. ESTEP, THE ANABAPTIST STORY 47 (1984) ("Some radical reformers were put to death for saying that capital punishment was wrong.")).

37. See, e.g., *The Challenge of Peace: God's Promise and Our Response*, in DAVID J. O'BRIEN & THOMAS A. SHANNON, CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 492 (1992) (a pastoral letter of the Roman Catholic Bishops of the United States); POPE JOHN PAUL II, THE GOSPEL OF LIFE 99-100 (1995) (determining that capital punishment is immoral).

38. The Christian witness of Martin Luther King, Jr. is difficult for Christians to ignore as both political and economic. See, e.g., JAMES WM. MCCLENDON, JR., BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY 65-86 (1974) (surveying King's theology).

39. Wars and rumors of wars, as the stock in trade of American political leaders, depend, of course, on this readiness. See the reflections of James T. Burtchaell in Thomas L. Shaffer & John H. Robinson, *H. Jefferson Powell on the American Constitutional Tradition: A Conversation*, 72 NOTRE DAME L. REV. 11, 73 (1996) (describing how Catholic naval officers were determined by the Navy's leadership to be willing to fire nuclear weapons despite the Catholic Bishops' opposition to the use of nuclear weapons).

40. See 1 *Samuel* 8:1-22.

tion—the faithful have suspected the blandishments of the state. They have subverted the economic wisdom of the state and the arrangements established and protected by lethal legal authority, because the God of the Bible *prefers* those whom the state oppresses. This preference is apparent from the Exodus through St. John's apocalyptic dream in the last book of the Christian Bible. The God of the Bible, in the "enthronement Psalms," for example,⁴¹ is contrasted with the gods elevated in the liturgy of the state (consider ball players standing for "The Star Spangled Banner"). It could be that patriotism (American civil religion if you like) is idolatry. For example, the current political pressure to amend the Constitution would make the flag as much an idol as the little wooden doll Melville's Ishmael was worried about.⁴² The god who blesses America is not the God of Israel. And if modern American mainline Christianity in America often seems to worship the idol of patriotism, it seems, now and then, to remember that patriotism almost always disregards biblical justice.

III. DOES ALL OF THIS MAKE ANY DIFFERENCE?

These countercultural influences are pieces of the history of biblical Israel and of the church. The empirical question is whether Christians in America who are or who want to be lawyers are affected very much by *any* of them. The polling data suggest the answer is that *most* Christians (and that is *most* Americans and *most* American lawyers⁴³) are *affected* by radical expressions of Christian faith—"affected" as in "disturbed," at least a little bit. Maybe American Christians could possibly be interested in the question I try to express in the title to this comment.⁴⁴ They would (do) listen to homilies and sermons and lectures. They read essays (though not often in law reviews) that remind them of these radical understandings of what it means to follow Jesus. If a Christian lawyer were to submit to her Christian congregation one of the legal ethics questions Professor Simon uses in *The Practice of Justice*, my guess is that the congregation would take it up and

41. See BRUEGGEMANN, *supra* note 31, at 79-85, 104-19 (explaining that the liturgy of enthronement exalts as Israel's God a God who supports royal power, a God who, finally, is not the God of Israel at all, but is a pagan god).

42. See Linda Greenhouse, *Senators Hear a Pitch for a Flag-Burning Ban*, N.Y. TIMES, July 9, 1998, at A18.

43. See David Briggs, *Poll by secular humanists: Americans a religious bunch*, S. BEND TRIB., July 26, 1996, at D1; Peter A. Brown, *Americans tend to be different*, S. BEND TRIB. Apr. 9, 1995, at A16; Richard Morin, *Keeping the Faith: A survey shows the United States has the most churchgoing people in the developed world*, WASH. POST, Jan. 12, 1998, at 37.

44. The article from which I borrowed the epigraph for this essay is an attempt by a skilled and eloquent preacher to suggest how preachers might creep up on Christian congregations and disturb and affect them. See generally Brueggemann, *supra* note 1.

that somewhere in the give-and-take toward communal discernment,⁴⁵ one, two, or all three of these radical expressions of biblical justice would surface.

Whether modern American Christian lawyers are disturbed by the radical roots of their heritage is only an empirical question.⁴⁶ The moral question, which is harder and deeper, is how Christian lawyers, disturbed or not, whether disturbed often or seldom, come to terms with their radical heritage.

Consider another story from the clinic. We have scores of immigration clients. Many of these clients are "undocumented"; that is, they are illegally in the United States and are, therefore, subject to deportation. Some of them have been here for years and are good non citizens. Many have regular employment, pay taxes, seek medical care for their children wherever they can get it, and, for all I know, vote for Hoosier politicians. Virtually all of them would like to stay in this country, which means we lawyers are going to suggest to them that they try to get themselves "documented," so that they will not be rounded up at work or in the middle of the night and hustled onto an airplane bound for a foreign place.

Recent sessions of Congress have left few ways for an illegal immigrant to obtain such documentation. One such method is application through a relative who is a citizen. Our clients, on our advice, seek this form of documentation by filing forms with the Immigration and Naturalization Service (INS). They seek our help with the forms. A section of one of these forms, INS Form 1-130, asks a series of questions about the person seeking documentation. One of the questions in that section requests the name and address of the applicant's present employer. That question is a trap: The Immigration and Nationality Act says that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible"⁴⁷ Such an alien, once here, is subject to immediate deportation.⁴⁸ In other words, if our client, who has been working in our town for the last three years, fills in that blank, the petition is dead at the mailbox, and,

45. See YODER, *supra* note 13, at 15-45 (outlining the procedural rules of the Christian ethical reasoning in a chapter entitled "The Hermeneutics of Peoplehood: A Protestant Perspective").

46. Simon is inconsistent in his esteem for arguments supported by empirical research. He criticizes advocates of the "Dominant View" in American legal ethics for making unsupported assumptions. See pp. 23, 54, 76 (explaining that many arguments of the Dominant View depend on unsubstantiated behavioral assumptions). But he does a good bit of that himself. See pp. 54-55, 66, 98 (making assertions about attorney and client incentives without any empirical evidence). In the last example, he says, "People generally feel entitled to breach contracts and pay damages when it is cheaper to do so than to perform." P. 98. I doubt that. See Thomas L. Shaffer, *Justice in Everyday Life*, J. CURRENT SOC. ISSUES, Summer 1979, at 51 (noting that people are willing to pay extra in contracts for the sake of "mutual confidence and a peaceful community").

47. Immigration and Nationality Act 8 U.S.C. § 1182(a)(5)(A)(i) (Supp. 1997).

48. See 8 U.S.C. § 1227(a)(1)(B) (Supp. 1997) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States is deportable.").

for all my client is allowed to know, her obedient candor will provoke the INS to send agents to find her, arrest her, and deport her.⁴⁹

Suppose our client, aware of the trap because of our astute legal advice, writes in the word "none" in the blank asking for present employment, and suppose, despite grave threats on the back of the form, there is little chance that the INS will investigate and find out the truth about her employment. In other words, why not lie about it?⁵⁰ The INS is, after all, an arbitrary, unreviewable, disgusting bureaucracy.⁵¹ Only something like Professor Simon's reasoning could come up with the argument that the INS deserves cooperation or even candor from an honest person—or from her lawyer. And the immigration laws of the United States are, from the perspective of biblical justice, as immoral as Pharaoh demanding more bricks.⁵² If the question were put to the church, and I were present to participate in communal discernment of biblical justice in this situation, I might come to suggest an analogy between INS rules and the demand of the Roman state that Chris-

49. She can, if she wants, leave her children behind; they were born here and are citizens under the Constitution. See U.S. CONST. amend. XIV, § 1.

50. The "Dominant View" does not allow lawyers to lie, or, perhaps, to counsel lying in a situation such as this. I see no reason for the lawyer to lie; the form can be filled out by the client alone. I have heard of lawyers who, in this situation, provide a stamped envelope for the client to use to mail the form. See Thomas L. Shaffer, *On Lying for Clients*, 1 J. INST. FOR STUDY LEGAL ETHICS 155, 167 (1996).

51. See Calvin Trillin, *Making Adjustments*, NEW YORKER, May 28, 1984, at 50, 51 ("When people who deal regularly with the I.N.S. try to illustrate the depths of its inefficiency and obduracy, they often find themselves at a loss for American institutions to compare it with, and turn to foreign examples . . .").

52. It violates biblical justice as to those who are already legally here, because it sets this country up as a place only for them, apparently in order to secure prosperity for them, against threats posed by those who want to be here:

[T]he propaganda of the state promises the very thing it cannot give because it is in principle opposed to it . . . [I]t cannot secure personal vines and fig trees for its citizenry because it is fundamentally devoted to a rapacious use of those very products. It cannot give up that rapacious use without at the same time abandoning its pretense of being an inclusive system which can keep every promise.

Walter Brueggemann, "*Vine and Fig Tree*": *A Case Study in Imagination and Criticism*, 43 CATH. BIBLICAL Q. 188, 198 (1981); see also BRUEGGEMANN, *supra* note 4, at 741 ("The apparent defeat of Marxist ideology and the incredible concentration of power in the market economies of the United States and Japan have caused unbridled consumption . . . which must be defended by military means [for example, immigration policy]"); cf. Philip Gailey, *The South Has Risen Again, but Still Has Far to Go*, ST. PETERSBURG TIMES, June 28, 1998, at D3 (noting the continuing disparity in wealth in different areas and among different racial groups in the South). And it violates biblical justice as to those it excludes (and, through concomitant trade policies, exploits): "[T]he world is intended by God to be a community that covenants, that distributes its produce equally, that values all its members, and that brings the strong and the weak together in common work and common joy." WALTER BRUEGGEMANN, A SOCIAL READING OF THE OLD TESTAMENT: PROPHETIC APPROACHES TO ISRAEL'S COMMUNAL LIFE 50 (1994); see also Roy Branson, *Refugees*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS 528-31 (James F. Childress & John Macquarrie eds., 1986) (explaining the biblical theme that exiles and pilgrims are favored by God). Immigration law is also, of course, racist, a situation sometimes noticed in "critical race theory." See Anthony V. Alfieri, *Black and White*, 10 LA RAZA L.J. 561, 581 (1998).

tians in the early church worship the emperor. That would be a way for a modern American lawyer to think about her radical Christian heritage.⁵³

IV. THEOLOGICAL GUIDANCE (IN CASE ANY OF THIS MAKES A DIFFERENCE)

These are *theological* issues. One advantage of identifying an issue as theological is that you can find theologians who talk about it with learning, insight, and persuasion. The question under consideration just now is how American Christians (lawyers, if you like) come to terms with their radical biblical heritage, given my impression that they probably *do* try to come to terms with it in some way other than giving up the practice and going to a monastery, or joining the Catholic Worker movement, or becoming Anabaptists.

Here Professor Simon's "framing" device is helpful.⁵⁴ The answer(s) to how a Christian lawyer comes to terms with her radical heritage reveals or involves *theological* ways of framing the issue. One theological way to frame the issue is to make the frame American rather than Christian. Another way is to frame it as both American *and* Christian. And a third way is to frame the question as the radicals would have framed it (as I perhaps did in my "framing" of the immigration form question).

American instead of Christian. The modern term for this theological answer is "Christian realism."⁵⁵ It tends to pose hard ethical notions as choices between evils—that is, as a skill for choosing the lesser evil.⁵⁶ It is a matter of doing your best to get as close as you can to the moral (biblical) ideal, deciding the ideal is not reachable, reaching an American answer (of the sort Professor Simon proposes) instead, and forgiving yourself so you can get

53. See note 11 *supra*. I am a Roman Catholic, mindful of the pastor who once told a new assistant, "Never ask people to choose between their country and their church." Dennis Hamm, *Radical Obedience*, AMERICA, Apr. 18, 1998, at 31. I imagine my suggestion would get more going than I manage to get going in most of my law school classes. But then, as the late William Stringfellow said, for the church to have such a stake in America "has encouraged and countenanced stupid allegiance to political authority as if that were service to the church and, a fortiori, to God." A KEEPER OF THE WORD, *supra* note 10, at 259. Alasdair MacIntyre has suggested that "we inhabit a kind of polity whose moral order requires systematic incoherence in the form of public allegiance to mutually inconsistent sets of principles." Richard John Neuhaus, *Is Patriotism a Virtue?*, 4 RELIGION & SOC'Y REP., July 1987, at 1, 3.

54. See pp. 149-56.

55. See James F. Childress, *Realism*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS, at 527-28 (James F. Childress & John Macquarrie eds., 1986). The late Reinhold Niebuhr is the modern American Christian theologian most associated with these teachings. In my reading the most consistent and thorough of Niebuhr's critics was John Howard Yoder. See JOHN HOWARD YODER, POLITICS OF JESUS 13-16, 110-11 (1972) (criticizing Niebuhr's assumptions about Jesus' political relevance).

56. "As a pacifist might go to war" is a phrase I remember from Richard John Neuhaus. I think of Hollywood-style Anabaptists and Quakers (e.g., the movie *Friendly Persuasion*, showing a Quaker Gary Cooper with his rifle on his shoulder).

along. An example is the law's killing people as punishment for crime. I suspect, now that Christian leaders (most notably Roman Catholic leaders) have decided that capital punishment is immoral, we can expect to see Christian realism employed by Christian judges in capital punishment cases.⁵⁷

American and Christian. This was the solution of the Founding Fathers. It involves deciding that there is no need to decide between God and America, because America is God's new Israel, the city on the hill—that, despite whatever tradition and scripture suggest, American capitalist republicanism is the biblical way of life. (This kind of political and religious thinking is so common in American popular culture, particularly during wartime, and so familiar in what political leaders say, that I would rather rely on my reader's experience of it than cite scholars who manage to notice what is all around them.) This is, historically, the kind of thinking that led to the Constantinian church, to the Holy Roman Empire, and to the political theology that moved the Fathers of the Reformation to turn their reformed churches over to the government.⁵⁸

Following the Radicals. This theological solution requires being "sectarian," a citizen who is (by and large) willing to be and is still allowed to be a citizen,⁵⁹ but who is pushed aside by the prevailing culture, not noticed, and who is allowed to be different so long as she does not get in the way. This was once the situation of Anabaptists, Quakers, and Seventh Day Adventists. It is now the situation of virtually any group of believers who let their faith show outside the church building or during the week. The agenda for the church in that situation (which is not the situation of the mainline church in America) is a political agenda. The agenda is how to influence the economy, the politics, and the legal ethics of those who are not interested.⁶⁰

57. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998), will help them. I wish there were a way to know how many such judges will employ evasions such as came to mind in the INS case above—will, that is, decide silently that they will never pronounce a capital sentence and will then keep their office by not mentioning their decision to anyone else. Garvey and Coney call that cheating.

58. I think of how the late Alfred Kazin described the theology of a descendant of his sixteenth century Calvinist forbears, who turned the Church over to the government: "[T]he fundamentalism of that expert killer Gen. Thomas Jonathan Jackson—the immortal Stonewall—who in battle cried 'Kill them! Kill them!' but who was not sure it was proper to kill on the Sabbath." Sean Wilentz, *Bookend: He Heard America Singing*, N.Y. TIMES BOOK REV., July 19, 1998, at 31.

59. The late John Howard Yoder wrote social ethics in this mood most of his life. See Thomas Shaffer, *The Jurisprudence of John Howard Yoder*, 22 LEGAL STUD. F. 473, 478-79, 483-85 (1998) (describing Yoder's approach toward the role of Christians in a secular, political society).

60. Brueggemann notes:

[T]he intellectual-emotional-cultural situation of the seventeenth century, for complex reasons, has been completely reversed. Atheism is now a credible, perhaps a consensus option for what is serious in life, and the articulation of life-with-God has become a risky intellectual outpost, perhaps as difficult and as odd and as embarrassing as was atheism in the seventeenth century.

V. MEANWHILE, IN COUNTY SEAT LAW PRACTICE

To frame the question of how a Christian lawyer comes to terms with her radical heritage, even with Professor Simon's help, is not to resolve the "ethical dilemmas" we lawyers write about.⁶¹ Professor Simon presents a couple of tax advice cases that remind me of cases in our clinic; I conflate one of his⁶² with one of ours. Two elderly women come to us to help them reduce the federal income taxes of one of them, who helps support the other but who, in Simon's terms, "under principles accepted in the legal system,"⁶³ cannot claim an exemption for her as a dependent. They live in a modest building where they pay \$600 a month for their apartment. The working partner is a maid and cook for a prominent local tax lawyer. The tax lawyer has a comfortable and vacant apartment over her garage. She offers to let our clients live there for nothing, and without reducing the pay of the working partner. Employing the expertise she has as a tax advisor to business, she suggests to them that they could report this arrangement as "for the convenience of the employer,"⁶⁴ which would mean that the value of the apartment is either not taxable at all or taxable only in part.

Professor Simon, talking about his half of our conflated case, thinks that a just lawyer, pondering what would be "consistent with [the] statutory purpose"⁶⁵ here, and taking account of the fact that the Internal Revenue Service does not have time to review such arrangements, "should not proceed with a plan that would frustrate the [government's] purpose,"⁶⁶ and should advise against following the suggestion of the tax lawyer.

If I were present to hear those clients or their potential landlord "tell it to the church,"⁶⁷ and somebody argued for Simon's position, I hope I would listen carefully, but I might end up arguing the other way. If I really got wound up, I might even betray my reading of the radicalism of the primitive

See Brueggemann, *supra* note 1, at 196. Compare Robert B. Reich, *What Happened to the American Social Compact?*, 50 ME. L. REV. 1 (1998) (illustrating an entirely secular reading of what is the reversal discussed by Brueggemann, but is characterized as the unraveling of the social compact), with Peter Steinfels, *Beliefs*, N.Y. TIMES, July 11, 1998, at B16 (reviewing Professor Richard Rorty's book *ACHIEVING OUR COUNTRY* (1998), which asserts that atheism is more rational than religious world views).

61. I can't give answers here, because I don't know what they will be; meanwhile, I remain interested in processes.

62. See pp. 146-47.

63. P. 51.

64. See p. 146; see also 26 U.S.C. § 119(a) (1994) (explaining that meals and lodging furnished for the convenience of the employer shall be excluded from gross income).

65. P. 147.

66. *Id.*

67. As persons are advised to do in *Matthew* 18:15-17 ("If your brother commits a sin . . . report the matter to the congregation.").

church, along with a modern Marxian understanding that such things as income tax laws are made and managed for the benefit of the ruling class.⁶⁸

It might make a difference if I find, after devoting more time to them than, perhaps, the ideal Simonesque lawyer would, that these clients have a history with federal taxing authorities. They once “owned” a small house, which they were buying on land contract. The house was subject to a mortgage that had been incurred by their seller, who owed money to the federal government, which meant that the house was subject to a federal tax lien.⁶⁹ They were visited, a couple of years ago, by an arrogant revenue agent who told them they would have to move because the government was taking over their house. This was not a legal result—but how were my clients, faced by a representative of the government, to know that? They moved. They found out from us, when it was too late, that they could have resisted the order from the revenue agent and could have saved their house.⁷⁰ They cannot get the house back, but they have an opportunity to replicate what was taken away from them—and they have reason not to be fond of the Internal Revenue Service. This history might make a difference if the question of whether “purposes adopted by authoritative lawmakers”⁷¹ can be trumped by other moral considerations, including the experiences of these individuals with their government’s tax collectors. And it might make a difference if the experiences of my clients bear on what biblical justice is in this situation.

Point: It is the case here, as I think it was the case with the adoption and immigration cases, that biblical justice differs from Professor Simon’s notion of justice in the communal discernment of what biblical justice is. I can imagine radical economic Christians, such as Jose Porfirio Miranda⁷² and other “liberation theologians,” saying we should side with the tax lawyer. I also can imagine followers of the Radical Reformation saying we should side with Simon and the government, if only because we should leave no doubt of our obedience when the government is not asking us to kill somebody. Each of us in this discussion, as we, together, are definitional of membership in the discerning community,⁷³ attends to each such argument; each of us is open to changing her mind. (Even, I tell myself, when Professor Simon shows up to

68. In this context, the ruling class is made up not so much of wealthy taxpayers as of tax specialists and agents of the Internal Revenue Service. See RODES, *LAW AND LIBERATION*, *supra* note 30, at 20-21; RODES, *PILGRIM LAW*, *supra* note 30, at 34-36.

69. See 26 U.S.C. § 6321 (1994) (stating that if a person is liable to pay any tax, the amount shall be a lien in favor of the United States upon all property of that person).

70. See, e.g., 28 U.S.C. § 2410(a) (1994) (articulating a taxpayer’s right to challenge the procedures employed in imposing a federal tax lien on his property).

71. P. 145.

72. MIRANDA, *supra* note 9, at 187; cf. Richard W. Stevenson, *I.R.S. Report Cites Abuses in Seizures*, N.Y. TIMES, July 11, 1998, at A7 (noting “widespread overzealousness” in the IRS’s seizure of property).

73. See text accompanying note 45 *supra*.

argue for authoritative government.) What is important to communal discernment, after one assumes the presence of God in the discussion, is that everyone be allowed to speak, and that everybody else feel bound to pay attention.

CONCLUSION

A Christian lawyer may end up practicing justice as Professor Simon says she should. But she may not end up that way; and even when she does, she will get there along a different road. Simon's justice is cultural; biblical justice is countercultural. "[W]hoever would be a Christian must be a non-conformist," Dr. King said.⁷⁴ Simon's justice at its most demanding is an appeal to patriotism. Biblical justice tends to find patriotism idolatrous. Simon's justice is relentlessly individualistic. Biblical justice is communal, and, for a lawyer, community begins and ends in a relationship with her client. (It begins and ends there; I have been talking about how it works in the middle.)⁷⁵

Practitioners of biblical justice are not censorious. They are, in my observation, happy people. A homemade (or Sunday School made) banner on the wall of a classroom in the Episcopal Cathedral of St. James, South Bend, Indiana, expresses their ethics: "To be sharers of joy, hope, venerable lovers, servants of others, and nonconformists without worldly values."

74. THE WHOLE WORLD BOOK OF QUOTATIONS 39 (Kathryn Petras & Ross Petras eds., 1995).

[R]eligion retreats into its own corner. . . . Anyone who sees religion as determinative for secular activities is likely to be regarded as a fanatic. Teachers, businessmen, politicians or judges who let religion impinge in a major way on their professional activities are considered eccentric. . . .

....

. . . [T]o be orthodox in our society it is necessary to be countercultural

Avery Dulles, *Orthodoxy and Social Change*, AMERICA, June 20, 1998, at 8, 9.

75. Finally, Simon's justice, which disdains communal discernment, and, as I read him, all other forms of relational moral reasoning, comes necessarily to depend on the individual lawyer's reasoning to and from operative *principles*, and thus stands in need of Lord Peter Wimsey's (pre-World War II) warning:

[N]ow that you have the age of national self-realization, the age of colonial expansion, the age of the barbarian invasions and the age of the decline and fall, all jammed cheek by jowl in time and space, all armed alike with poison-gas and going through the outward motions of an advanced civilization, principles have become more dangerous than passions. It's getting uncommonly easy to kill people in large numbers, and the first thing a principle does—if it really is a principle—is to kill somebody.

DOROTHY L. SAYERS, GAUDY NIGHT 339 (1936).

