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LEGAL ETHICS AND JURISPRUDENCE FROM WITHIN RELIGIOUS CONGREGATIONS

*Thomas L. Shaffer**

Then Rabbi Elfezer said: "Even this carob tree can prove that the law must be construed in the way I have argued!"

And the carob tree uprooted itself and moved one hundred cubits away. Some even insist that it moved four hundred cubits away.

But the other Rabbis said: "A carob tree cannot serve as proof."

Rabbi Elfezer said: "If the law is to be construed in the way I have argued, then let the stream of water here prove it!"

And the stream of water began to flow backward.

But the other Rabbis said: "A stream of water cannot serve as proof."

Again, Rabbi Elfezer said: "If the law is to be construed in the way I have argued, then let the walls of this House of Study prove it!"

And the walls of the House of Study began to incline.

But Rabbi Joshua rebuked them and said: "What business is it of yours, you walls, if the scholars have a disagreement about a point of law!"

The walls did not, therefore, fall down completely—out of respect for Rabbi Joshua. But, out of respect for Rabbi Elfezer, they also did not straighten up completely again. They remained standing in an inclining position.

Rabbi Elfezer now cried out: "If the law is to be construed in the way I have argued, then let God Himself prove it!"

And, in fact, a Heavenly Voice was heard proclaiming: "What do you want from Rabbi Elfezer? Don't you know that in all matters of law the decision is in accordance with his opinion?"

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At that, Rabbi Joshua jumped to his feet and shouted: "It is not in the heavens!" (*Deuteronomy* 30:12).

What did he mean by that quotation from Deuteronomy?

Rabbi Jeremiah explained: "The Torah had already been revealed at Mount Sinai. We, therefore, need not be concerned with further Heavenly Voices. . . ."

Later, when Rabbi Nathan met the Prophet Elijah, he asked the Prophet: "What did the Holy One, praised be He, do at that hour?" Elijah replied: "He smiled and said: 'My children have prevailed against Me! My children have prevailed against Me!'"¹

INTRODUCTION

The Rabbis of the Talmud were a community for moral discernment—a community commissioned by God to interpret the Word of God. Their story is theology. Michael Scanlon, a modern Roman Catholic thinker, assumes such a theology and adds anthropology.

Moral theories and ethical rules have their place. But they do not make people moral. Morality finds its source and its nourishment in community. A community supplies an accumulated moral wisdom as its tradition expands to meet the ever-changing conditions of human life. People become moral through relationships, through cooperation in common projects, through the intersubjec-

1 OUR MASTERS TAUGHT: RABBINIC STORIES AND SAYINGS 43–44 (Jakob J. Petuchowski ed. & trans., 1982).

It is not in heaven, that thou shouldest say: "Who shall go up for us to heaven, and bring it unto us, and make us to hear it, that we may do it?" Neither is it beyond the sea, that thou shouldest say: "Who shall go over the sea for us, and bring it unto us, and make us to hear it, that we may do it?" But the word is very nigh unto thee, in thy mouth, and in thy heart, that thou mayest do it.

Deuteronomy 30:12–14 (Hertz trans.). A modern rabbi, Rabbi Jacob Chinitz of Montreal, summarizes the modern force of this: "Torah law, and . . . halachah allows for (even demands) change—not because the Torah is not divine, but because even a divine Torah is human." Jacob Chinitz, *Forum: Readers React*, MOMENT MAG., Feb. 2000, at 23–24; see also ROGER BROOKS, *THE SPIRIT OF THE TEN COMMANDMENTS: SHATTERING THE MYTH OF RABBINIC LEGALISM* 18–27 (1990); Rabbi Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 493–94. Rabbi Levine argues, however, in Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998), that communal thought in Judaism refers to and depends on rabbinical expertise. "[L]ike the Constitution, the Bible functions as an authoritative legal text that must be interpreted in order to serve as the foundation for a living community." *Id.* at 512. He applies this point to Maimonides, *id.* at 517, 525–26, and to Nachmanides, *id.* at 516–17, 520–22.

tive power of language, through experience brought to reflection, and through the example of others. People become moral when they are transformed by a moral tradition with its “dangerous memories” of love overcoming hatred, of justice prevailing over injustice, of peace avoiding conflict, and of care triumphing over indifference.²

The Rabbis assume and Scanlon describes a community for ethical discernment. It is a perception—somewhat empirical, somewhat theological—that is important and neglected for lawyers in academic jurisprudence and in religious legal ethics. My argument here is that what lawyers should do about “ethical dilemmas” in professional practice can be discerned in the sort of community the Talmud describes, and Scanlon describes, better than in “professional” committees that propound and interpret ethical rules.

For example, American lawyers oppress the poor—imposing or mediating racial oppression, related sexual oppression, and the growing gap between haves and have-nots in the economy of the United States. Complicity in injustice, by lawyers and by their prosperous clients, describes a “situation”³ lawyers might hope to meet truthfully in processes of communal discernment and in religious congregations—to meet their, in the light of what we Roman Catholics call the (scriptural) preferential option for the poor,⁴ ethical dimensions they are unlikely to meet in their “professional” relationships.

Such communal discernment might even correct what Rabbi Joshua sought to correct when he told even the Lord to back off, something every teacher of legal ethics notices—that our students, however sensitive and well meaning, are captives of an ethic that leaves each of them where Rabbi Elfezer was—morally alone; each of them as her own moral tyrant; each of them, from a perspective described by the modern history of morals, a captive of the Enlighten-

2 Michael J. Scanlon, *Christian Anthropology and Ethics*, in VISION AND VALUES: ETHICAL VIEWPOINTS IN THE CATHOLIC TRADITION 27, 50 (Judith A. Dwyer ed., 1999).

3 For a more detailed argument, see generally Thomas L. Shaffer, *Jews, Christians, Lawyers, and Money*, 25 VT. L. REV. (forthcoming 2001). See also Molly Ivins, *It Won't Change a Thing, But She'll Vote for Nader*, S. BEND TRIB., Oct. 29, 2000, at B8 (“Government matters most to people on the margins. If I may be blunt about this, we live in society where the effluent flows downhill. And the people on the bottom are drowning in it.”).

4 For further explanation and discussion, see ROBERT E. RODES, JR., PILGRIM LAW XV, 96–99, 102–11 (1998), and Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 NOTRE DAME L. REV. 737 (1998). See also David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 839 (1999) (finding that in-house corporate lawyers are “indistinguishable from corporate executives, or, more broadly, from clients,” rather than guardians of public norms).

ment's exaltation of abstract masculine reason. Our students are like their elders in the practicing profession; too often they find themselves working in what Walter Brueggemann calls "brutality rooted in autonomy."⁵ One result of their captivity is that American lawyers seem unable to locate a way to figure out what to do about living too well at the expense of those who do not live well enough.

I propose to add to Scanlon's anthropology something that is clear if implicit in the rabbinical story—an advertently theological and "sectarian" bias. I propose to focus, more narrowly than Scanlon does, on the local congregation of believers, Jewish and Christian, to suggest that the local church (and its Jewish congregational counterpart) is a privileged "moral tradition with . . . 'dangerous memories' of love overcoming hatred, justice prevailing over injustice . . . peace avoiding conflict" and "care triumphing over indifference."⁶ Gustavo Gutierrez, defending his *A Theology of Liberation*⁷ to a (relatively gen-

5 Walter Brueggemann, *The Role of Old Testament Theology in Old Testament Interpretation*, in *IN SEARCH OF TRUE WISDOM: ESSAYS IN OLD TESTAMENT INTERPRETATION IN HONOUR OF RONALD E. CLEMENTS* 70, 88 (Edward Ball ed., 1999). On the Enlightenment, see George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608 (1999) (analyzing rabbinical literature on equality and deciding that Kant represents a watered-down religious ethic of equality), and EUGENE MCCARRAHER, *CHRISTIAN CRITICS: RELIGION AND THE IMPASSE IN MODERN AMERICAN SOCIAL THOUGHT* 189 (2000).

American religious life increasingly reflects the most powerful centrifugal forces of late capitalist culture—the elevation of "personal choice" as the *summum bonum* of the good life, and the attendant dislodging of moral and religious symbols from historical traditions. Both liberal Protestantism and Roman Catholicism have been shaken and remade by these disintegrative forces. Liberal Protestantism lives in genteel spiritual poverty, a wheezing *rentier* entailed to a dilapidated estate and a dwindling historical capital. It shows, even sympathetic observers write, "many signs of tired blood—levels of orthodox belief are low, doubt and uncertainty in matters of faith common, knowledge of the Scriptures exceedingly low." At the same time, the condition of American Catholicism is only a little less critical. Beneath much of the post-Vatican II period's bland and reflective optimism about the "laity," one can discern a growing uneasiness about the capacity of that laity to undertake the social reconstruction to which they have been exhorted by papacy, hierarchy, and reformers. As one of the American Church's most astute observers has written, the post-Vatican II generation displays a "meager knowledge of Catholicism," speaks "an impoverished religious vocabulary," and knows little or nothing of papal encyclicals and pastoral letters on economics, racism, or nuclear weapons.

Id.

6 Scanlon, *supra* note 2, at 102.

7 GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION* (Caridad Inda & John Eagleson trans., 1988).

tle) panel of French theological academics, thus emphasized what I will call a congregation as fundamental to his influential liberation theology.

My concern was to bring out the point that the following of Jesus always supposes membership in the assembly, the *ecclesia*. The following is, of course, a personal, free decision on my part, but I cannot live it out except in a community. . . . We follow Jesus and become his disciples in a community. . . . [T]his not only does not diminish the personal element but even gives it its full meaning.⁸

One agenda for such an “ecclesiological” focus is suggested in a provocative proposal by Professor Sondra Ely Wheeler, who finished her recent study of the teachings of Jesus on wealth, a book she called *Wealth as Peril and Obligation*,⁹ with a set of admonitions based on St. Luke’s Gospel. The text she focuses on reports Jesus saying: “Sell your possessions and give alms; provide yourselves with purses that do not grow old, with a treasure in the heavens that does not fail, where no thief approaches and no moth destroys. For where your treasure is, there will your heart be also.”¹⁰

Wheeler directed her proposal to local congregations of believers in the mainline church. She offered nineteen questions aimed at provoking communal discernment of answers to moral issues involving money.¹¹ Five of her nineteen questions strike me as provocative for the lawyers in such communities, and perhaps useful to those who feel able to call Christian lawyers to account in the Church for what they do for themselves and for their clients.

1. “Could we *hear* a call that asked us to leave it all behind? How do we know?”¹²

2. “To what extent is the wealth of modern Christians the *product* of injustice in the form of coercive or exploitative practices in labor, management, or marketing?”¹³

3. “Can we defend the *work* we do in terms of its contribution to human good and its compatibility with Christian obligations to love and serve the neighbor?”¹⁴

8 GUSTAVO GUTIERREZ, *THE TRUTH SHALL MAKE YOU FREE* 49–50 (Matthew J. O’Connell trans., 1990).

9 SONDRA ELY WHEELER, *WEALTH AS PERIL AND OBLIGATION: THE NEW TESTAMENT ON POSSESSIONS* (1995).

10 *Id.* at 71–72 (quoting *Luke* 12:32–34).

11 *Id.* at 138–45.

12 *Id.* at 138 (emphasis added).

13 *Id.* at 140–41 (emphasis added).

14 *Id.* at 141 (emphasis added).

4. "Are we aware of the ways in which increasing numbers of possessions bind us more and more closely to a particular location, a particular set of tasks, a particular level of income—in short, to a particular *life*?"¹⁵

5. "How do contemporary Christians make use of the social *power* conferred by wealth? Are our economic resources used to give unfair access to, or privileged treatment within, the mechanisms of *law and government*? To *coerce* the behavior of others?"¹⁶

I focus here on these as questions about lawyers, because I argue that money is the principal moral problem lawyers in the United States have, and because lawyers could, if they wanted, be a major influence in the lives of the managers of business and government who control wealth in this country and, with their lawyers, are the principal agents of the oppression of the poor.

It is important in the present project to notice first, that these are questions about lawyers and those who are able, in the congregation, to call lawyers to account, and second, that Wheeler proposes them not for individual reasoning but for congregational deliberation. She offers them as bearing on communal discernment of answers to the economic moral questions Christians are invited by Scripture to have; and she chose *questions*, rather than rules or principles, because she envisions congregational discussion if not congregational resolution. The questions, she wrote,

are framed in the first person plural, as it is only thus, in the self-examination and self-criticism of a gathered community, that they can legitimately be appealed to as norms. . . . [M]oral reflection and moral re-formation about the status of possessions must take place in communities of discernment and mutual accountability. . . . [T]he courage to achieve honesty must be developed, and the right to expect it must be earned.¹⁷

Wheeler is an academic theologian. She trains Christian pastors. Her high regard for the usefulness and ability of communal moral discernment is unusual in her profession, as it is in mine. (It could be she comes to communal discernment because she has not been able to locate any other form of discernment, individual or collective, civil or ecclesial, that has not been corrupted in advance by our culture.) I suspect that few religious congregations in Christianity and Judaism would let such questions have a place on the agenda and that most members of modern American religious congregations would find the

15 *Id.* at 138 (emphasis added).

16 *Id.* at 141–43 (emphasis added).

17 *Id.* at 145.

discussion she suggests impertinent and intrusive. Most modern American believers hew, one at a time, to the principles of the well-known moral theologian, Ann Landers, agreeing with a writer, Anonymous Out East, who wrote "It is NEVER appropriate to ask: How much money do you make?"¹⁸

I think of an unusual sermon I heard when I was a boy in the Baptist church I grew up in. As I remember, the pastor discussed with us what kind of new car he should buy after the end of the war (World War II) made it possible for him to replace his old car. He—we, perhaps—decided on a new plain black Ford sedan. His question, and the one Ann Landers shuns, is among the questions Wheeler would have a discerning congregation ask of its members—of its lawyers. They are the questions a member of such a congregation would want to evade in preference to the relatively trivial issue of what the congregation should do with its money. "Seeking first God's kingdom," Wheeler says, calls into question "many of the assumptions of middle-class existence, including the fundamental assumption that there is such a thing as 'economic security' and that Christians are entitled to it."¹⁹

Wheeler does not neglect the systemic evils lawyers tend to defend. She asks:

Can we defend the work we do in terms of its contribution to human good and its compatibility with Christian obligations to love and serve the neighbor? . . . How do contemporary Christians make use of the social power conferred by wealth? Are our economic resources used to give unfair access to, or privileged treatment within, the mechanisms of law and government? To coerce the behavior of others?²⁰

But, even when the focus is systemic—political, jurisprudential—Wheeler recognizes that the communal discernment she proposes is unlikely to reach lawyers in a modern, mainline Christian congregation, if only because we (especially we lawyers) tend to adopt the social, political, and economic opinions of those we serve and associate with, especially the wealthy and powerful ones, the sort of association, St. James warned, that tends to corrupt decisions and "judges with evil thoughts."²¹

18 Ann Landers, *He Can't Reconnect After Failed Relationship*, S. BEND TRIB., Aug. 17, 2000, at C3 (agreeing with the writer's observation "It is NEVER appropriate to ask . . . [h]ow much did you pay for that?").

19 WHEELER, *supra* note 9, at 136.

20 *Id.* at 141.

21 *James 2:4* (Canadian Roman Catholic Lectionary).

Wheeler admits that the discussion she hopes to provoke will involve both facts and *feelings* about facts that believers would rather not admit, let alone admit in a meeting. Her purpose is "to guide the process of collective moral discernment in which Christians not only counsel one another but call one another to account,"²² recognizing that

the courage to achieve honesty must be developed, and the right to expect it must be earned. . . . [H]olding one another accountable to a moral tradition is hard work, requiring both humility and stubbornness, both patience and daring. To undertake it requires a high stake in the vitality and fidelity of the community's enactment of Christian faith.²³

She implies here that the activity she proposes is unchurchly, that the discussion she seeks will rest on an unlikely level of trust among people who meet in worship, meet to listen to a speaker, to sing together, to pray, but hardly ever meet, in church or synagogue or anywhere else, for ethical deliberation.

The elements of community the Rabbis assume, and Michael Scanlon identifies, in other words, are not likely to be evident in a modern congregation. They are a dim memory among believers, suggesting shtetls in Shalom Alichem's Eastern Europe, or the primitive church described in the Book of Acts, or the medieval monastery, or fugitive congregations of Anabaptists in early sixteenth-century Europe. That is not to say that Wheeler's sort of discussion cannot be found anywhere anymore. I will suggest here that it can be found in congregations that function around the edges of the mainline church. I have found it among law students in clinical ethics seminars²⁴ and once in a Presbyterian Sunday School.²⁵ Liberation theology found Wheeler's sort of discussion when its academic theologians learned to listen to young believers from the lower classes in France and Latin America. My son Mike, who is a trial lawyer in Tacoma, found it in a chat room on the Internet, when half a dozen trial lawyers pondered together the suggestion from one of their clients that St. Paul directed Christians not to bring tort suits in the civil courts. (At one point, one of these lawyers surveyed the Bible, Torah to First Corinthians, and concluded, "Interested in what others think.") I find it when my

22 WHEELER, *supra* note 9, at 144.

23 *Id.* at 145.

24 See Thomas L. Shaffer, *On Teaching Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 606-09 (1996); Thomas L. Shaffer, *On Teaching Legal Ethics with Stories About Clients*, 39 WM. & MARY L. REV. 421, 434-37 (1998).

25 See Thomas L. Shaffer, *The Christian Lawyer—An Oxymoron?*, AMERICA, Nov. 23, 1996, at 12.

friend and teacher, Professor Robert E. Rodes, Jr., invites lawyers to ponder the fact that they are oppressors of the poor.²⁶ And I wonder why conversations such as these rarely occur at the times and in the places believers gather for worship.

I propose to take Wheeler's proposal seriously and to suggest instances of congregational life that are more promising for effective, serious discussions of social and economic theology, personal and systemic—of jurisprudence and legal ethics—and that, in being serious, consider themselves entitled to the provisional infallibility claimed by the Rabbis of the Mishnah, and the first leaders of the Church—the Rabbis pondering the moral lives of Jews as they became aliens or early Christians reconciling the daily demands of observant Jewish life with the suffering of their Gentile converts. In Christian discernment, “It has seemed good to the Holy Spirit and to us”²⁷ In rabbinical discernment the voice of God says that it is up to God's people to determine what Torah requires: “It is not in the heavens.”²⁸

I. THE PRIMORDIAL COMMUNITY

The primordial model of the people of God as a discerning community rests on Jewish and Christian readings of the story of Creation in the Book of Genesis and of the story of liberation in the Book of Exodus.²⁹ The Lord God created and then rescued a particular community, trusted it to be a priestly people for the benefit of all humankind, directed that it be and continue to be a people apart, empowered it to determine in its deliberations what the moral life

26 See ROBERT E. RODES, JR., *LAW AND LIBERATION* 20, 214 (1986).

27 *Acts* 15:28.

28 *Deuteronomy* 30:12.

29 For development of this proposition, see MILNER S. BALL, *CALLED BY STORIES* 104 (2000), and Milner S. Ball, *Just Stories*, 12 *CARDOZO STUD. L. & LITERATURE* 37, 51 (2000). Professor Ball argues, from Jewish and Christian sources, that the communities that result from initiation rites in each tradition are “world[s] of covenant, of commitment to (and with) others with no place for individualism,” so that “[t]o each his own” is a wholly inadequate understanding of a body whose members live in “a covenantal rather than a legal relation.” *Id.* at 51 (quoting NANCY DUFF, *HUMANIZATION AND THE POLITICS OF GOD* 181 (1992)); see MICHAEL WALZER, *EXODUS AND REVOLUTION* 102–07 (1985); Walter Brueggemann, *Faith at the Nullpunkt*, in *THE END OF THE WORLD AND THE ENDS OF GOD: SCIENCE AND THEOLOGY ON ESCHATOLOGY* 143, 143–54 (John Polkingthorne & Michel Welker eds., 2000); see also STANLEY J. GRENZ, *THEOLOGY FOR THE COMMUNITY OF GOD*, at ix–x (2000) (“God’s central program for creation . . . [was] the establishment of [a] new community of reconciliation, fellowship, and harmony . . . a human community, . . . rather than . . . isolated individuals.”).

required for it and for each person who was a member of it, and, finally, named it a moral teacher for anyone who was not a member.

For this will show your wisdom and discernment to other peoples, who, when they hear all these statutes, will say, "Surely this great nation is a wise and discerning people!" For what other great nation has a god so near to it, as the Lord our God is whenever we call to him?³⁰

This is to say, with particular reference to ethical discernment, that the God of Jews and Christians has a unique way of dealing with evil and that the people of God—created to be unique and separate and priestly—have a unique way of figuring out what evil is. Or, to put that still another way, that this God has a unique way of self-revelation.³¹ I notice several implications of this scriptural account of this discerning people.

A. *It Is an Alien and Unsettled Community*

It is an alien and unsettled community. It has an odd distaste, for example, for representing its God in images. This has the ethical effect of removing God's people from the company of those who trade in images, in silver and gold, as the community removes itself from idolatry, from "the safe, privileged world of religious image"³² (and

30 *Deuteronomy* 4:6–7.

31 These observations are expanded in John R. Donahue, *A Life Unfolds*, AMERICA, Jan. 15–22, 2000, at 30 (providing a reflection on the Gospel of Mark). RAYMOND E. BROWN, S.S., AN INTRODUCTION TO THE NEW TESTAMENT (1997), suggests that (i) the canon in Christian scripture—what's in and what's out—is the product of discernment, much of it local, *id.* at 10–12, and that (ii) such decisions were theological, rather than historical (that is, not based on evidence of authenticity), *id.* at 10–12. For example, the *Gospel of Peter*, in use in the congregation at Rhossus, was forbidden by Serapion, Bishop of Antioch, circa 190 C.E., because it was being used by docetic heretics. *See id.* at 10–11. This "without any debate as to whether or not it came from Peter." *Id.* at 10. For a second example, the *Book of Revelation* was not favored by the Eastern Church, nor *Hebrews* by the Western Church. *Hebrews* was not used in the West until the fourth and fifth centuries. *Id.* Theological arguments over the *Letter of James* and *Mark* 16:9–20 were not resolved by Roman Catholics until the Council of Trent. *See id.* at 52–53. And people still argue about the *Gospel of Peter*. *See id.* at 769–70.

32 WALTER BRUEGGEMANN, OLD TESTAMENT THEOLOGY: ESSAYS ON STRUCTURE, THEME, AND TEXT 123 (Patrick E. Miller ed., 1992). Jews thus pray regularly: "It is our duty to praise the Master of all, to exalt the Creator of the universe, who has not made us like the nations of the world and has not placed us like the families of the earth; who has not designed our destiny to be like theirs, nor our lot like that of all their multitude." DAILY PRAYER BOOK 136 (Philip Birnbaum trans., 1977); *cf.* FREDERICK M. DENNY, ISLAM AND THE MUSLIM COMMUNITY 11, 67 (1987) (stating that the *umma* is the community; its consensus is infallible; it, as a community of faith, "is sustained and its

maybe, if one wanted to raise a point for discussion in one of Wheeler's discerning congregations, this has the effect of the community being excluded from the country club).

For another example, its being alien and unsettled comes from its being a community created in resistance, resistance evident in its history (slavery in Egypt, a rural and unruly tribe in Canaan, objects of persecution in the Roman Empire). This primordial priestly people was created to keep itself intact to "resist[] fragmentation, compartmentalization, and, therefore, repression."³³ Its legal precepts, and the legal precepts imposed on it, "have meaning only against the backdrop of the community's historical narrative."³⁴ It is intended—directed—to practice a just social order and in doing so to show other peoples what a just social order looks like. Its perception of what justice is is precisely religious. "God is not simply a religious concept but a mode of social power and social organization."³⁵

Michael Walzer, in this mood, took issue, in the mid-90s, with the tendency among modern American Jews to practice pressure-group politics. "[A] narrowly-focused understanding of Jewish needs may leave us well-off but with no sense of who we are or why those first-person-plural pronouns, we and us, will have a resonance for Jews beyond the world of interest."³⁶ He said, "we are clearly not succeeding in creating cadres of specifically Jewish activists, significant numbers of committed people with some real understanding of the Jewish sources of their commitment."³⁷ His corrective was that these "committed people" ponder the Ethics of the Fathers in the Mishnah (for example, "do not keep aloof from the community").³⁸ These committed people, not separated from their communities, "would fashion,"

peculiar identity secured by the Quran [sic] and Sunna as they are incorporated through intimate and indelible processes of personality formation and imprinting and habits of the mind, body, and heart").

33 BRUEGGEMANN, *supra* note 32, at 126.

34 *Id.*

35 *Id.* at 128; see also Peter Burns, S.J., *The Problem of Socialism in Liberation Theology*, 53 THEOLOGICAL STUD. 493, 498–99 (1992) (arguing that the Bible does not teach theology but teaches instead "the real-life liberation of the poor and oppressed"); Donahue, *supra* note 31, at 31 (asserting that God expects the Church to be prophetic and "a community of disciples," quoting John Paul II, as it is expected to understand that the God of Jews and Christians has a unique way of dealing with evil and a unique way to have the People of God figure out what evil is, as well as a unique way of revealing Himself).

36 Michael Walzer, *Toward a New Realization of Jewishness*, CONG. MONTHLY, June–Aug. 1994, at 3, 3.

37 *Id.*

38 See DAILY PRAYER BOOK, *supra* note 32, at 478, 486.

he said, "over time, and in the course of many lively debates, a kind of speculative and critical Halacha: a Jewish understanding, internally pluralist and always disputed, of distributive justice, democratic politics, war and peace, and anything else that we need to think about."³⁹

Walter Brueggemann, reflecting on his "Old Testament theology," talks thus of Israel's "shared kinship, to see what is recurring midst the vagaries of testimony."⁴⁰ He said:

Ancient Israel in the Hebrew Bible . . . is capable of thinking theologically about the future of the world and about the future destiny of individual persons. . . . Its preferred and most characteristic mode of thought, however, is done through critical theological reflection about the community of Israel itself, its situation in the world, its position vis-a-vis God . . . its future amid the vagaries of history.⁴¹

Brueggemann,⁴² Stanley Hauerwas, and William H. Willimon⁴³ (all three of whom train preachers) speak of the modern Christian congregation as a community of exiles. These exiles, or resident aliens, in modern America are (in metaphor) like Moses in the desert: homeless, displaced, deported, outsiders, orphaned, and rootless. They experience (they should expect to experience) strangeness, and ponder their strangeness as they decide what to do and what to be. In one modern sense, they are invited to experience rootlessness, because old forms of civil and religious comfort are no longer available to them. "[F]ailed hopes, anger, wistful sadness, and helplessness permeate our sense of self, sense of community, and sense of future."⁴⁴

"Christians," he said, "only need to act and speak out of any serious conviction concerning the public claims of the gospel, and it be-

39 Walzer, *supra* note 36, at 5.

40 Brueggemann, *supra* note 5, at 78.

41 *Id.*

42 See generally WALTER BRUEGGEMANN, *CADENCES OF HOME: PREACHING AMONG EXILES* (1997) (characterizing Christians as a community exiled from dominant society).

43 See generally STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* (1989) (characterizing Christians as a community of non-conformists).

44 BRUEGGEMANN, *supra* note 42, at 3; cf. *PRAYING WITH THE JEWISH TRADITION* 87 (Elias Kopciowski ed., Paula Clifford trans., 1997).

Several times during the [Day of Atonement] a confession is read together which lists practically every sin, including the most serious, because the whole community is also responsible for the sin of the individual, in that, if they had intervened with moral or material help at the right time, the sinner would probably have been saved in time.

Id.

comes promptly evident that we are outsiders to the flow of power."⁴⁵ The Church—and here, I think, he means the discerning congregation brought to reflection by preaching that reminds it of its situation—needs to be “liberated’ . . . to assert that hard-core, prerational buoyance”⁴⁶ one finds (he finds) in reflection on the situation of biblical Israel. He mentions Esther, “able to outflank established power,” and Daniel, “able to exercise authority in the empire precisely because he maintained a sense of self rooted quite outside the empire,” both resident aliens.⁴⁷

B. *A Disturbed and Disturbing Community*

It follows that this discerning community would be, as biblical Israel was, *disturbed as well as disturbing*. Take, for example, the venerable jurisprudential and ethical proposition that a lawyer should obey the law and advise her clients to obey the law. Professor Milner S. Ball, in his recent, powerful book *Called by Stories*, suggests that such an admonition, from the perspective of believers, makes sense only when law expresses love of neighbor.⁴⁸ Which would mean, I think, that *lég*al advice to the powerful makes moral sense only when it expresses love of neighbor. (If I were in one of Wheeler’s groups, I might ask the Church to figure out whether and when I should obey or disobey or evade the American legal profession’s rule forbidding me to give money or other material assistance to my clients.⁴⁹)

Ball steps back from such specific suggestions on the law to notice that the life of a priestly people takes place in a particular, unique “environment of liberation,”⁵⁰ so that moral *acts* consequent on moral *rules* are less important for reflection in the community than the sense that God is present in the community (which is what Ball calls its environment). Biblical Israel is reminded of this presence by its prophets, whose appeal is to the memory and collective responsibility of the community. The ideal is an ideal for biblical Israel’s internal political life (what Walter Brueggemann calls its “Mosaic trajectory”⁵¹) as well as a priestly witness to other peoples (that is, in the modern United States, to the civil community).

45 BRUEGGEMANN, *supra* note 42, at 2.

46 *Id.* at 3.

47 *Id.* at 11.

48 BALL, *supra* note 29, at 253 n.14.

49 See MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (1999).

50 BALL, *supra* note 29, at 36.

51 WALTER BRUEGGEMANN, ISRAEL’S PRAISE: DONOLOGY AGAINST IDOLATRY AND IDEOLOGY 150 (1988). The “Mosaic trajectory” is a theme that runs through much of Brueggemann’s work.

C. *A Political Community*

The life of this discerning community is *political*. It has, as Walzer said to modern American Jews, a *political agenda*. It will not heed those modern American law teachers and political scientists who tell us that to use religious argument in public—that is, in politics, in jurisprudence, in legal ethics—is immoral. The political agenda will be, as Walzer argues, fashioned in the discerning community;⁵² it may sometimes be like a labor union endorsing a candidate—it will be no less political than that—but, if so, endorsement will be the product of discernment within the community, as it was when Israel, enslaved in Egypt, decided to follow Moses and, later, wandering in the desert, reluctantly decided to stay with him. “The old slogan, ‘God acts in history,’ surely means that the community of faith characteristically attests to what it knows in and through the givenness of its own lived life, for hope from anywhere else is only of second-range importance.”⁵³

The primordial discerning community, as Michael Lerner forcefully suggests, resists the demand that the “spiritual” in its identity be separated from the political—so that, in retaining the identity of the spiritual and the political, what it argues over and determines will be no less political (no less jurisprudential or ethical) than the pressure-group politics Walzer criticized.⁵⁴ Politics, in the ordinary, modern American sense, is

potentially a vehicle through which we get back to the fundamental unity of our spiritual and ethical being. . . . Moses is not the first person to recognize spiritual reality. But he is one of the first to hear a voice from the fire of God’s passion that requires us to struggle against existing systems of oppression.⁵⁵

It applies to lawyers. As Robert E. Rodes, Jr. put it in his *Law and Liberation*:

[W]e cannot work in cooperation with God’s purposes, cannot work for the coming of God’s kingdom, if our work is appropriated and trivialized by the economic and social order. . . . It follows that liberation—the freeing of the worker from . . . alienation through reforming or dismantling the economic and social structures that bring it about—is itself a major work of cooperation in the coming of God’s kingdom.⁵⁶

⁵² See Walzer, *supra* note 36, at 3.

⁵³ Brueggemann, *supra* note 29, at 150.

⁵⁴ See MICHAEL LERNER, *JEWISH RENEWAL: A PATH TO HEALING AND TRANSFORMATION* 63–65 (1994).

⁵⁵ *Id.*

⁵⁶ RODES, *supra* note 26, at 2–3.

This is religious politics: It trembles before God.⁵⁷ It demands, in the civil society, that individuals in the civil society—including its own members—recognize both their spirituality *and* their priestly mission to liberate the oppressed. This recognition is integral to being what it is, because the way the discerning community lives out its politics is to remain unique, separate, apart, *and* communal:

[D]on't expect many *individuals* to be able to sustain a spiritual life at a higher level of development than the rest of society, because the only way a person can do so is to *separate* from the rest, turn his or her back on the pain and suffering of others. The kind of spirituality that is thereby achieved is a false or deeply flawed spirituality because it is arbitrarily and hurtfully separated from the kind of ethical awareness and connection to others that the truth of our being demands.⁵⁸

D. *Gifted with Enduring Certainty*

Finally, this primordial discerning community is gifted with enduring certainty. Its determinations claim divine sanction because God is present in it. (I avoid "infallible," although that is part of what I mean, because I understand the determinations of the discerning community to be provisional and circumstantial, as all of politics and most of jurisprudence and ethics are bound to be.) The primordial community is biblical Israel, always stumbling, always redeemed, because of

the wounded but undefeated, affronted but not alienated, shamed but not negated resolve of [the Lord] to have a people—this people, this same people, this deported people—as [the Lord's] own people in the world. [The Lord] will not be 'Israel-less' in the world. . . . And therefore, it is clear in the canonical text of Jews and Christians, there will be a new Israel, Israel again, Israel reloved, healed, ransomed, blessed, brought home, rejoicing—by no claim of its own but by the nonnegotiable resolve (not yet known in the act of relinquishment)—of [the Lord] to have Israel.⁵⁹

II. THE MODEL REVIVED

No doubt the Church in the Middle Ages and Judaism in diaspora practiced congregational discernment and even resistance to oppressive power as the more prominent devices of western religious

57 See LERNER, *supra* note 54, at 64–75.

58 *Id.* at 65 (emphasis added).

59 Brueggemann, *supra* note 29, at 146.

teaching became the business of academic thinkers, of theologians, of rabbinical expertise, and—particularly for Catholic Christians—as religious teaching became more authoritarian.⁶⁰ It is, though, fundamental to accounting for the Protestant Reformation that it, for a brief moment, separated itself from academic and hierarchical ways of deciding what believers ought to do. There is a case to be made for the proposition that the Reformation revived, for a moment, the primordial community of moral discernment.

The Reformers were diverse, certainly, with diverse claims about the primitive church and about a medieval church that had in their view gone wrong. But it is safe to say that, whatever their disagreements, they agreed that “our moral reasoning cannot proceed unself-critically. We can never simply stand on the shoulders of an unquestioned consensus from the past. . . . Any reservation of the responsibility for moral discernment to a specialist must be challenged,” as the late Professor John Howard Yoder put it, “especially if that specialist is understood to hold authority partly because he is one of a category of persons separated from the life-situations of people making moral choices.”⁶¹ This, from the early Reformation’s point of view, is particularly the case when the person claiming authority “is independent of the local body of believers in which it is exercised.”⁶²

In the early 1520s, Martin Luther and Huldrych Zwingli both claimed autonomy—“dialogical liberty”—for each local congregation of Christians.⁶³ John Calvin would do so, for a while, in his own way, later.⁶⁴ As it turned out, of course, this claim of communal autonomy was short-lived, particularly when it meant separation from local government. The mainline Reformation—led by those the Anabaptists came to call “magisterial reformers”—proved generally ineffective at

60 This development is nowhere better illustrated than in Judge Noonan’s magnificent history of Scholastic (that is, largely but not entirely academic) thought on the morals of usury, JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957), an account that stretches from the thirteenth-century view that earning money on money was immoral, *id.* at 49, to the late nineteenth-century’s “revised theory [that] approved all the basic financial mechanisms of a capitalistic society,” *id.* at 408. His work on the morals of bribery is similar. See generally JOHN T. NOONAN, JR., *BRIBES* (1984). For a more American point of view, see his history of religious freedom, JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998).

61 JOHN HOWARD YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* 16–17 (1984).

62 *Id.*

63 See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 105 (1993).

64 See *id.*

keeping "reformation on moral matters . . . within the continuing control and responsibility of ecclesiastically committed Christians."⁶⁵

From a modern point of view, durable revival of congregational discernment in the Reformation seems to have been limited to the radical reformers, many of them early dissenters from Zwingli, in Zurich. I refer here to those who came to be called "Anabaptists," called such because they limited initiation into the Christian community to adults and resisted both the practice and the theory that infant baptism turned a baby into a Christian in the cradle (and, by the way, enrolled a baby in the civil order of Christendom).⁶⁶ The political, ethical, and jurisprudential implications of this "believers church" rested on a theology that said, "God speaks where his people gather and are free to be led"⁶⁷ and that located in scripture certain methods for conducting ethical deliberation. "The marks of the validity of the conclusions they reach are to be sought not alone in the principles applied but in the procedure of the meeting."⁶⁸ This *procedure* did not seek and in fact resisted legal review of the moral conclusions of the congregation. These early "free-church" congregations claimed scriptural authority and precedent in an appeal to the processes of discernment of the New Testament Church, rather than in appeals to government or ecclesiastical hierarchy.

Yoder identified three critical procedural questions to test the ethical conclusions of the local congregation: "Were all free to speak? Was every speech heard and weighed? Did the prophets grant their need to undergo interpretation?"⁶⁹ If so, the congregation could claim the promises of God, both for what it decided collectively and

65 YODER, *supra* note 61, at 23.

66 For a more thorough review of this history, see Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 *FORDHAM L. REV.* 1089, 1090-95 (1998).

67 YODER, *supra* note 61, at 22.

68 *Id.* at 22-23.

69 *Id.* at 23. One might apply to this third test, on prophets—or perhaps to another of Yoder's categories of special ministry in the congregation—what Rodes said, in *Pilgrim Law*, about the particular situation of lawyers.

It is true enough that if we are to serve the poor we must learn from them.

We must try to see their situation as they experience it rather than filtering it through extraneous categories of our own. Even so, we cannot forget that our service to them depends on our deployment of skills that they do not have. It may be difficult to teach lawyers about the condition of the poor, but it is easier than to teach poor people law.

RODES, *supra* note 4, at xiv. I can concede that, I think, but then want to ask whether what lawyers say about law and the practice of law is open to interpretation in the congregation and particularly whether what lawyers say about the law is open to interpretation by the poor.

for what each of its members did in accordance with its decision. "The moral validity of a choice one makes is connected to the freedom with which one has first of all made the choice to confess oneself a disciple of Jesus and to commit oneself to hearing the counsel of one's fellow disciples."⁷⁰ And that was in the sixteenth century and since—as it was in Rabbi Joshua's assembly—unique: "Most guides to practical moral reasoning do not have the nerve to claim that the discernment reached will stand ratified in heaven."⁷¹

The key to the authority of the congregation over the individual was the fact that the individual made a free, adult, continuing choice to be in the congregation. That free choice was the way the congregation protected civil liberty and affirmed human dignity; it was also the philosophical and empirical, meta-ethical source of the congregation's competence. "Voluntary commitment to a community distinct from the total society provides resources for practical moral reasoning of a kind which are by definition unthinkable where that option is not offered and where the only way to be an individual is to rebel."⁷² (In this way—which is also a matter of *politics*—the free church of the Radical Reformation is a neglected prototype for the voluntary associations of modern communitarian legal theory.)

Congregational moral determination—what Yoder called "a communal instrument of moral reasoning"⁷³—was not, in the modern sense, a "sectarian" ethic. These congregations were, in the modern sense, political and jurisprudential, willing to consider what the civil community through its legal institutions should do and what the civil community should be like. Part of their civic willingness was, as the politics of the radical tradition led to the lives of political figures such as William Penn and George Fox, a matter of showing the civil community how it could be Christian and at the same time egalitarian and protective of civil liberty. Part of it was deciding, in the revived community of discernment, what its own congregational politics should be.

As they developed in Europe, these congregations were cruelly persecuted by both Roman Catholic and Protestant princes; most of the early Anabaptists were killed and most of the survivors of persecution fled to enclaves.⁷⁴ Their separation from civil society was—as I read the history of the matter, and as Yoder did—the result more of

⁷⁰ YODER, *supra* note 61, at 25.

⁷¹ *Id.* at 27.

⁷² *Id.* at 25.

⁷³ *Id.* at 40.

⁷⁴ *See id.* at 130–34.

persecution than of a "sectarian" theology that led the congregations to withdraw from their neighbors and from situations in which civic responsibility was possible. My suggestion here is that the revived communities of moral discernment suggested by the Radical Reformation, and, no doubt, reflected in communities, here and there, in the modern mainline church and in local Jewish communities, are competent to decide matters of professional ethics—and, from the perspective of faith, have a competence that "professional organizations" do not have.

Care for the oppressed is a lingering, persistent perspective for this religious, procedural ethic. To revive the community of moral discourse as the church, which is what the Radical Reformation did, was also to revive the Exodus. Among Jews, who have had their own reformations, this would be perhaps a revival of the deliberations of the ancient synagogue, where "[c]are for the poor was as important . . . as reading and discussing the scriptures In such a setting, someone with something to say could say it."⁷⁵ This ancient Jewish model was the pattern for early congregations of Jewish Christians and was therefore the pattern for the New Testament Church.

Jews might cause Christians to reflect on the priestly vocation of the primordial Exodus community. In that community, as Michael Walzer argued in his influential *Exodus and Revolution*,

The door of hope opens on a larger vision, not simply of more and more of whatever good things are available but of enough for everyone. Then everyone will be secure in his possessions and there won't be any tyrants in the land. "They shall sit every man under his vine and under his fig tree; and none shall make them afraid."⁷⁶

Among Christians who claim to have inherited the priestly vocation of Israel, the focus of the congregation's deliberation in professional ethics will almost always be, I think, "what Paul and the rest of us desire to do but have difficulty enacting. It is living for other people at the expense of our own selves. It is Christ resurrected."⁷⁷ This faith "causes us to look . . . to the church for the embodiment of a hope that is much more than the historical optimism of a therapeutic

⁷⁵ Edmund Flood, *New Light on Roots of So Accessible Jesus: Joseph's Job Site, Jewish Meals Played a Part*, NAT'L CATH. REP., Dec. 19, 1997, at 3–4; see also Shmuel Noah Eisenstadt, *Sectarianism and Heterodoxy in Jewish History: Some Comparative Civilization Notes*, 37 JEWISH STUD. 7, 19–20 (1997) (discussing Jewish social and institutional arrangements during the first two centuries after the destruction of the Second Temple).

⁷⁶ WALZER, *supra* note 29, at 107 (quoting *Micah* 4:4).

⁷⁷ Keith G. Meador & Shaun C. Henson, *Growing Old in a Therapeutic Culture*, 57 THEOLOGY TODAY 185, 193 (2000).

culture.”⁷⁸ It might cause us to look to the Church for what might finally, fairly, be called revolution and for what several modern Christian theologians (Karl Rahner, Dorothee Sölle, Martin Luther King, Jr.) spoke of as a bottom-up view of what the Church is.⁷⁹

III. THE COMMUNITY DISCOVERED

The Roman Catholic Bishop Samuel Ruiz Garcia came to Chiapas in 1960.⁸⁰ Christians had been there for four hundred years.⁸¹ The diocese’s first bishop was Bartholme de Las Casas, who took office in 1543.⁸² The people Bishop Ruiz came to—400,000 of them—were in a thousand local communities.⁸³ In the fourteen years that followed his arrival, Bishop Ruiz came gradually to think of these people not as his subjects but as his teachers, teaching in and from discerning communities that had figured out how to hope for “the end of ecclesiastical imperialism in Latin America.”⁸⁴ Bishop Ruiz *discovered* the Church in Chiapas.⁸⁵ (I thought when I read about him of the legal-aid lawyer Paul Tremblay, of Boston College, who has written of the clients he serves as communities that are there for lawyers to *discover* and then to serve.⁸⁶)

In Chiapas, Bishop Ruiz assembled what he called a “congress of the indigenous” in 1974; the avowed purpose of the congress was so that the people could teach him about the Church, about their congregations.⁸⁷ The process resembled, perhaps, consultation with other “basic ecclesiastical communities” in Latin America.⁸⁸ In either situation, “the poor are increasingly making these communities reveal

78 *Id.*

79 See KARL RAHNER, *THE CHURCH AFTER THE COUNCIL* 44–51 (1966); DOROTHEE SÖLLE, *THE TRUTH IS CONCRETE* 101–09 (Dinah Livingstone trans., 1969); Martin Luther King, Jr., *The Answer to a Perplexing Question*, in *THE TWENTIETH CENTURY PULPIT* 115, 118–20 (1978).

80 Gary MacEoin, ‘*Seeds of the Word*’ in *Chiapas*, *NAT’L CATH. REP.*, Feb. 18, 2000, at 10, 10.

81 *See id.*

82 *See id.*

83 *See id.*

84 *Id.*

85 *Id.* The Bishop told Mr. MacEoin that the people who first came to his Congress of the Indigenous in 1974 led him to begin to envision “the end of ecclesiastical imperialism in Latin America, Africa, and Asia.” *Id.*

86 See Paul R. Tremblay, *Acting ‘A Very Moral Type of God’: Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2477–78 (1999).

87 MacEoin, *supra* note 80, at 10.

88 *Id.*

the presence in the church of the 'nobodies' of history,"⁸⁹ as Gustavo Gutierrez writes, noting, from his own situation as a pastor in Peru, that the rise of basic ecclesial communities is one expression of this phenomenon. Both resemble the visits of Bishop Remy DeRoo, in the Diocese of Victoria, in British Columbia, as he went from village to village on Vancouver Island, and there learned how to be the shepherd of congregations of what the Canadians call "first peoples."⁹⁰ Bishop Ruiz, reflecting on such a process and on the changes in the Church in Chiapas that followed it, said that what was happening was "shaking the foundations of an unjust society and a colonial church."⁹¹ He has ever since been in trouble with higher authority in the Roman Catholic Church and with the Mexican government.⁹²

Such experiences lend themselves to theological generalization. Thus, Father J. Robert Hilbert, who was a pastor on Indian reservations in Canada for seventeen years, and who then worked with the poor in Belize, writes that a theology such as the "preferential option for the poor" of modern Roman Catholic social thought needs to begin with an understanding of the people for whom the option might be exercised.⁹³ Discovery first, then pastoral theology; that is what happened in Peru and Victoria and in the base communities of Liberation Theology. "Decision and leadership in the U.S. church does not very much proceed from that social underside,"⁹⁴ Hilbert says. To gain it,

we would have to deliberately cultivate change of perspective—a truly compassionate vision from the side of the poor. . . . The Good News is not, "You, too, can participate in the Great American

89 GUTIERREZ, *supra* note 8, at 152.

90 See Arthur Jones, *Small Christian Communities Lead a Kind of Double Life*, NAT'L CATH. REP., Dec. 25, 1998, at 14 (describing Kristus, "a registered Canadian charity designed to promote and develop small faith communities"). There are fifty such groups on Vancouver Island (Roman Catholic population 90,000). *Id.* Bishop DeRoo encourages them. Mr. Jones says Canadian Catholics are generally disaffected or indifferent. In one book, MARY JO LEDDY ET AL., *IN THE EYE OF THE CATHOLIC STORM: THE CHURCH SINCE VATICAN II* 107 (1992), the authors refer to the Canadian Bishops' "Ethical Reflections" and its five steps toward "a pastoral methodology for transforming society: The first step is to identify with the poor; to be present to them, listening to their experiences." *Id.* at 107. The ethical reflections are in WALTER BLOCK, *ON ECONOMICS AND THE CANADIAN BISHOPS* 68-76 (1983). See also DOUGLAS J. ROCHE & BISHOP REMI DEROO, *MAN TO MAN: A FRANK TALK BETWEEN A LAWYER AND A BISHOP* (1969).

91 MacEoin, *supra* note 80, at 10.

92 See *id.*

93 *Id.*

94 J. Robert Hilbert, *A Compassionate Vision*, AMERICA, Sept. 14, 1996, at 15, 17.

Dream." A Christian option for the poor will not be simply a concern that they become like us. It will require a change in the values and world view of the non-poor and consequent change in the structures that incarnate those values.⁹⁵

Bishops Ruiz and DeRoo would say it will require, first of all, learning from the discerning, discovered Christian congregations that know what they are talking about when they talk about poor people, as they know what they are talking about when they talk about following Jesus. "They are," Gutierrez says, connecting his perception as a pastor with one of the documents of the Second Vatican Council, "a manifestation of the people of God as existing in the world of poverty . . . profoundly marked by Christian faith, . . . 'a messianic people.'"⁹⁶

In many ways the congregations of Chiapas (and of Victoria) are like congregations in the Black Church in the United States.⁹⁷ Black Church congregations were at first defined by banishment, in the days of slavery a web of underground congregations. James A. Cone said of the Black Church, that its hope of heaven "was the means by which slaves affirmed their humanity in a world that did not recognize them as human beings."⁹⁸ In this way, the Black Church refused to be a subculture of the ("Christian") civil society that oppressed the slaves: "To seek an indigenous Christianity . . . is to dissolve that process by which Christianity identified its normative cultural vehicle in a philosophical tradition."⁹⁹

In modern times, the Black Church is perhaps defined not so much by what it has become as by what it does. It is "a rock and a beacon,"¹⁰⁰ a place of "moral fire,"¹⁰¹ a comely community "that is

95 *Id.* At least at the level of procedure, Archbishop Rembert G. Weakland apparently felt qualified to tell his masters in Rome what the Roman Catholic people of Milwaukee felt about their faith, without revealing how he found out. See Rembert G. Weakland, *Reflections for Rome*, AMERICA, Apr. 18, 1998, at 8. Compare a procedure that uses the tools of modern social science to "listen" to the people. Mary Johnson et al., *Young Adult Catholics: Conservative? Alienated? Suspicious?*, AMERICA, Mar. 27, 1999, at 9.

96 GUTIERREZ, *supra* note 8, at 152.

97 See Peter C. Phan, *Method in Liberation Theologies*, 61 THEOLOGICAL STUD. 40, 57 (2000).

98 James H. Cone, *Black Theology in American Religion*, 43 THEOLOGY TODAY 6, 7-8 (1986). Thus, in James H. Cone, *Demystifying Martin and Malcolm*, 51 THEOLOGY TODAY 27, 27 (1994), Professor Cone could argue that the Black Church produces political radicals.

99 Rosemary Radford Ruether, *Re-contextualizing Theology*, 43 THEOLOGY TODAY 22, 25 (1986).

100 Emily Hiestand, *Hymn*, ATLANTIC MONTHLY, July 1998, at 71, 72.

itself a form of sanctuary,"¹⁰² Emily Hiestand, a white convert in the community of Union Baptist Church, Cambridge, Massachusetts, writes. She speaks of her congregation with such words, as she focuses more on what the Black Church does than on an attempt to define it. She notices two aspects of moral discernment she has found in a congregation of Black Baptists, one aspect speaking out from the church, the other speaking within the church. "What a subtle thing is going on here: at the same time that this community is steadily helping its members to gain a fair share of the nation's goods," for example, "it is steadily infusing material reality with another idea of wealth altogether."¹⁰³ In both ways, her congregation is, she says, "a place that has some clues not only for its core members but for the larger community of the nation."¹⁰⁴

Like the congregations of Chiapas, the Black Church nourishes what Dr. King spoke of as "the eschatological hope of freedom,"¹⁰⁵ in its theology, its discernment, and its liturgy. In its tradition of responses from the congregation, "the inexplicable alchemy of longing and joy: God is good . . . *all* the time. Tell the world—*teach!*"¹⁰⁶ These practices are related to the social agenda of these congregations, to their witness against what Rosemary Radford Ruether refers to as "the deformation of biblical religion . . . into forms and rituals that sacralize social oppression, the privileges of religious and social elites" and that ignore "God's agenda of justice and mercy."¹⁰⁷ Dr. King called this deformity "the ethical heresy of white Christians."¹⁰⁸ Bishop Ruiz called it the colonial church.¹⁰⁹

Ms. Hiestand wrote that she felt strange when she first came to Union Baptist, a lone white woman in a crowd of active black worship-

101 *Id.* at 74.

102 *Id.*

103 *Id.* at 76.

104 *Id.* at 78.

105 James H. Cone, *Martin Luther King, Jr., Black Theology—Black Church*, 40 THEOL-
OGY TODAY 409, 419 (1984).

106 Hiestand, *supra* note 100, at 75.

107 Ruether, *supra* note 99, at 26.

108 Cone, *supra* note 98, at 17; *see also* Sandra M. Schneiders, Madeleva Lecture at St. Mary's College, Notre Dame, Indiana (Apr. 30, 2000) (stating that ethical heresy is "the hermeneutical advantage that the poor and oppressed have forced upon them, namely, a view of social systems from the standpoint of those for whom these systems do not work"). Professor Schneiders compared that "hermeneutical advantage," and the perspective it provides, with what she spoke of as communal discernment. "Either we get to the Promised Land together as a people, or none of us does. Purely private good is an obsolete category." *Id.*

109 MacEoin, *supra* note 80, at 10.

ers.¹¹⁰ It helped when one day one of the women in the church—a woman who was celebrating with the congregation her eighty years in the church—handed her a tissue, at a moving moment in the service and said, in response to Ms. Hiestand's thanks, "That's what we're here for, to help each other."¹¹¹ On another Sunday, a deaconess of the congregation helped her to see that she was entitled to a member's name tag and said to her, "You're home now."¹¹² Ms. Hiestand gradually found that she could discuss, among people who cared for her, "how it feels, viscerally, to be radically in the minority and to lack insider knowledge."¹¹³ She had discovered a discerning congregation, learned from its discernment, and then joined it, there to listen, there to be heard, there to *be* in solidarity with the oppressed.

"This is a place that aspires to *communitas*, where society's distinctions are softened," she said, because it is "*the* institution that African-Americans control completely, a nurturing place of leaders, of artistry and mind—the place where a microcosm of sanity and goodness can be conjured."¹¹⁴ She noticed particularly the congregation's moving ways to express and explore a theology of unmerited, redemptive suffering, something Dr. King emphasized as he brought attention to the primordial discerning communities of scripture.¹¹⁵ She remembers a powerful Sunday sermon:

"We will tear *down* the enemy's walls," [the preacher] says—her voice is blazing now, her arms are outstretched. The woman has reached with her voice down into the torment of centuries, and seems to be speaking for all that time. The other pastors stand and go to her, gathering around close, as if to hold and bank her cathartic fire. The wooden floor of Union begins to rumble under a slow stamping of feet, and the whole room is weeping.¹¹⁶

These congregations' "outreach" (a white-church word, I think) in social witness, strong political pressure, *and* in the law, as they care for those the Reverend Jesse Jackson calls "the locked out,"¹¹⁷ is evident in any American town that has Black Church congregations. Each congregation's deciding what to work for and where to work is

110 Hiestand, *supra* note 100, at 71.

111 *Id.* at 80.

112 *Id.*

113 *Id.* at 77.

114 *Id.* at 76. See generally Pamela Dickey Young, *Beyond Moral Influence to an Atoning Life*, 52 THEOLOGY TODAY 344 (1995) (discussing the unifying influence of the Black Church).

115 See Cone, *supra* note 98, at 12.

116 Hiestand, *supra* note 100, at 77.

117 Jesse Jackson, Martin Luther King Day Talk (Jan. 17, 2000).

regularly included in its discerning agenda. The presence of such congregations has perhaps influenced the modern academic theologians who write of a “paradigm shift” in the mainline church’s understanding of Jesus.¹¹⁸ The academic theologians may have *discovered* something. (If not, it is there for them to discover.) In this “bottom-up” Christology, as in the Dioceses of Chiapas and Victoria,

118 See JEROME H. NEYREY, *HONOR AND SHAME IN THE GOSPEL OF MATTHEW 227–28* (1998); DOROTHEE SÖLLE, *THINKING ABOUT GOD: AN INTRODUCTION TO THEOLOGY* 133 (1990); William P. Loewe, *From the Humanity of Christ to the Historical Jesus*, 61 *THEOLOGICAL STUD.* 314, 320 (2000) (speaking of “the community of those who respond in faith to the classic expressions of the event of Jesus Christ” keeping alive and reformulating the dangerous or subversive memory of Jesus).

“The Church,” Sandra M. Schneiders said at the 2000 Madeleva Lecture at St. Mary’s College,

still oscillates between apologizing for the mistakes and violence of the past and making new and equally violent mistakes in the present . . . either stereotypically male, fiercely independent and even condemnatory of culture . . . or stereotypically female, merged to the point of innocuous invisibility into its cultural surroundings. Critical participation, that is, a genuinely prophetic presence, is difficult to sustain. [Jesus] was both a profoundly religious person who could not be absorbed by the religious institution and a powerfully subversive participant in his society whom no political party or revolutionary agenda could claim.

Schneiders, *supra* note 108. Professor Schneiders spoke, I think, of the hierarchical church. Consider, by way of contrast, George W. Hunt, *Of Many Things*, *AMERICA*, July 20, 1996, at 1, 1, arguing that the Roman Catholic Church has tended in modern times to centralization, to institutions that centralize authority. For example, he says, until the nineteenth century Vatican policy was to leave the appointment of bishops to the local church. See *id.*; Ken Smits, Letter to the Editor, *New Richness*, *AMERICA*, Sept. 30, 2000, at 29, 29 (“It is important to remember that the authentic basis of devotion to the saints lies in the local popular cult. This existed long before the process was taken over by papal authority.”). The question might be put as whether the local congregation is ethically *instrumental*. See Marian Y. Adell, *The Body of Christ in Methodist Hymnody: Dismembered and Remembered*, 1996 *PROCEEDINGS OF THE N. AM. ACAD. OF LITURGY* 77, 90 (1996) (commenting on the decline of the Constantinian Church in modern American Protestantism). Adell writes, “Whereas Methodist teaching earlier in the twentieth century had left the church useful but unnecessary, there now was a form of grace available through the church which could not be replicated elsewhere.” *Id.*; see also JOHN C. HAUGHEY, S.J., *THE HOLY USE OF MONEY: PERSONAL FINANCE IN THE LIGHT OF CHRISTIAN FAITH* 147, 184–85 (1986) (stating that bringing money to Jesus, a local thing to do, is among the communal “acts of inclusion” and is “the stuff of Christology”); McCARRAHER, *supra* note 5, at 187 (developing an argument, notably with Christopher Lasch, that politics from the Church is communal and not just another “liberal” idea). McCarragher suggests that congregational politics would solve the problem of academics living “the lives of mobile, harried, e-mail-deluged professionals whose commitments curtail the time and labor available for a ‘religious-popular’ front,” *id.*, and thereby reduce “the gulf between the classrooms and the pews,” *id.* at 189.

The classic event of Jesus Christ . . . occurs in the present through the mediation of the community founded on the original apostolic witness to that event. The tradition stemming from the apostolic witness constitutes the Church in the present as the community of those who respond in faith to the classic expressions of the event of Jesus Christ in which the actual Jesus, the dangerous memory of whom the tradition keeps alive, is encountered religiously as God's own self-presence.¹¹⁹

IV. THE ISSUE

My discussion of the discovered community could well have included a more detailed explanation of the way I read Latin American liberation theology. Certainly the perception of the primordial community is there, in Christian terms: "[People] are called together, as a community and not as separate individuals, to participate in the life of the Trinitarian community, to enter into the circuit of love that unites the persons of the Trinity."¹²⁰ Belief itself is a communal experience. The mystery of God is accepted not only in prayer but also in political commitment. The language needed for communicating God to others is political language.¹²¹ Discussion of Liberation could have been worked as well into the section on the revived community. Liberation appeals, as the Radical Reformation did, to the revival of the New Testament Church. "What was spontaneously and intuitively expressed in the first centuries [before Constantine] must manifest itself today in a more reflective and critical fashion."¹²²

There is a difference, though, between two understandings of the local congregation as a discerning community, and—while the difference can too easily be exaggerated—it provides a way to think about jurisprudence and legal ethics. The Radical Reformers would not have said, as Gutierrez does, "[C]ommunion with God and others pre-

119 Loewe, *supra* note 118, at 320; *see also* NEYREY, *supra* note 118, at 181, 183, 187, 227–28 (showing how the portrayal of Jesus by St. Matthew describes a person who rejected conventional social ideas of honor, revenge, and mercy); Stephen C. Barton, *Christian Community in the Light of 1 Corinthians*, 10 *STUD. CHRISTIAN ETHICS* 1, 11 (1997) (explaining that St. Paul wanted the Church in Corinth to be a "contrast society").

120 GUTIERREZ, *supra* note 7, at 259.

121 *Id.* at 269–70; *see also* GUSTAVO GUTIERREZ, *THE GOD OF LIFE*, at xiv (Matthew J. O'Connell trans., 1991) (1989) ("The act of believing is a vital and communal experience. The mystery of God must be accepted in prayer and commitment. . . . Within this combined contemplation and practice there arise the categories and language needed for communicating God to others.").

122 GUTIERREZ, *THE GOD OF LIFE*, *supra* note 121, at 258.

supposes the abolition of all injustice and exploitation."¹²³ They saw themselves as a remnant likely to remain a remnant until the end of time. They sought the abolition of injustice and exploitation among themselves; they did not *define* themselves as seeking these reforms in civil society.¹²⁴ (Think of the history and modern presence of the Hutterites.¹²⁵) The Radical Reformers were pacifists, some of them put to death by the state for refusing to affirm that the state should put people to death; they declined civic service that involved what they called "the sword."¹²⁶ But they recognized that the coercive state, in employing lethal violence to keep order, exercised authority it had from God.¹²⁷ The difference was that the discerning congregation lived in "the perfection of Christ," and those running the government did not.¹²⁸ The Liberation theologians, and, even more, the base communities that gave rise to liberation theology, would not have made that distinction. For them, I think, the perfection of Christ is a social agenda.

The antecedents of Liberation were small groups of young Christians, in France at first, and then in Latin America, who gradually (as the product of their communal discernment) came to reject "the distinction of planes approach" that dominated the civil presence of the

123 *Id.* at 263.

124 See Walter Klaassen, *Anabaptist Ethics*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS 20, 20–21 (James F. Childress & John Macquarrie eds., 1986); Walter Klaassen, *Mennonite Ethics*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS, *supra*, at 377, 377–78; Shaffer, *supra* note 66, at 1090–95; Max L. Stackhouse, *Seet*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS, *supra*, at 566, 566–67; see also Thomas N. Finger, *The Problem of Law During the Protestant Reformation*, in THE BIBLE AND THE LAW 65, 90–91 (1982) (describing the position of Anabaptists on "Christians interested in legal matters").

125 The Hutterites date from the 1530s in Moravia; their distinction among other Anabaptist groups is common ownership of property. WILLIAM R. ESTEP, THE ANABAPTIST STORY: AN INTRODUCTION TO SIXTEENTH-CENTURY ANABAPTISM 131–37 (3d ed. 1996). Three modern Hutterite communities are described in *The Bruderhof: The Community Movement Behind Plough*, PLOUGH READER, Apr.–May 2000, at 69. A fourth is described in *Alternative Communities: Montana Eden*, ECONOMIST, Jan. 8, 2000, at 31. See also Leonard Gross, *Jurisprudential Perspectives in the Light of Anabaptist-Mennonite Tradition: Bibliography with an Interpretive Introduction*, 5 CHRISTIAN LEGAL SOC'Y Q. 16, 16–19 (1984); Robert E. Rodes, Jr., *The Cause of Love*, CATH. WORKER, Dec. 1998, at 6 (describing the Hutterites in World War I, who were imprisoned for their refusal to submit to military service and were killed there). What made these Hutterites special was the support of their community during bitter experience. As a result, the community Rodes describes moved to Canada after the war. *Id.*

126 Shaffer, *supra* note 66, at 1091.

127 *Id.* at 1091–95.

128 See *id.*

Roman Catholic Church in both continents.¹²⁹ The idea had been that those engaged in lay activity could be political but should not invoke religious (prophetic) judgments on the civil society and particularly not on the dominant political and economic classes. Such religious judgments, in what Gutierrez calls a “narrow and aseptic conceptual model,” belonged to the clerical “plane.”¹³⁰ Religious judgments on civil order were for priests and bishops, which is to say, of course, for bishops.¹³¹

These early Liberation groups came to understand that the “distinction of planes” dogma meant that the Church would speak out politically only when what it said protected the dominant classes, when “it lent legitimacy to a dictatorial and oppressive government,”¹³² when it supported the status quo. Religious judgments that did not defend the interests and privileges of the dominant classes were subversive. Hierarchical Christianity in Latin America was what Bishop Ruiz called the colonial church.¹³³ The young lay people, long before they came to be defended by academic theologians, groups of priests, and a bishop or two, were “a presence of the church,” in Gutierrez’s phrase, a presence that did not separate religion from politics, that proclaimed in public that “the oppressive and alienating circumstances in which the great majority of mankind exists” were “offensive to man and therefore to God.”¹³⁴ These young lay people, in their base communities, figured that out for themselves; clerical and theological support came later; it was a case of the poor discovering the Church before the Church discovered the poor.

The analysis was, at last, a “New Christendom without the name,” Gutierrez said.¹³⁵ The line between working for the Kingdom and working for the social revolution were, finally, he said, *blurred*.¹³⁶ This is a blurring that would not have been proclaimed by the Radical Reformation. And it is not proclaimed by the modern descendants of those reformers, for whom “good fences make good communities.”¹³⁷ J. Budziszewski argues:

129 GUTIERREZ, THE GOD OF LIFE, *supra* note 121, at 65–67.

130 *Id.* at 63–64.

131 *See id.*

132 *Id.* at 65.

133 *Id.*

134 *Id.* at 64.

135 *Id.* at 71.

136 *See id.*

137 This phrase appears in the beginning phase of a program on modern Anabaptism (the Amish, the Mennonites, and the Hutterites) at the Menno-Hof, a museum in Shipshewana, Indiana. Judge Noonan argues in an analogous way for independent scholarly centers for “advanced Catholic studies” that would be characterized by “in-

[E]very community but one, the community of faith, is merely external. . . . [T]his Commonwealth transcends all old communal lines, [but] it does so only for those who enter within its gates. . . . [T]he Christian is sharply at odds with any program to make the temporal community the starting point for ethical or political theory. . . . That which is secular is not thereby neutral.¹³⁸

But who are as willing to try to be prophetic, and as committed to trying to figure out, in the congregation, what that might mean, as the reformers in Liberation are?

Modern practitioners in both traditions are willing to practice their denunciation of injustice publicly and in ecumenical association with other Christians and with Jews. They in fact proclaim a new vitality in ecumenism (scoffing a bit, in a reference Gutierrez mentions, to old-fashioned ecumenism as “a marriage between senior citizens”¹³⁹). I suppose practitioners in both traditions determine in their discerning communities, and then again through their ecumenical gatherings, what should be denounced and how. Neither the Anabaptists nor the Liberationists advocate violent revolution, and, so far as I can tell, the ecumenical politics of Liberation does not endorse violence. So that, finally, what may distinguish the two approaches is not pacifism, but rather, that the modern Anabaptists (and Quakers and other “free church” groups) do not set out to change the entire civil society, and Liberation does.¹⁴⁰

dependence, cooperativeness, concentration.” John T. Noonan, Jr., *An Institute for Advanced Catholic Studies*, AMERICA, July 1, 2000, at 7. He says that, “as family members more conscious of the family’s flaws and virtues than strangers could ever be, believers may begin such an enterprise to explore, to enrich, to encompass their Catholic cultural heritage.” *Id.*; see also John T. McGreevy, *A Case of Doctrinal Development: John T. Noonan, Jurist, Historian, Author, Sage*, AMERICA, Nov. 17, 2000, at 12; John T. Noonan, *An Institute for Advanced Catholic Studies*, AMERICA, July 1, 2000, at 7 (arguing that the relationship between faith and reason “could fruitfully be explored” in an institute for advanced Catholic studies).

138 J. Budziszewski, *The Problem with Communitarianism*, FIRST THINGS, Mar. 1995, at 22, 22–23.

139 GUTIERREZ, *supra* note 7, at 104.

140 See L.A. King, *Legalism or Permissiveness: An Inescapable Dilemma?*, 97 CHRISTIAN CENTURY 434 (1980). Somewhat contrary to the impression that persecution drove their Anabaptist cousins on the continent into enclaves, the history of the second generation of English Quakers (after 1690) appears to have been that they became more “gathered” in an attempt to reclaim their original rigor from lukewarm members—rather like the Amish perhaps. King explains, “[w]hat was happening during this period in Friends’ history was a change from bold expectation of conquering the world for Christ to fear of being infiltrated by the world and its spirit—a mood shift from the offensive to the defensive.” *Id.* at 435. King notes somewhat the same complaint from John Wesley toward the end of his life. See *id.* at 435–36.

That distinction should not be pressed too far. John Howard Yoder's *For the Nations*,¹⁴¹ which appears to me to be faithful to the traditions of the Radical Reformation, is a collection of talks he made to (mostly) small groups of Christians—discerning congregations, I think—all over the world, in which he urged Christians to participate in civil society as fully as their refusal of the sword would permit (and, to him, that area of activity was large). He once said that he preferred to live in a community where the potholes were fixed. He reminded me that the early Radical Reformer Pilgram Marback remained, after his conversion, a civil engineer for city governments. And he regularly invoked the Prophet Jeremiah, writing to captive Israel in Babylon: "Build houses and live in them; plant gardens and eat their produce. Marry wives and beget sons and daughters. . . . Seek the welfare of any city to which I have carried you off, and pray to the Lord for it; on its welfare your welfare will depend."¹⁴² Cultivation of civil community, Yoder's teacher, Karl Barth, taught, is the normative task of the *State*, but it is also a project the discerning community can consider as worthy of its attention and effort—provided, of course, that the discerning community must decide within itself what it can and cannot do about cultivating civil community.¹⁴³

I think Yoder would not have had difficulty with Gutierrez's bugle call for justice, including "the search for radical changes and untrodden paths."¹⁴⁴ Yoder (and I invoke him, of course, as a modern teacher of Anabaptists) might have stepped aside from Liberation's tendency to identify leftist political and economic reform with the Eschaton. I think he would not have identified the mission of the Church with political revolution, even peaceful revolution. He would, I think, have hesitated at d'Escoto's prayer, quoted by Dorothee Sölle, "Help us, so that the whole people can rise up in a new Guatemala."¹⁴⁵ He might have proposed nuances for Gutierrez's reading of the Prophet Isaiah: "The establishment of 'what is right and just' is the mission that the God of the Bible entrusts to the people."¹⁴⁶ Yoder

141 JOHN HOWARD YODER, *FOR THE NATIONS* (1997); see also Thomas L. Shaffer, *The Jurisprudence of John Howard Yoder*, 22 *LEGAL STUD. REV.* 473 (1998) (discussing primarily, this, Professor Yoder's last book).

142 *Jeremiah* 29:4–8.

143 See KARL BARTH, *ACTION IN WAITING FOR THE KINGDOM OF GOD* 60–69 (Soc'y of Brothers, Rifton, N.Y. ed. & trans., 1969).

144 GUTIERREZ, *THE GOD OF LIFE*, *supra* note 121, at 252.

145 SÖLLE, *supra* note 118, at 133.

146 GUTIERREZ, *THE GOD OF LIFE*, *supra* note 121, at 124 (discussing *Isaiah* 11:4–5).

used to say he had to decline the obligation to intervene in the power game, to help history turn out right.¹⁴⁷

Yoder would have loosened some of Liberation's theological categories in favor of more open, broader discernment, in order to invite the "communal quality of belief"¹⁴⁸ in the discerning congregation. Ethics is a communal process; the discerning congregation is capable of a stewardship of creativity that might make unique contributions to civic discourse.¹⁴⁹ Perhaps that last point might not be a difference at all. It might involve a return to the sources of liberation theology, back to the time before it was theology in any academic or institutional sense. The point is important; perhaps a biblical picture will show how it works.

CONCLUSION

Walter Brueggemann's reflection on the story of Assyria's siege of Jerusalem¹⁵⁰ describes the wall around Jerusalem, the people of God on the inside speaking Hebrew to one another, and the attackers outside the wall speaking in Aramaic to Jerusalem's delegates, who stand on the wall.¹⁵¹ The people of the city, behind the wall, alternately deliberate with their delegates and, as the delegates return to the top of the wall, listen. The pre-theological analogy, in what Brueg-

147 See YODER, *supra* note 61, at 151–55.

148 YODER, *supra* note 141, at 24.

149 See *id.* at 22–45; see also *id.* at 190–91, 244; Katharine Temple, *An Anarchist Confession*, CATH. WORKER, Oct.–Nov. 2000, at 3 (explaining that Christian anarchism is not chaos, but rather (quoting Dorothy Day) "groups of people working together in communities. . . . Martin Buber said there could be a 'community of communities' rather than a state. . . . There would be no more money lenders"). Yoder's early teaching on this was developed broadly in JOHN HOWARD YODER, *CHRISTIAN WITNESS TO THE STATE* 28–35 (1964), and was, perhaps, updated in his last book. See YODER, *supra* note 141, at 103–24. Stanley Hauerwas's discussion in *Christian Existence Today* is helpful and, I think, consistent both with Yoder's teaching and with the argument of this Essay:

The issue is how the church can provide the interpretative categories to help Christians better understand the positive and negative aspects of their societies and guide their subsequent selective participation. . . . What is required for Christians is not withdrawal but a sense of selective service and the ability to set priorities. . . . What allows us to look expectantly for agreement among those who do not worship God is not that we have a common morality based on autonomous knowledge of autonomous nature, but that God's kingdom is wider than the church.

STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY* 17 (1988).

150 2 Kings 18–19.

151 Walter Brueggemann, *II Kings 18–19: The Legitimacy of a Sectarian Hermeneutic*, 7 HORIZONS BIBLICAL THEOLOGY: AN INT'L DIALOGUE, June 1985, at 1, 4.

gemann called "a sectarian hermeneutic,"¹⁵² is that the discerning community (in this case consulting the Lord and one another on the critical matter of whether to save their lives at the price of captivity and slavery, as the Assyrian commander proposed, or to resist) speaks a language of its own.¹⁵³ But then the Assyrian commander addressed the people of the city, over the wall, in *Hebrew*.¹⁵⁴ Eliakim, Shebna, and Joah, representatives of King Hezekiah, asked him not to do that; they asked the Assyrians to speak in Aramaic to people who spoke Hebrew to one another. (Some of the people understood Aramaic and used it in "secular" conversation.)¹⁵⁵

Nonetheless, the immediate purpose of sectarian discernment, in Hebrew, behind the wall, is the *transformation* of the secular conversation in Aramaic. The sectarian conversation, behind the wall, authorizes "those who join the public conversation on the wall to be present freely, imaginatively and critically," but it is "kept open to its own language, to its own experience, and its own proper reference is . . . essential to serious public discourse."¹⁵⁶ It is, like conversation in German among the Amish of LaGrange County, Indiana, sectarian—as "an alternative offer of a reading of reality processed through the experiential lens of a particular community informed by its history of pain,"¹⁵⁷ and it comes first. It influences, and it may determine, what the secular conversation is to be. That is what I talk about here as communal discernment; the point of the biblical story is that this is the first agenda, the way the community figures out what it is to do and what it is to be. God blessed the process. God said that King Hezekiah, who set this system up, was the greatest of the kings of Judah.¹⁵⁸

152 *Id.* at 6.

153 *See id.* at 7.

154 *Id.* at 8–9.

155 *Id.* at 1; *see* HAUERWAS, *supra* note 149, at 12–13. Hauerwas writes:

Unless the church and Christians are trained first to understand their community's language, they will lack resources to notice times when the language of the state is not their own. To be sure, there may be continuities between those languages, but those continuities cannot be recognized unless Christians first know that their community's language is determined by what Walter Brueggemann has called the "singular holiness of God."

Id. (quoting Brueggemann, *supra* note 151, at 15).

156 HAUERWAS, *supra* note 149, at 16.

157 *Id.*

158 *2 Kings* 18:5.