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Thomas L. Shaffer

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

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Recommended Citation

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ON THINKING THEOLOGICALLY ABOUT LAWYERS AS COUNSELORS

Thomas L. Shaffer*

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Professor Morgan is more than gracious to me, his colleague in legal ethics. He understands, I think, that our little sub-discipline is an academic youngster — open, as children are, to insight and persuasion, willing to listen to almost anybody. I am grateful to him for his kind reference to my work. Along with other American law teachers, I am grateful for his leadership, critical thought, scholarly discussion, and example as one of the American legal profession's principal teachers of ethics.

My usefulness among commentators on Morgan's *Thinking About Lawyers as Counselors*¹ is probably that I write about legal ethics in reference to the Hebraic theological tradition — with attention to the ethics of Moses and of Jesus.² And so I take the occasion to argue that the theological perspective is useful in considering the ethics of legal counseling, and to wonder at and complain about the neglect of religion by my colleagues in legal ethics as they try to decide how American lawyers should behave.

*B.A., J.D., LL.D.; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

1. See Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439 (1990).

2. These ideas and arguments are developed more fully and documented tediously in my work in theological legal ethics. See generally T. SHAFFER, *AMERICAN LEGAL ETHICS* (1985) (rejecting the idea of a separate professional majority); T. SHAFFER, *FAITH AND THE PROFESSIONS* (1987) (attempting to develop a narrative, Aristotelian approach to legal ethics); T. Shaffer, *Lawyers and their Communities* (unpublished manuscript); T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981) (advocating the Judeo-Christian idea of caring for the client over the professional norms of deferring to the client and being paternalistic to the client in performing the lawyering function).

I. HOW TO BE GOOD

In ethics, even legal ethics, we agree that we want to be good people, or, at least, we agree that it is interesting to talk about lawyers being good people. By definition, we are beyond the issue of why we bother with the question. After the issue of motivation to be good is resolved or assumed away, the fundamental question for us is how to tell whether an action, or a disposition, or a life, is good. I understand Professor Morgan to have decided that a lawyer's action or disposition is good when it feels right or when it seems to come naturally.³ He contrasts his view with that of David Luban, who decides the question by reference to what Luban calls "ordinary morality,"⁴ and with the answer (or procedure) of William Simon, who consults "legal values."⁵ What these four theories of how to tell what is good have in common is that none of them describes the morals of American lawyers.⁶ The feels-right test, the feels-natural test, the ordinary-morality test, and the legal-values test do not demonstrate what an anthropologist would notice first of all — the coherent, describable, *cultural* contours of the morals they propose to influence.⁷

The failure to describe is a defect in all four theories. Those who think and write about legal ethics *should be* careful to describe lawyers' morals as fully as they can. Description is necessary first for usefulness and second for clarity — necessary, that is, to lawyers who might be open to influence from the scholarship of legal ethics, and also necessary to those who want to understand what the scholars are saying. I mean to be judgmental, to imitate the fraternal correction of Carl Van Doren when his brother Mark once showed him a draft of something Mark had written discussing "values." Carl said to Mark: " 'Values,' Good God, you can't say 'values'! Decide what you mean and then say that!'"⁸

There is a third particular and fairly ominous reason for my complaint: Abstract ethical discussion in the legal profession has not done

3. Morgan, *supra* note 1, at 459

4. *Id.* at 442 n.11.

5. *Id.* at 444 n.20.

6. By "morals," I refer to the notions, ideas, and impulses that appear to determine behavior. For other similar usages, see S. HAUERWAS, VISIONS AND VIRTUE 14-20 (1974) (using the term "moral notions"); I. MURDOCH, THE SOVEREIGNTY OF GOOD 15-16 (1970) (moral vision).

7. See, e.g., R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART (1985) (examining the relationship between character and society in America); C. GREENHOUSE, PRAYING FOR JUSTICE (1986) (examining methods of sitting and evading disputes in a suburban Baptist community).

8. M. VAN DOREN, THE AUTOBIOGRAPHY OF MARK VAN DOREN 99 (1958).

very well at keeping fatuity at bay. Our professional past — a past that is not dead, not even past; the long and not-yet-ended era of the gentleman's ethic in the American legal profession — shows that American lawyers tend to slip into an unfortunate and indefensible ethic of honor and shame. Abstract legal ethics of the sort Professor Morgan discusses have not been able to keep them from slipping.

The ethic of honor and shame says that the way to be good is to seek the approval of professional peers. This is the legal ethic that made it possible for lawyers in America to countenance, approve of, defend, and provide the legal frameworks for slavery, imperialism, exploitation of immigrants and women, yellow-dog contracts, the depredations of the robber barons, and the rape of the earth.⁹ The ethic of honor and shame is, as Aristotle says,¹⁰ heuristically fragile; it also tends to evil consequences. As a matter of logic and of consequences, honor and shame is an ethic that relies on self-deception. The survival of such an ethic among lawyers is likely when those who write ethics for lawyers avoid describing the morals of the lawyers they write for.

A legal ethic that attends to the description of morals avoids this sort of moral drift; it learns to discipline itself into arguing in terms of *what is going on*. (And what has been going on is slavery, imperialism, exploitation, etc.) Thus, I suggest that a test for any ethical account in American legal ethics is whether it provides a corrective for the ethics of honor and shame. Compliance with such a test is, I think, the proper business of those who make their living talking in the university about what American lawyers ought to do. The reason I relate this moral demand on my colleagues to theology is because that is where I learned about it.¹¹

II. RELIGIOUS ETHICS AS A WAY TO DESCRIBE WHAT IS GOING ON

What is needed in times of moral drift in a community (or in a profession, or in a university law school) is a way of seeing, a counter-reference, a moral perspective that is, in the circumstances, novel — “an alternative perception of reality . . . not simply a defensive measure, but . . . an act of identity, energy, and power,” as Walter

9. See Shaffer, *The Unique, Novel and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 698-703 (1988).

10. See ARISTOTLE, *NICHOMACHEAN ETHICS* 8 (M. Ostwald trans. 1962).

11. See H. NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* (1963) (influential statement of a Christian ethic of responsibility for oneself); see also A. JONSEN, *RESPONSIBILITY IN MODERN RELIGIOUS ETHICS* (1968) (a theological ethic of responsibility).

Brueggemann puts it.¹² "[S]uch specificity . . . exercises an important critical function to show that the large claims of the dominant reality cannot be taken at face value."¹³

Attention to the possibility of a counter-reference in ethics may seem to assume a description of reality to which the counter-reference can refer. That is, one who proposes to use Brueggemann's "alternative perception" first has to take into account the "dominant" way to describe reality. In fact, though, in Hebraic theology (which is, when it comes to moral perception, the theology of the Hebrew prophets), the counter-reference is what makes *any* description of reality possible; it is an alternative *perception*, but it is not *another way to see*. There is only one way to see, and the alternative (prophetic) perception is it. The "dominant" way to see is no kind of perception; it is delusion. The alternative, in Hebraic religion, points always away from delusion and toward things as they are. The ethic of honor and shame is the sort of delusion from which prophetic perception points away.

To say, as I do, that those who work in American legal ethics evade the task of describing lawyer's morals is to say that they fail to point away from delusions that support fatuous moral theories such as the ethics of honor and shame. My colleagues are not telling us how to see and how to say what is going on. I don't argue that my colleagues in legal ethics point to delusion and self-deception; I argue that they do not point to reality at all. They brilliantly attend to analysis of the abstract; but they do not, along the way to analysis, describe the morals they apparently want to shape with their ethics. (If they do not want to shape morals, why are they bothering with ethics?) Their ethical theory does not seem to need perception. I am also, of course, arguing that this is a theoretical deficiency. (If I do not want to make theoretical arguments, why am I bothering with ethics?) In both senses, this argument of mine is itself a moral argument: My sisters and brothers in this child-like sub-discipline of ours should do more to stem fatuity in the moral reasoning of American lawyers.

Why don't our colleagues describe the morals of lawyers? I believe it is because they are (for the most part) law professors who do not like to think, write, or talk about *religion*. At any rate, they do not appear to like to talk about the sort of religion that has to be taken

12. Brueggemann, *II Kings 18-19: The Legitimacy of a Sectarian Hermeneutic*, 7 HORIZONS IN BIBLICAL THEOLOGY 1 (1985). All of the quotations and references to Brueggemann herein are from this essay.

13. *Id.*

seriously. There is some discussion of religion in law school and in continuing legal education, but most of it occurs when those who talk about it are dealing with the law of church and state. In those discussions, religion in America is treated as a nineteenth-century intruder on the American secular enterprise — as if the Declaration of Independence and Thomas Jefferson's vision of a republic in North America occurred before the *Conquistadores* came to the Southwest, or the Jesuits to Canada, or the Pilgrims to Plymouth Rock.

This is odd, almost inexplicable, when you consider that legal academics come from, and teach and write in and for, a nation that is perennially attentive to its Hebraic religious heritage: ninety percent of Americans say they believe in God (and my guess is that most of those who say this mean the God of Abraham, Isaac, and Jacob). Seventy percent claim affiliation with organized religion (Jewish or Christian for the most part). More than half say they regularly attend organized religious services.¹⁴ For some reason my colleagues in legal ethics, like my colleagues in the rest of legal education (but *not* like my colleagues in other respectable parts of the university), find it plausible to ignore, or at least not to describe, the prosaic contours of the morals of those on whom the law is imposed, and of those who practice law, and of those who decide cases in the courts.

In a way this situation is a compliment to the honesty of law teachers: you cannot truthfully describe morals in America if you leave religion out of the description; my colleagues are not comfortable talking about religion, but they do try to be truthful when they talk; and therefore. . . .

III. RELIGIOUS ETHICS AS CORRECTIVE

Scholarly discipline is not the reason I take this occasion to attempt to correct a deficiency in legal ethics. I climbed into my religious niche in legal ethics for more personal reasons. My interest in a theological ethic for the law office is "confessional." I did not get into this way of writing in an attempt to provide what my colleagues evade, although that aspect of my choice sometimes makes what I do defensible to my academic superiors. I describe religious ethics in legal ethics because I am a believer who accepts it as part of being grateful to the Lord to acknowledge my faith, even in law school. That reason is "scholarly" enough, I suppose: the world, including law school, is, as John Calvin said, a theatre for the glory of God.¹⁵ I suppose it is consistent with

14. THE GALLUP REPORT (Report No. 259, Apr. 1987).

15. J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 72, 179, 341 (F. Battles trans. 1960) (originally published in 1536).

a confessional purpose to say that it is intellectually important for lawyers to know where they come from and where they are headed. It helps keep them honest about their influence on students. But that, too, for me, is incidental. I did not come to religious legal ethics through scholarship; with me it's the other way around.

In my case, as in the case of others who share my occupation and my faith (and who tell me about it), a confessional person may need to decide a couple of consequent theological issues. He may need to decide, for example, whether he is interested in ecumenism, or in attempts to formulate among lawyers a consensus expression of ethical principles. My preference, as "theological ethicist," in a law school, in the post-ABA-Model-Rules world, is descriptive. I prefer seeking to learn what the morals of American lawyers are and where they come from. I think it is better for legal ethics, just now, to dig in and find out, rather than to attempt to resolve. What American legal ethics needs, in other words, is to develop an anthropology for itself.

Most ecumenism is sappy; I would rather see if I can find a clear, uncompromising, and unmediated statement of the implications of *halachah*¹⁶ in a Jewish lawyer's life with her clients than work on a proposal for a "Judeo-Christian" solution to the "problem" of keeping client confidences. My truculent sentiment extends to attempts at "nonsectarian" consensus statements of moral principle; it has been my melancholy experience that consensus statements by American lawyers compromise or avoid most of what is ethically important.¹⁷

Consider, as an example of why religious legal ethics might be better off digging in and finding out, the American lawyer's drift into the ethics of the gentleman. I return to this example because I think it is historically and circumstantially central to our work — historically in that gentleman's ethics was and still is the most attractive and powerful force in the morals of lawyers in America, circumstantially in that currently popular accounts of gentleman's ethics, as the American Bar Association's campaign for professionalism demonstrates,¹⁸ grow ever more incoherent.

16. "Halachah" (halakah) means law, but it is law in a system that makes no clear distinction between law and morals. W. HERBERG, JUDAISM AND MODERN MAN: AN INTERPRETATION OF JEWISH RELIGION 292 (1951).

17. See Shaffer & Rodes, *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5, 15-16 (1988).

18. *Report on the Commission on Professionalism to the Board of Directors and the House of Delegates of the American Bar Association*, 112 FED. RULES DECISIONS 243 (1986); Stanley, *Professionalism and Commercialism*, 50 MONT. L. REV. 1 (1989).

The principal reason these accounts are both so durable and so unclear is that they avoid the description of morals; and the principal reason they get away with avoiding the description of morals is that they get away with disdaining the theological clues. Theology is evident in our cultural history, in the history of the church in America, and in nineteenth-century statements of legal ethics from David Hoffman (1817)¹⁹ to Thomas Goode Jones (1885).²⁰ These theological clues, when they are noticed in other disciplines and in our own professional history, say that the morals of the gentleman-lawyer come from the Anglo American Protestant church (what Anthony Trollope's mother once called the American state religion).²¹ The most powerful ethical force among American lawyers, in other words, *is a theology*.

It is equally evident to me that the ethical error the gentleman-lawyer made in America was a *theological error* — an error the theologians of the Reformation would have pointed out, had they been consulted, an error that was in fact pointed out by John Henry Newman, a scholarly gentleman who was also the English Church's most eminent convert to Roman Catholicism: The theological error was a failure to come to terms with how the Children of Israel and the Children of the Gospel learn to overcome evil in the world.²² The gentleman has not been willing to contemplate, let alone to follow, the Cross and the Suffering Servant of Israel. Christian gentlemen have been unwilling to act morally when it appears to them that others will suffer if they do, and that has made them, in Philip Mason's phrase, merely a sub-cult of the English Protestant Christianity which is their heritage.²³

Those who have formed the gentleman's ethic into an ethic of honor and shame have hidden both from the gentleman's strength as a believer and from his difficulty as a believer who deceives himself. They have wanted a theology without pain. They have sought a professional world in which no one gets hurt, and thus they have sought, in Cardinal Newman's phrase, to quarry granite with a razor and to moor their

19. D. HOFFMAN, *Resolutions in Regard to Professional Deportment*, in *A COURSE OF LEGAL STUDY* 752 (2d ed. 1836) (originally published in 1817).

20. See Code of Ethics, 118 Ala. xxiii (1899). Chief Judge Jones wrote this code and contributed to its modifications, which became the 1908 version of the ABA Canons of Legal Ethics. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

21. Cf. F. TROLLOPE, *DOMESTIC MANNERS OF THE AMERICANS* 89-95 (1832) (P. Smith ed. 1974) (describing American religious establishments).

22. See P. MASON, *THE ENGLISH GENTLEMAN: THE RISE AND FALL OF AN IDEAL* 182-83 (1982) (quoting John Henry Newman); T. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* chs. 1-5 (galley proofs 1991) (unpublished manuscript).

23. P. MASON, *supra* note 22, at 181 (discussing Newman's theories and explaining how the English regarded the "gentleman" as a focus for their moral code).

vessel with a thread of silk.²⁴ Which means, of course, that their ethic has needed to cherish calculations of honor and shame, rather than an account of what is going on, in order to survive.

IV. WHO'S LISTENING?

The elementary ethical task of describing the morals of the gentleman-lawyer in America illustrates a specific, scholarly, academic, professional, and pervasive reason for digging into the theological. It gives the digger a motive, and, I suppose, it gives the digger an excuse for complaining, as I do, that others are not also digging. But it does not provide a reason for people to listen to the digger or to look at what he digs up, which is to say that if the listeners are as wed to the gentleman's ethic as the gentleman is, digging up its theological error may be at best futile and at worst self-indulgent. And that is to say that one explanation for why legal ethics ignores theology is that lawyers, law students, and judges are not interested in what theology has to offer.

Perhaps lawyers and judges who read law reviews, and students in law school, want to know why they should listen to a troublesome, divisive, uncomfortable theological legal ethic; I have listened to them wonder. It may be the case — I suspect many teachers of legal ethics think it is — that our audience is as little inclined to listen as the scholars are to dig.

One answer for me to give to these suppositious listeners is that many of them are already listening; people find theological questions interesting, once they get used to them. We teachers can learn from the disciplines of theology and religious studies — disciplines that even today, in an America which university professors call post-Christian, sustain thousands of exacting, demanding scholars. If almost all of our listeners believe in God, and two-thirds of them belong to a religious denomination, and half of them go to services regularly, it probably seems unusual to our listeners that we talk about morals and ignore religion. I have listened to them wonder about that, too.

Another answer for listeners is the possibility that a theological legal ethic would affect them in a deeper and more satisfying way than abstract, analytical, "philosophical" explanations have — which is another way to say that it is useful to notice that ethics did not begin with the Enlightenment's rejection of religious authority. Who,

24. *Id.* at 186-87.

after all, contemplates her life with her clients when she reads John Rawls?²⁵

Our morals run deeper than our democratic-liberal jurisprudence does: Our morals are earthier and more physical; they have to do with feeling and experience and what we bring to the profession from family, neighborhood, and town. We teachers of ethics may call such observations "positions," once we figure out that we can make a living by talking about them, but we know in our hearts that a serious ethical argument among American lawyers comes from our cultural, traditional, *and* theological roots. "There are no raw events[,] as Walter Brueggemann puts it. "There are only events shaped and discerned through a community of perception."²⁶ Such communities of perception in our culture have been religious communities, and religious communities remember (even when they betray the memory) that they know how to see and how to say what is going on.

Here is a positive example of the use of theological argument, in public, on moral questions like those we take up in legal ethics: recent pastoral statements from organized American religious groups on issues of homelessness, pollution, the capitalist economy, and the federal government's manufacturing, storing, and threatening to use nuclear weapons.²⁷ These pastoral statements have been *sectarian* arguments, made in diverse (or as we often say, "pluralistic") communities, made both in the "marketplace of ideas" and in communities of believers. They are doubtless among the oldest forms of "republican" argument in America. (By "republican," I mean that they depend on a social order in which groups other than the government have influence both on thought and on uses of power.) They stand in a tradition of pastoral statements that reaches back to the pulpits of the Massachusetts Bay Colony in the East and the Franciscan missions in the West, through the synagogues of eighteenth-century American Jewry and the revival preachers of the nineteenth century, to the twentieth-century Social Gospel and modern Roman Catholic doctrines on social justice. Their substance, their inspiration, and their style are rooted in persistent, faithful reading of the Hebrew Prophets.

25. John Rawls is currently a member of the Department of Philosophy at Harvard University. He is the author of *A THEORY OF JUSTICE* (1971). 114 CONTEMPORARY AUTHORS 377 (1985).

26. Brueggemann, *supra* note 12, at 32-33.

27. See generally H. BECKLEY, *JUSTICE IN AMERICAN THEOLOGICAL ETHICS* (Westminster galley proofs 1991) (unpublished manuscript); Beckley, *Love, Human Dignity, and Justice: Some Legacies from Protestant and Catholic Ethics*, ___ NOTRE DAME L. REV. ___ (1991); Beckley, *The Legacy of John A. Ryan's Theory of Justice*, 33 AM. J. JURIS. 61 (1988).

If nothing else, this old tradition of pastoral statements in America demonstrates that the civic community — what politicians and television reporters refer to now as “the American people” — is interested in religious argument. Only law professors fail to understand that.

V. RELIGIOUS ETHICS AS THE TRUTH

Another reason to dig out, describe, and observe the religious roots of legal counselors' morals is that the theological account might be the truth. That reason has two sides to it. On one side the theologically persuaded person exhibits her confidence in religious truth so that the community can see her do it. In traditional religious terms *she bears witness to her faith*. Her statement to the community is not universal in a Kantian or Rawlsian sense,²⁸ but it is universal nonetheless because she makes it to everyone, for everyone, confident that everyone would be better off to find it truthful, as she does. It has always been important to Jews and Christians to be candid about their faith in this way, and to seek to interest others in its truthfulness. In this sense, the faithful learn to think of themselves as a priestly people: “I will make of thee a great nation, and I will bless thee, and make thy name great; and . . . in thee shall all the families of the earth be blessed.”²⁹

The other side of the theological-truth reason has to do with the purity and soundness of theological argument. It is why many of those who are serious about theological ethics are wary of professional consensus statements on morals: The community of faith is suspicious of all conventional wisdom and attends to its own theological integrity, as it bears witness, tells its stories, and is faithful to its memory, because unless it does *it will not have anything to say*. The faithful remember this lesson in stark, painful images: Joshua's God in combat with pagan gods;³⁰ Jesus letting the rich young man walk away;³¹ Oliver Cromwell, in Carlyle's image, prostrating himself in the dust before his God and setting his foot on the neck of his king.³² Integrity means that the faithful remember their prophets, their martyrs, and their most powerful preachers.

28. “Universal,” that is, in the sense that the indicated morality would apply to any person, regardless of culture. See I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 56 (L. White Beck trans. 1969) (originally published in 1785).

29. *Genesis* 12:2-3.

30. See generally *Joshua* 24:15 (describing the crossing of the Israelites into the promised land).

31. *Mark* 10:17.

32. T. CARLYLE, OLIVER CROMWELL'S LETTERS AND SPEECHES Vol. 1, pt. 2, at 185 (1845).

Theological integrity requires a stubbornness that can be mistaken for aloofness, or even for pietism, but is instead a matter of faithfulness: "When the singular holiness of God is assigned to historical structures, it has become self-serving ideology[,] " Brueggemann says.³³ It has become a civic and bogus religious reason for serving the interests, whatever they are, of the state, of the prosperous and powerful, or of the fraternity of professional gentlemen.

"The primal conversation in the Old Testament is behind the wall," Brueggemann says, "and it is not different in the New Testament. It is a tradition of suspicion against the dominant rationality. . . . [T]his posture of suspicion is the source of vitality and passion, and I dare say of compassion and humaneness."³⁴ Suspicion preserves the "sectarian" conversation behind the wall. This does not mean that "outsiders" are excluded so much as that compromise with the dominant rationality has to be limited by truthfulness, by the alternative perception that gives ethics coherence and force. Compromise destroys vitality when compromise is the result of coming to terms with power, rather than coming to terms with another person's perception of the way things are.

The vitality and passion that are protected by this sectarian suspicion are the sources of compassion because love is not enough. (Feeling right and doing what comes naturally, and helping a friend are not enough. In fact, granite is not quarried with a razor, nor are vessels moored with silk.) A coherent and forceful *ethic* of love does not rest on physical urges or on a neurological surge of fellow feeling; we *learn* to love, as much as we learn to speak a language. We learn to love — and we learn what love is — in a tradition, in the memory of a community, in the conversation behind the wall. A coherent and forceful ethic of love has to be suspicious because it has to protect the place where we learn what love is like.

Brueggemann's biblical image is Assyria's siege of Jerusalem,³⁵ and the two conversations it provoked — one with the invading army, on the wall,³⁶ and one among the besieged faithful, behind the wall.³⁷ In much of his recent work on what Christians call the Old Testament, Brueggemann devotes energy and eloquence to the contrast between the "sectarian" conversation *behind* the wall (the conversation about

33. Brueggeman, *supra* note 12, at 15.

34. *Id.* at 29.

35. This siege is described in 2 *Kings* 18, 19.

36. Brueggeman, *supra* note 12, at 4-5.

37. *Id.* at 5-6.

what a faithful people ought to be) and the secular conversation *on* the wall, the conversation with the "empire."³⁸

The conversation on the wall is what today we would likely call the *civic* conversation. It is a dialogue in which sectarians make their arguments for what the community (or the professional fraternity) ought to do. The conversation in which the faithful speak on the wall is the tradition the Bible tells about as prophetic. Brueggemann speaks of it as a tradition of "pain brought to speech."³⁹ This description recalls Newman's complaint that the English gentleman turned away from the way their religious tradition taught them to come to terms with evil in the world.⁴⁰

The "empire" of which Brueggemann speaks has learned not to pay attention to its victims: "The empire . . . does not mind oppressed people being hurt," Brueggemann says, "so long as there is no public outcry"⁴¹ — that is, so long as the dominant rationality keeps the empire and its professional fraternities from noticing those who are being hurt. The empire's discomfort (and either its use of force to attempt to silence the outcry or its momentary attentiveness to the outcry as a counter-reference for moral perception) comes when the sectarians speak out, with "a cry of pain that destabilizes, assaults and delegitimizes every absolute imperial claim."⁴²

In order to be able to speak out in that way, the sectarians have to be careful — and often they fail to be careful — that the *empire* does not become their sect; if they let the empire become the sect (as Christians in America have usually done), they will lose their ability to be discontented as well as the more subtle gift they may from time to time be given to speak out for the discontented.

The sectarians of Hebrew Scripture preserve their ability to criticize themselves (and thereby their ability to criticize the empire), when they do (which is not often), by remembering where they come from, and how they came (out of slavery in Egypt, by the power of God, through the suffering of the Servant, on the Cross), and by remembering the style, the energy, and the courage of the prophets. They preserve their power to cry out as they remember their unfaithfulness and repentance. Unless they attend to their *theology*, to what Dietrich Bonhoeffer called the memory of the church,⁴³ they will not have anything to say.

38. See generally *id.*

39. *Id.* at 18.

40. See P. MASON, *supra* note 22, at 184 (quoting John Henry, Cardinal Newman).

41. Brueggemann, *supra* note 12, at 18.

42. *Id.*

43. C. FANT, BONHOEFFER: WORDLY PREACHING 27 (1975).