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Thomas L. Shaffer

*Notre Dame Law School*, [thomas.l.shaffer.1@nd.edu](mailto:thomas.l.shaffer.1@nd.edu)

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## LEVINSON BUILDS THE KINGDOM: COMMENT ON "PROFESSING LAW"

THOMAS L. SHAFFER\*

For all of his measured civility, my friend Levinson talks about an angry God. Levinson's issues are idolatry, false prophets, and the destruction of graven images in the desert.

The idol is the law. The idol is worshipped in the desert where Levinson and I live; this place of ours is *not* a river, it is a desert. Worshipping the idol in the desert defies and disobeys the God Who says, "I am the Lord your God. . . . You shall have no other god to set against me."<sup>1</sup> The Book of Genesis tells us that God's covenants bind all human beings.<sup>2</sup> Likewise, the commandment against idolatry binds us all; it binds every human person, not because every human person hears the God Who commands, but because every human person is bound to keep things in ordinary perspective, to worship only what can, in common sense, *be* God.

Levinson is describing false worship, led by false priests, rationalized by false prophets. There are two tasks facing those who would "act . . . in agreement with the will of God."<sup>3</sup> One task is to tear down the idol. The "deconstructors" are doing that. The fashionable academic issue they provoke ("nihilism" or whatever) is a spurious issue based on the false virtue of loyalty, loyalty occasioned by the more or less accidental fact that the deconstructors are camped in the desert with the false priests, with the false prophets, and with such quizzical bystanders as Levinson and me. All of us—false priests, false prophets, deconstructors, and quizzical bystanders—are together in an institution (law school). I call it a desert because that is the way it seems to me; whether a desert or not, those who live there and worship the idol have conceived a morality of loyalty to protect themselves. Their loyalty raises the same issue that worshipping the idol raises.<sup>4</sup>

The second task is to build the Kingdom.<sup>5</sup> The deconstructors do

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\* B.A., J.D., LL.D.; Professor of Law, Washington and Lee University; member of the Indiana Bar.

1. Exodus 20:2-3.

2. See Genesis 9.

3. A. HESCHEL, *BETWEEN GOD AND MAN* 186 (1959).

4. That is, loyalty to professional colleagues is justified by the legal system. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1981); MODEL RULES OF PROFESSIONAL CONDUCT, Preamble, Rules 8.1-8.5 (1983).

5. S. Hauerwas, *On Living Between the Times*, 17 VAL. U.L. REV. 57 (1983).

not even pretend to work on this task. Instead, they are tearing down the idol, and that is an important and even obedient thing to do. The cry "nihilist" is the outrage one would expect to hear from the priests who serve the idol and the prophets who rationalize the worship of the idol. Still, the angry, nose-thumbing work of the deconstructors<sup>6</sup> is not the building of the Kingdom.

I want to write about the building of the Kingdom. How do we build the Kingdom, here in the desert?<sup>7</sup> Maybe we will only come up with another idol. According to Levinson, constitutionalism is an idol. The notion of "citizenship" is also an idol, though Levinson might disagree.<sup>8</sup> If, in our attempt to build the Kingdom, we only produce another idol, then we should hope the deconstructors will tear down our idol, just as they are tearing down the idol of the law. We should hope the deconstructors will have the clarity of vision to do that, which is why we need to continue our muted praise of the deconstructors. But Levinson does not want to join the deconstructors, and neither do I; we want to get on with the second task; we want to build the Kingdom.

Levinson discusses the rebuilding of the Kingdom in, as he puts it, *epistemological* terms. When cast in these terms, the question we ask ourselves, as we look across the desert and behold all the frantic activity going on among the priests and the prophets and the deconstructors, is: Where do we stand? Levinson uses the story of Jesus and Pontius Pilate<sup>9</sup> as a focus for his epistemological question: What is truth? Although he uses Pilate as a symbol, and Pilate's confrontation with Jesus as a story, Levinson does not (if I understand him) mean to stand where Pilate stands. Levinson means to stand somewhere else and look at Pilate as Pilate stands among the priests and prophets and deconstructors, as they shake their fists at one another in the shadow of the

The Hebraic (Judeo-Christian) religious tradition speaks both of building the Kingdom and of *seeing* the Kingdom that is already built; God is present among people, but He also gives each person the ability to share in His creating. *See infra* note 23 and accompanying text. As Heschel states: "His being immanent depends upon us." A. HESCHEL, *supra* note 3, at 212-13.

6. Trillin, *Harvard Law*, *The New Yorker*, March 26, 1984, at 53.

7. *See* A. HESCHEL, *supra* note 3. The early American Christian evangelical tradition saw the religious mission as a spur to the state and to public life as "post-millennial." The early Revival had this social fervor and a relatively clear sense of what it meant to be building the Kingdom. *See also* M. MARTY, *RIGHTEOUS EMPIRE* (1970); T. SMITH, *REVIVALISM AND SOCIAL REFORM IN MID-NINETEENTH CENTURY AMERICA* (1958). The 20th Century "Christian realism" of Reinhold Niebuhr was in some ways an attempt to revive the early fervor and to purge it of self-deception. *See generally* R. NIEBUHR, *THE IRONY OF AMERICAN HISTORY* (1962); R. FOX, *REINHOLD NIEBUHR* (1985).

8. Shaffer, *The Legal Ethics of Radical Individualism* (forthcoming); Shaffer, *Jurisprudence in the Light of the Hebraic Faith*, 1 *NOTRE DAME J. L. ETHICS & PUB. POL'Y* 77 (1984).

9. Matthew 27; Mark 15; Luke 23; John 18:28-19:22.

idol.

I do not want to talk about the building of the Kingdom in epistemological terms, but I do want to linger for a moment over Levinson's epistemological image. I want to urge Levinson to give it up. Pontius Pilate is one of three human persons (there are only three) who are mentioned by name in the Christian creed; the others are Jesus and his mother.<sup>10</sup> The creed casts Jesus and Pilate as opposites: the prophet seeking truth (refusing power); the priest of the false idol of governmental power asking the epistemological question. Pilate is dishonest; he wants to appear, for one wistful moment, as if he were indulging a bit of liberally educated curiosity. But he stands in a forest of gibbets, crosses to which his soldiers nailed Jesus and many other Jews. Pilate is (I agree) a symbol: a symbol of power, not truth. Pilate's crosses are the enduring symbol of what men do to one another in the name of the law.

Levinson and I do not want to stand in Pilate's place because, in the end, Pilate worshipped the idol. His epistemology was a bluff. Instead, Levinson and I want to gather with Joshua and the heads of the families of Israel. We listen as Joshua says to us: "Choose here and now whom you will worship: the gods whom your forefathers worshipped beside the Euphrates, or the gods of the Amorites in whose land you are living. But I and my family, we will worship the Lord."<sup>11</sup> Talk of epistemology will not do, Levinson; your account of the enterprise, in those terms, is a mistake. If the activity we are talking about is, as you say, religious, then the issue is idolatry, not epistemology.<sup>12</sup>

10. Apostles' Creed (apx. 370 C.E.) in what is referred to as its second article: "We believe in Jesus Christ. . . . He was conceived by the power of the Holy Spirit and born of the Virgin Mary. He suffered under Pontius Pilate, was crucified, died, and was buried."

11. Joshua 24:15.

12. The theology of vicarious atonement, which is particularly prominent in Calvinism and Lutheranism, accepts—as all Christian theology does—that the death sentence imposed by Pontius Pilate was legal under Roman Law. It was necessary, according to Lutheran and Calvinist theology, that Jesus be condemned officially, so that he could take the place of sinners who would otherwise be condemned by the Father. 2 K. BARTH, *CHURCH DOGMATICS* § 35.4, at 449-506 (1957); K. BARTH, *DOGMATICS IN OUTLINE* 101-113 (G.T. Thomson trans. 1959); J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 2.16.5 (1559), pp. 507-510 (J.T. McNeill ed. 1960); 2 H. THIELICKE, *THEOLOGICAL ETHICS* 323-324 (1969).

This doctrine of vicarious atonement tends to absorb more than to dispute the theme of idolatry. Other theologies in the Christian tradition are clearer that (i) the issue in the story is idolatry; (ii) the idol is the Roman legal system; and (iii) Jesus and Pilate are on opposite sides of the issue. The theology of the Radical (Anabaptist) Reformation is an example. See J. YODER, *THE PRIESTLY KINGDOM* 157 (1984). The Roman legal system, as it appears in the narrative in Luke 22-23, "is a capsule of a general view of government as such . . . both the relative acceptance of the 'powers that be' expressed in Romans 13 and the realistic denunciation of those same powers when their claim to be benefactors is unveiled as idolatry in Revelation 13." Roman Catholic

Of course, certain *conditions* are prerequisites for talking seriously about anything. We builders pretty much have to be interested in maintaining the two conditions of freedom and civility. But freedom and civility are only conditions. The Kingdom is not merely a place where people respect one another (although it is that), nor is it merely a place where each person is free to think and speak (although it is that too). The Kingdom is greater than the sum of its parts. The enduring mistake of liberal democracy is that it confuses the conditions necessary for the Kingdom with the Kingdom itself; it supposes that orthodoxy is the enemy of freedom, which is not the case. Orthodoxy is inevitable, as Levinson demonstrates. It is inevitable that the law faculty will be a creedal community, one that currently excludes from serious consideration not only astrology but most of what the grandparents of the faculty members considered important. Of course, the false prophet proclaims false orthodoxy (as Levinson demonstrates), just as the false priest worships the idol. The confusion of conditions for the Kingdom with the Kingdom itself is the confusion that supposes orthodoxy is excluded because the false prophets have said so. What the false prophets have actually done is to establish their own orthodoxy, false but no less orthodox, even though the false prophets call it something else.

False orthodoxy is no less false when its prophets and the critics of its prophets are free and civil. Historically, it is an open question whether those who seek to build the Kingdom do a better job under conditions of freedom and civility than they do under conditions of tyranny. The Kingdom is a free and civil place, but the way to the Kingdom may not be.<sup>13</sup> History, tradition, and myth argue that the Kingdom is bought for a price. In any event, just because freedom and civility are desirable in the desert does not point the way to the Kingdom, any more than the fact that people can think limits reality to logical propositions.

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theology has accommodated both kinds of emphasis. R. MCBRIEN, CATHOLICISM 405-407, 478-480 (1980); H. KUNG, ON BEING A CHRISTIAN 183-195, 291-294, 332-339 (E. Quinn trans. 1975). There seems to be agreement across the tradition that the sentence passed by Pilate was not only legal but also in some sense legitimate; that is, the idol is a real idol, with a rationale and a logic of its own. On this point, I think, Yoder speaks for most Christians: "The . . . authorities were defending themselves against a real threat. That the threat was not one of *armed*, violent revolt . . . is a proof of the political relevance of [Jesus's] nonviolent tactics. . . . Jesus's public career had been such as to make it quite thinkable that he would pose to the Roman Empire an apparent threat serious enough to justify his execution." J. YODER, THE POLITICS OF JESUS 59-60 (1972).

13. "The Cross is not a detour or a hurdle on the way to the Kingdom, nor is it even the way to the Kingdom; it is the Kingdom come." J. YODER, THE POLITICS OF JESUS, *supra* note 12, at 61. There is similar irony in the Jewish liturgy: "Thou hast loved, favored and exalted us above all nations, and sanctified us with thy commandments." DAILY PRAYER BOOK 398 (P. Birnbaum ed. 1977).

We mean to be building the Kingdom. I see two risks, two alternatives for us, beyond these preliminary and distracting issues about epistemology, freedom, and civility. One of the alternatives (risks) is that what we think of as better will only be a better idol; the other is that we think we can dispense with idols.

Citizenship is, I think, another idol. It is a better idol than the law, for all the reasons Levinson gives, but it is still an idol. (Justice under law is a better idol than Baal, but it is still an idol.) "Citizen" is a more desirable identity than "lawyer," but a less obedient identity than the one Joshua mentioned. Citizenship leads away from hedonism, as Levinson says, but the question is not what citizenship leads away from, but what citizenship leads us toward. The classic American answer has been that (American) citizenship leads to the Kingdom. America is, according to Jefferson, God's new Israel—the righteous empire.<sup>14</sup> But the American kingdom is a false kingdom; it is another idol, an idol visible along every mile of American history.<sup>15</sup> It requires more credulity than Exodus demands of us to suppose that the citizens of America can, despite their past, locate a *telos* that is worthy of the devotion of the human minds that Moses and Socrates assumed us to have.

Faith in citizenship is more egalitarian than faith in professionalism (which, for American lawyers, is faith in the law), although faith in citizenship, in all of its American manifestations so far, has been ready to exclude human persons who were not American citizens. (Listen to television news report the latest airplane crash; listen for the identification of the victims according to citizenship.<sup>16</sup>) But faith in citizenship is a lot like faith in professionalism—like David Hoffman proclaiming that American lawyers were priests in the temple of the law and truthful carriers of the promise of order and justice;<sup>17</sup> or like Walter Metzger's description of the academic scientist's faith in a fraternity of observation and measurement. And so, I think, citizenship is only another idol; better than the law (in ways that have to do more

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14. M. MARTY, *supra* note 7, at 48-49.

15. R. NIEBUHR, *supra* note 7.

16. H.R. NIEBUHR, *THE RESPONSIBLE SELF* 87-88 (1963): "The process of self-transcendence . . . does not come to rest until the total community of being has been involved . . . . The responsible self is driven as it were by the movement of the social process to respond and be accountable in nothing less than a universal community." Which is to say that a morally adequate account of membership in community goes beyond the notion of citizenship. See Ruether, *Re-Contextualizing Theology*, 43 *THEOLOGY TODAY* 22 (1986).

17. See 2 D. HOFFMAN, *A COURSE OF LEGAL STUDY* 730 (2d ed. 1836); T. SHAFFER, *AMERICAN LEGAL ETHICS* 59, 65 (1985). Hoffman concludes that the legal profession should be "a profession, whose object and pride should be the suppression of all vice, by the vindication and enforcement of laws . . . ministers at a holy altar."

with hedonism than Levinson admits<sup>18</sup>) but nonetheless an idol.

Community can also be an idol, but not the community that Levinson is thinking of. Community is, like freedom and civility, a condition for the Kingdom; it is not the Kingdom. But community is more than civility and freedom. Freedom and civility can leave the human person alone and fragmented. Community, with or without freedom and civility, holds the human person together, and puts him back together when freedom and civility have broken him apart.<sup>19</sup> So community is an important reality, a characteristic of the Kingdom, and also a reality that *builds* the Kingdom: I am thinking of Martin Buber's image of the community as an interconnection of I-Thou relationships, each of which bears testimony to God.<sup>20</sup>

Beyond that, and in what Levinson speaks of as a "polity," community can be prophetic; it can speak the truth and speak against the pretensions of the false idol of the law. Buber, a citizen of Israel and, more importantly, a resident of the Jewish community, probably intended an oblique warning of certain governmental excesses in the modern state of Israel when he described the ancient Roman state as: "a forced union that had supplanted all natural community; it was legitimized arbitrariness, sanctioned sacrilege, a mechanism wearing the mask of an organism, an organism wearing the mask of the spirit . . . a contraction of a strayed will to community."<sup>21</sup> Buber was describing an idol.

By contrast, Buber's image of the Kingdom was a communal image, and without community the Kingdom would be meaningless. Community points to the Kingdom in a way that civility and freedom do not; and community is also as much a prophetic witness against the idol of citizenship as it is a prophetic witness against the idol of the law. As Buber writes:

The religious character of the people consists emphatically in that something different is intended for it from what it is now, that it is destined for something different—that it should become a true people, the people of God. Precisely in the religion of Israel is it impos-

18. See Danner, *Affluence and the Moral Ecology*, 81 *ETHICS* 287 (1971). See also C.S. LEWIS, *ON STORIES* 152 (1982), for a conversation on science fiction between Lewis, Kingsley Amis, and Brian Aldiss, which reads in part:

Lewis: Oughtn't the word *serious* to have an embargo slapped on it . . . ?

Aldiss: You can't be serious without being earnest.

Lewis: Leavis demands moral earnestness: I prefer morality.

Amis: I'm with you on that one.

Lewis: I mean I'd sooner live among people who don't cheat at cards than among people who are earnest about not cheating at cards.

19. R. BELLAS, R. MADSEN, W. SULLIVAN, A. SWINDLER, AND S. TIPTON, *HABITS OF THE HEART* (1985).

20. M. BUBER, *I AND THOU* 149-168 (W. Kaufmann trans. 1972).

21. M. BUBER, *ON JUDAISM* 124-125 (1968).

sible to make an idol of the people as a whole, for the religious attitude to the community is inherently critical and postulative.<sup>22</sup>

In this positive mood, community nourishes justice and peace, not as conditions or procedures (not justice as order, or peace as the absence of orderly or disorderly mayhem), but substantive justice. Community points to justice, for example, as a gift that people in the community (I's and Thou's) give to one another, and it points to peace as servanthood and forgiveness. Community points to the Kingdom as it appears in the imagery of the Hebrew prophets.<sup>23</sup> If a legal thinker or a jurist takes seriously these substantive notions (justice-as-gift, servanthood, forgiveness), he begins, I think, to see the Kingdom—and it is community that makes it possible for him to see.

The second risk I perceive in Levinson's program for building the Kingdom is the alternative that says, "Let's get along without *any* idols. Let's gather around the lecturer's podium and agree that there is meaning in life, and talk together, each of us striving to be coherent and to hear coherence in what others say." That sounds like a community; it observes the condition of freedom and provides the virtue of civility. If you leave the gods out, it is positively *Athenian!* But neither Levinson nor Goffman claims that it is the Kingdom. What they say about the image implies that we had better give up on building the Kingdom. The image sounds good to me because I am weary (more than Levinson, I think) of lingering in the desert and listening to people quarrel over idols. I wish they would all leave, so that we who are left can say what we think and listen to one another, and that is what they have done in Levinson's (Goffman's) lecture hall. No idols can be found there.

It is close to the essential faith (and I use the word carefully) of public-law professors (*e.g.*, Levinson) that such a thing as Goffman's lecture hall is possible and that it can endure. I doubt that it is possible, that it has ever existed, or that it could survive for five minutes in the desert Levinson and I work in. But that is an untested argument, and also a cynical one. All I can offer in support of it is the sort of orthodoxy that many of my friends see as oppressive. Nonetheless, I record my doubt, for myself and for the gloomier corners of my own religious tradition. (It is Thomas More's corner, I think.<sup>24</sup>)

What I really think, on this score, about Levinson's paper, is that

22. *Id.* at 207.

23. S. HAUERWAS, *THE PEACEABLE KINGDOM* ch. 5-6 (1983).

24. I am thinking not so much of Robert Bolt's More as of the medieval More who wrote "The Dialogue of Comfort." R. MARIUS, *THOMAS MORE* 472-79. Which is not to doubt that educators help build the Kingdom, because "[w]ithout *education* everything would remain the doing of God, and nothing would be the doing of man. Mutuality—the covenant—would vanish." E. Fackenheim, *Martin Buber: Universal and Jewish Aspects of the I-Thou Philosophy*, *MIDSTREAM*, May, 1974, at 46, 54.



he is hiding the ball. I think his vision of the lecture hall is a vision of a community, observant of the conditions of freedom and civility, in which argument is carried on not epistemologically, *but for the sake of heaven!* I think Levinson is talking about the *Kingdom*. I could be wrong, and in any case my writing that I think this of him violates the orthodoxy that those who quarrel around the idol have imposed on us; I even risk being intrusive about opinions Levinson is entitled to keep to himself. But—still—that is what I think.