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**NUCLEAR WEAPONS, LETHAL INJECTION, AND
AMERICAN CATHOLICS: FAITH CONFRONTING
AMERICAN CIVIL RELIGION***

THOMAS L. SHAFFER**

If we . . . were truthful, just and holy and loving in mind and soul . . . if then God would let this promise of salvation grow out of our fate and our life: that the whole of mankind, awakened . . . enlightened . . . uplifted by our destiny and life, should, in unity with us, turn to the One and Only—and if thus we would fulfill our vocation as priests to humanity—what bliss there would be

—Rabbi Samson Raphael Hirsch (1808-1888)

Maybe Rabbi Hirsch was announcing a political agenda for believers, and a jurisprudence, as well as an ethic. I want to argue here that he could have been. When I came across what he said, quoted in a new book on Jewish obligation in a non-Jewish society such as ours,¹ I thought of a story Father Jim Burt-

* This article is an expanded version of the Joseph B. Brennan Lecture, delivered at Georgetown University on April 15, 1998. When I use the phrase “American civil religion,” I mean the religion of patriotism. When I say that faith confronts American civil religion, I want to suggest that the biblical prophets of Judaism and Christianity, from Moses through Martin Luther King, Jr., and William Stringfellow, have two things to say about patriotism: (1) Whatever our country is, it is not God; and (2) government is necessary, and its biblical purpose is to support the community as it “distributes its produce equally . . . values all its members and . . . brings the strong and the weak together in common work and common joy.” WALTER BRUEGGEMANN, *A SOCIAL READING OF THE OLD TESTAMENT: PROPHETIC APPROACHES TO ISRAEL’S COMMUNAL LIFE* 50 (Patrick D. Miller ed., 1994).

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1. See J. David Bleich, *Tikkun Olam: Jewish Obligations to Non-Jewish Society*, in *TIKKUN OLAM: SOCIAL RESPONSIBILITY IN JEWISH THOUGHT AND LAW* 61, 91 (David Shatz et al. eds., 1997).

chaell told a couple of years ago about Catholics in modern America:

I had a classmate who worked at the Pentagon at the time the Catholic Bishops first circulated the draft of their letter on . . . nuclear arms. . . . [He] told me that when it first came out . . . the Navy began to make plans to withdraw Catholic officers from command positions on nuclear submarines, because all of a sudden they were stricken with the thought that Catholics were all security risks. . . . [But] within a few weeks they didn't worry anymore. They realized that there was no risk at all. Catholics weren't paying any attention to the Bishops, because the Bishops had been trying so long to preach to the Oval Office that they stopped preaching to Catholics

I was struck by that story, and wished that my fellow Catholics were more of a security risk.²

Capital punishment orders issued by judges are a more current Catholic issue. But, like the image of Catholic naval officers poised over the nuclear button, the question of death sentences will soon become unimportant. Dean John H. Garvey and Amy V. Coney treat the question as one involving the disqualification or recusal of Catholic judges in death-penalty trials and appeals.³ The basis for particular treatment, or a claim to particular treatment, would be that teachers of Catholics, including the Bishop of Rome, have decided that capital punishment is immoral.⁴

Analysis of the judicial question is hypothetical, but it is also more complex than analysis of the military question.⁵ After all,

2. Thomas L. Shaffer & John H. Robinson, *H. Jeff Powell on the American Constitutional Tradition: A Conversation*, 72 NOTRE DAME L. REV. 11, 73 (1996).

3. See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

4. See JOHN PAUL II, *EVANGELIUM VITAE* para. 56, at 91-92 (1995). A recent, American example of Roman Catholic teaching on the death penalty is *A Good Friday Appeal to End the Death Penalty: A Statement of the Administrative Board of the U.S. Catholic Conference* (Apr. 2, 1999). The American Bishops have steadily opposed the death penalty since 1971. See JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

5. For responses to the Pope and bishops from governors who are Roman Catholics and who say they will not follow the direction of their bishops on imposition of the death penalty, see Robert F. Drinan, *Catholic Politicians and the Death Penalty*, AMERICA, May 1, 1999, at 19. Some of these responses simply state disagreement; others take the position that the principles of their faith do not apply to their actions as public officials. Judge John T. Noonan, Jr., took a position somewhat like the latter, before the promulgation of *Evangelium Vitae*, he invoked the role of federal judges (who are in a position to frustrate imposition of the death penalty) as a moral factor that limits conscience. See John T.

Garvey and Coney devote fifty-nine pages to it. Finally, the conclusion I came to from reading their admirable scholarship is that disqualification will not be necessary, for pretty much the same reasons Father Burtchaell's friend noticed in the Pentagon: Death-house America, like nuclear America, needn't worry. When it comes to a conflict between the biblical faith discerned by their teachers, and Americans' unique and persistent determination to kill criminals, Catholic judges will stick with America.

There are examples the other way: Dietrich Bonhoeffer's proclamation of Christian discipleship during the Holocaust;⁶ Rabbi David R. Blumenthal's saying, "Only God's relationship to Israel gives significance to our lives";⁷ the day President Bush's bishop picketed the White House in protest against the Gulf War;⁸ Bishop Ruiz's speaking about state murder in Chiapas. *The Economist* noted what Bishop Ruiz said, and worried about his safety: "Even if churchmen can agree on a political agenda, history suggests they may be unwise to pursue it."⁹ Bonhoeffer would say that defiance and even subversion of the ruling wisdom is the point of such stories.¹⁰ Theology as politics in such stories is dangerous by definition.

Noonan, Jr., Essay, *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993).

6. For a range of quotations from Bonhoeffer's witness, and from his theology of the church, see A TESTAMENT TO FREEDOM: THE ESSENTIAL WRITINGS OF DIETRICH BONHOEFFER (Geoffrey B. Kelly & F. Burton Nelson eds., 1995) [hereinafter Kelly & Nelson]; Keith Clements, *Community in the Ethics of Dietrich Bonhoeffer*, 10 STUD. CHRISTIAN ETHICS 16 (1997); Robert Coles, *Secular Days, Sacred Moments*, AMERICA, Feb. 28, 1998, at 4.

7. DAVID R. BLUMENTHAL, GOD AT THE CENTER: MEDITATIONS ON JEWISH SPIRITUALITY 29 (1988).

8. The incident involving Bishop Edmond Browning and President Bush was reported by Peter Marks. See Gaylord Shaw, *The Gulf Crisis: Bush at Peace with Himself about Efforts*, NEWSDAY, Jan. 16, 1991, at 17.

9. *Turbulent Priests*, THE ECONOMIST, Dec. 6, 1997, at 34. The modern efforts of the organized Roman Catholic Church in Bishop Ruiz's homeland are described in Paul Farmer, *A Visit to Chiapas*, AMERICA, Mar. 28, 1998, at 14.

10. See Kelly & Nelson, *supra* note 6, at 99:

Bonhoeffer wrote in 1932 that when the church speaks, it speaks from its own discernment. It speaks from biblical commandment, which "is not there once and for all, but is given afresh, again and again. Only in this way are we free from the law, which interposes itself between us and God."

Brueggemann uses the word "subversion" frequently in explaining his Christian political theology, but makes it clear that overthrow of the government in a Marxist sense is not what he means; his notion about subversion recognizes the legitimacy, and even the divine commission, of the regime being subverted. See, e.g., WALTER BRUEGGEMANN, HOPEFUL IMAGINATION: PROPHETIC VOICES IN EXILE 90-108 (1986).

Maybe these Jews and Christians have wanted to put God first. Maybe, reversing the standard law school question, they have wanted to talk about the government as a problem for faith, rather than faith as a problem for government. Walter Brueggemann, a prolific biblical scholar who trains Presbyterian ministers in Georgia, looks at the question in this unfamiliar way:

Biblical faith is a peculiar phenomenon in the history of world culture. In every phase of life it seeks to articulate an alternative to commonly accepted presuppositions and widely practiced usages. In every phase of life that alternative is at least strange and perhaps peculiar; sometimes it is scandalous if not absurd.¹¹

Brueggemann affirms the contrast I mean to propose here. Perhaps he would affirm the strange, peculiar, scandalous, and absurd proposition that a Catholic naval officer cannot be depended upon to push the nuclear button, that a Catholic judge cannot be depended upon to order the lethal needle.¹²

My late and beloved colleague John Howard Yoder, speaking for and from five centuries of Anabaptist tradition, explained, simply, why reluctance, danger, and even (Brueggemann's word) subversion might be what a Christian (or Jewish) political morality is all about: "Jesus is Lord," Yoder said, quoting the Apostle Paul.¹³ Believers seek, in following Jesus, to live lives of servanthood, which means at least that they are not called to conform themselves to the American dream. Nonetheless, John was fond of quoting the prophet Jeremiah, who advised the Israelites held captive in Babylon to "seek the peace of the city."¹⁴ They were resident aliens; there was a difference between seeking peace and being Babylonians. (It was no doubt helpful in his moral vision that he was a pacifist.)

Jesus is Lord. Already. "Our life is to proclaim, not to produce, the new world," Yoder wrote.¹⁵ The Netziv of Volzhin, a 19th century Lithuanian rabbi, probably meant this when he said, "Israel was created to be an illumination unto the nations and to cause them to achieve knowledge of the Lord of the uni-

11. WALTER BRUEGGEMANN, *A SOCIAL READING OF THE OLD TESTAMENT* 276 (Patrick D. Miller ed., 1997).

12. From a biblical perspective, this would occur, as I suggest below, because a *community* of faith has discerned a *reality* the dominant order does not see and refuses to understand.

13. *I Cor.* 12:3.

14. *Jer.* 29:7. This is the theme and thesis of Yoder's last book, JOHN HOWARD YODER, *FOR THE NATIONS* (1997); for my discussion, see Thomas L. Shaffer, *The Jurisprudence of John Howard Yoder*, 22 *LEGAL STUD. F.* 473 (1998).

15. YODER, *supra* note 14, at 209, *quoted in* Shaffer, *supra* note 14, at 478.

verse.”¹⁶ Not to learn society’s lessons, but to teach other lessons to itself and to “society.”¹⁷

An extension of such sentiments is enough to cause an American lawyer to notice what has happened to Bracton’s daring 13th century proposition, “Not under the king, but under God and the law.” We learned that in law school in my day—in Latin. It is the sort of thing that gets carved over courthouse doors, God and the law having meant the same thing to those who built courthouses. But maybe Bracton meant to put God and the law in tension: God and the law—take your pick. Maybe he even meant to suggest a difference in results, in moral answers.¹⁸ If so, American lawyers abolished the tension. We conflate God and the law. We turn Bracton into American civil religion. We eliminate the contrast I mean to describe. We have our own version, for example, of the way ordinary citizens are supposed to exhibit religious nationalism when the nation-state gets ready for war: Whether the war is wise or foolish, right or wrong, the American thing to do—the religious thing to do—is to support it.¹⁹

David Hoffman, the founder of American legal ethics, told his law students that they would be priests in service at the altar of American law.²⁰ The president of my trade union, the Association of American Law Schools, sent us this written message in November 1997: “[T]he law has been the means for founding, defining, preserving, reforming and democratizing a united America,” and “America’s lawyers have been charged with setting the nation’s values.”²¹ Lawyers’ civil religion is like being left with only one way to spell a word. “If a word in the dictionary were misspelled,” as Steven Wright said, “how would we know?”²²

16. Bleich, *supra* note 1, at 61.

17. *Id.*; see also Shmuel Noah Eisenstadt, *Sectarianism and Heterodoxy in Jewish History: Some Comparative Civilizational Notes*, 37 JEWISH STUD. 7, 35-59 (1997) (developing a “sectarian” Jewish political theology).

18. That is, there are here *three* perspectives, not two. The king is subject to what lawyers proclaim as “the rule of law” (in modern America an article of faith for civil religion); both the king and the law are subject to God; the law does not reliably express the will of God, although the law owes its existence and the respect of believers to God. See *Rom.* 13:1-7.

19. This position is described theologically in BRUEGGEMANN, *supra* note 11, at 91-110.

20. Developed notably in the introduction to DAVID HOFFMAN, *COURSE OF LEGAL STUDY* (2d ed. 1836), reprinted in THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 59-63 (1985).

21. John Sexton, *We Must Protect the Law and Its Role from the Demagogues*, AALS NEWSL., Nov. 1997, at 1.

22. Steven Wright, *Laughter, the Best Medicine*, READER’S DIG., Jan. 1998, at 65.

I want to insist on a contrast between Hebraic faith²³ and American civil religion.²⁴ I want also to argue that faith's side of the contrast is as political and jurisprudential as civil religion's side. But first it is important to see how strong civil religion is—to see it *as* religion, as persuasive and as dominant. Thus, as expressions of *civil religion*, it seems right to *honor* loyal naval officers and judges faithful to the oaths they took when they assumed their burdens. "Honor" is the right word here; honor is the key virtue in civil religion, even if honor is a confusing value for believers.²⁵ (I think of C.S. Lewis's saying somewhere that there was no honor in Gethsemane.)

But, still, honor is important among us. "He was an honorable man" is still a moving thing to say, at a (man's) funeral. The notion, and the liturgy that invokes the notion, show us believers that civil religion has a hold on us, and that we need a place where we can *sit down together and think things out*.²⁶ This argument of mine needs to get beneath simple contrasts between biblical faith and civil religion. We believers need to reason together, plopped down as we are in the middle of the present. We believers include naval officers and lawyers and teachers of children and employees of the Social Security Administration. What are we supposed to do when our faith confronts honor in America's civil faith?

In aid of a more careful look, I will try to describe three positions taken and being taken by believers and teachers of

23. I use "Hebraic" rather than the more common "Judaeo-Christian" because I mean to suggest, at least for present purposes, a single theological tradition, not a combination of traditions. See Thomas L. Shaffer, *Jurisprudence in the Light of Hebraic Faith*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 77 (1984).

24. My colleague Philip Gleason describes American civil religion as a form of idolatry that, early in American history, produced "a sacred dimension to American ideology and institutions," a "superreligion" and a common denominator to which every citizen is expected to subscribe if she is to be both religious and American. PHILIP GLEASON, *SPEAKING OF DIVERSITY: LANGUAGE AND ETHNICITY IN TWENTIETH-CENTURY AMERICA* 256-57 (1992).

25. Honor was a central value for David Hoffman, see HOFFMAN, *supra* note 20, and for the protection of such American institutions as militarism and slavery, see BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982). Aristotle had a hard time thinking of honor as one of the virtues. See SHAFER, *supra* note 20, at 74-75.

26. There are, of course, many places where a modern American lawyer might find companions for such a process of discernment. See Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. (forthcoming 2000). The community of faith claims its reliance on the promises of God, as Walter Brueggemann argues in *The Rhetoric of Hurt and Hope: Ethics Odd and Crucial*, in ANNUAL OF THE SOCIETY OF CHRISTIAN ETHICS 73 (1989).

believers who have tried and who try to be helpful. The first of these *points to* what seems to be reality. The second *objects to* what seems to be reality. The third *withdraws from* what seems to be reality.

I. POINTING TO REALITY

When Steven Decatur proposed the toast, "Our country right or wrong," John Quincy Adams is said to have said, "I disclaim all patriotism incompatible with the principles of eternal justice."²⁷ That sounds more rebellious than it was. I suspect Adams was worried about Decatur's excess more than he was about the threat his country posed to his conscience. Lots of bold 19th century American lawyer talk is like that. Adams, a lawyer, spoke from privilege and from elite power, as lawyers usually do.²⁸ He was practicing an honorable virtue; he believed eternal justice and what he could get from the federal courts (as in *The Amistad*²⁹) were the same thing.

Adams was a child of successful revolution and an exemplar in what Willard Hurst called "the Golden Era of American Lawyers."³⁰ Adams thought he could be realistic and faithful at the same time, as his forebears had been—those who said America was the city on the hill. I would guess that Adams believed, as his father, John Adams had, and Benjamin Franklin, and Thomas Jefferson, that America was God's new Israel; that was the Apostles' Creed of American civil religion.³¹

27. Alan Thomson, *The Mail*, NEW YORKER, Dec. 8, 1997, at 14 (quoting Adams and Decatur).

28. The modification of Marxist class warfare into what Robert E. Rodes calls "class dialectic" and the realization that the Marxist notion of a ruling class is today, in capitalist democracies, better fixed on managers (especially lawyers) than on investors, has been the burden of Rodes' recent Christian jurisprudence. See generally ROBERT E. RODES, *LAW AND LIBERATION* (1986); ROBERT E. RODES, *PILGRIM LAW* (1998). Colleagues and friends of Rodes discussed this work, and an array of his periodical essays on these themes, in a conference reported in Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 NOTRE DAME L. REV. 737 (1998).

29. 40 U.S. 518 (1841).

30. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS I* (1950).

31. See MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* 24 (1970):

On July 4, 1776, Benjamin Franklin, John Adams, and Thomas Jefferson were appointed to be a "Committee to prepare a device for a Seal of the United States of America" Franklin advocated a design which featured Moses. In the background, the troops of Pharaoh would be seen drowning in the Red Sea Jefferson's suggestion contained elements that were to be included in the adopted seal: The

Such sentiments were not made in America. They trace, among Christians, to the Emperor Constantine. My childhood Baptist pastor used to say that Constantine baptized the Roman Army; that was the beginning, he said, of the Roman Catholic Church. Constantine's generation of rulers and churchmen established the notion and the practice that the worldly power of the state and the other-worldly power claimed by the church could be exercised in harmony and together. The later word for it was Christendom. The American Protestant term for it is Christian realism. It is a Christian program for pointing to the realities of worldly power, for coming to terms with civil religion *without* confronting it.³²

Modern realism proposes an appealing idea for the main-line church: The believer faces things as they are, does the best she can, and does not obsess over getting her hands dirty. In this way, Karl Barth, facing the domination of Europe by the Nazis, could say both that capital punishment was wrong and that it was all right for his government to inflict it on traitors to Switzerland.³³

Realistic believers do not give up on the faith; they call upon honor and an array of lesser civic virtues, habits for being realistic and faithful at the same time. Consider, for example, the lesser civic virtues of role, competence, and tolerance: The Christian has a *role* in the society, a useful and admirable role—in the Navy, on the bench, in the Social Security office. That role implies its own peculiar morality—not a morality that replaces the morality the Christian has as a believer, but a morality that shows her how to do her job and still be a believer. She performs her role faithfully and with the right attitude, with the *competence* she is trained to have in such a role. Martin Luther, reasoning thus, said that a Christian could be a hangman. He thought St. Augustine would agree, and he may have been right.³⁴ The virtue of *tolerance*, in the account of the dominant modern American jurisprudence at present, does not mean modesty and civility

children of Israel in the wilderness were "led by cloud by day and a pillar of fire by night."

32. John Howard Yoder understood Reinhold Niebuhr's doctrine to this effect as the argument that Jesus of Nazareth disdained politics. See JOHN HOWARD YODER, *POLITICS OF JESUS* (2d ed. 1994) (1972).

33. See KARL BARTH, *CHURCH DOGMATICS* III/4, at 447-48 (Geoffrey W. Bromiley ed. & T. Clark trans., 1961); see also Garvey & Coney, *supra* note 3 (discussing Barth's position on Swiss patriotism and the death penalty).

34. See THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 71-110 (1987).

in confronting disagreement.³⁵ It means keeping belief to oneself.³⁶ When the individual participates in the affairs of the civil community, civil religion affirms a moral right to consult only convictions that are shared by others in the nation-state.³⁷

The Bible never approves of this sort of realism. Garrison Keillor was being biblical when he said, "Sometimes you have to look reality in the eye and deny it."³⁸ But the Bible sometimes respects realism, as Keillor admitted. The realists of the New Testament account were descendants of the Maccabees; they saved much of Jewish independence, despite Roman military occupation. The Sadducees, theologians and lawyers, tried to save what they could of Jewish belief, practice, and law; the Pharisees, who lived a private faith in a corrupted community that compromised faith too much, taught the Rabbis of the *Mishnah*. They are the ancestors of rabbinic Judaism.³⁹ Realism has an impressive religious pedigree.

II. OBJECTING TO REALITY

The objectors' position is the opposite, and is more biblical. In Hebrew scripture the objectors include the Prophets, who hardened the contrast I meant to suggest with the examples of the nuclear naval officer and the death-penalty judge. Micah and Jeremiah told the government what to do, objected to the dominant ideology, and proposed an alternative. They were instruments of God's intrusion into politics.⁴⁰ I think of troublesome colonial Americans such as my ancestor Nathaniel Bacon; the college students of the anti-war movement; Bishop Walter Sulli-

35. See GLENN TINDER, *TOLERANCE: TOWARD A NEW CIVILITY* (1976) (advocating a more Aristotelian notion of tolerance, but he takes this notion into account).

36. If one must *speak* about morals, she should appeal to morals that are shared throughout the culture. Tolerance, so understood, becomes a matter of *legal* rights; heretics in civil religion have a right to deviant belief; but the right is the right only of each individual, each individual being understood as citizen first and believer second. In American civil religion, his deviance is heresy but it is not sedition. That is the *law* of tolerance.

37. These legal arguments, and proponents of them, are cited and discussed in STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); for my attempt to inject "sectarian" reflection into Carter's book, see Thomas L. Shaffer, *Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601 (1994) (book review).

38. *Prairie Home Companion* (Public Broadcasting System Oct. 4, 1997).

39. See the general historical background described in ISADORE EPSTEIN, *JUDAISM* 72-120 (1959).

40. Not to mention modern Anabaptist theology, liberation theology, or the political theology of Walter Brueggemann. See Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1988).

van standing outside the gates of Virginia's death house on execution nights; and Dorothy Day who, even in her life, was proposed for sainthood. (Day insisted on objection. When she heard of the proposal to make her a saint, she said, "I don't want to be dismissed so easily."⁴¹)

Objection may become violent, as Bacon's was and the students' sometimes were. Often, in theory, it accepts the prospect of revolution, as the New Testament Zealots did. Violent or not, the objectors confront realism with a political and legal agenda. They subvert legal order. Even at its most gentle, the objectors' position takes issue with believers who claim to be realistic about American law and politics. Martin Golding is representative among Jews: "The problem is not whether there is a role for religious conviction in a liberal democracy," he said, "but whether there is a role for secular politics in the Jewish tradition."⁴²

By and large, objectors live in modern secular society without imposing or suffering lethal danger; democratic-liberal jurisprudence invites them to prosper peacefully, and to be neither seen nor heard. Catholic Christendom in Europe and the civic guardians of the Protestant Reformation slaughtered the Anabaptists because the Anabaptists objected to Christendom and to what they have called the magisterial reformation. Protestants and Catholics turned faith over to the government, to sixteenth century civil religion. One focal issue was pacifism, and Swiss Anabaptists were killed for opposing capital punishment. The other focal issue was infant baptism—that is, enrolling children in civil religion.⁴³

American civil religion enrolls children in ways that are similar to infant baptism into Christendom. But America no longer slaughters people for being "sectarian"; American law even allows narrow exemption from killing people. But to the extent that America and American tolerance leaves objectors alone it requires of objectors—or they come to require of themselves—that they speak softly and stay out of sight. That civic and legal arrangement satisfies American civil religion, most of the time, but it is a scandal for the communities it ignores. John Yoder said, "[T]he love of a sovereign God drives us into concern for the social order God does not . . . tell us to accept the

41. Paul Hendrickson, *Dorothy Day: Sinner and Reluctant Saint*, S. BEND TRIB., Jan. 9, 1998, at D2 (quoting Day).

42. Bleich, *supra* note 1, at 201, 204 (quoting Golding).

43. An array of sources on 16th century Anabaptist history is quoted and discussed in Shaffer, *supra* note 40; see also Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903 (1999).

existing order; he tells us . . . that it must change."⁴⁴ Yoder had in mind that believers would participate in our tolerant civil order as objectors, as prophets. Brueggemann would say as agents of *subversion*.⁴⁵

I used to talk with Yoder about the extent to which his political theology allows for subversion of the civic and legal order: I can imagine the naval officer who, for all that appears, continues to be ready to push the nuclear button, but who has resolved that he will not do it. I can also imagine the judge who has decided she will not sentence anyone to death, but does not say so. Garvey and Coney provoke me to pause over the judges; they twice use the verb "to cheat"—to describe somebody who steals cars and to describe a Catholic judge who has privately resolved never to pronounce or affirm a death sentence.⁴⁶ In virtually any situation the law will put him in, this judge can find a law school argument for avoiding the death sentence. But if he does that, he is, Garvey and Coney say, a "cheater."⁴⁷

That's the issue Yoder and I used to talk about, the matter of faith *subverting* legal order. I can imagine a judge, informed by the spirit of realism, deciding, as Garvey and Coney do, that ordering people killed is not as immoral as "cheating." But I can also imagine a judge, informed by the spirit of objection, who would say that "cheating" is, in this situation, not immoral at all.

III. WITHDRAWING FROM REALITY

The third alternative is withdrawal from reality. In the first century of the Common Era, some believers went into the desert or back to the farm—got out of the way and, in as much isolation as possible, pursued a separate way of life. That way, in the first century, was the way of the Essenes. In Christendom, it would become the way of the monastery. After the Radical Reformation, it became the way of the Anabaptists (not, I think, so much because they chose it as because Catholic Christendom and the Magisterial Protestants forced it on them). I mean here to refer to historical *communities* of withdrawal. I am not thinking of the hermit or the recluse. I am thinking of groups, each of them a people who sought to be distinct among other peoples. The Essenes, the monks, and the Anabaptists did what they did in communities that were distinct in membership and in civic order.

44. YODER, *supra* note 14, at 182, *quoted in* Shaffer, *supra* note 14, at 475.

45. *See supra* note 10.

46. Garvey & Coney, *supra* note 3, at 308.

47. *Id.* at 346.

Biblical scholarship offers an ancient example—Israel in Canaan after the death of Moses. Some scholars suggest that Israel was a social, political, and legal community confronting the injustices of the land-owning, urban, aristocratic Canaanite “empire.”⁴⁸ Whether or not such a class-warfare analysis works, certainly scripture, taken literally, affirms the political and legal distinctiveness of this Israelite community: “You must not intermarry with them . . .,” the Lord says to Israel, “If you do, they will draw your [children] away from the Lord and make them worship other gods”⁴⁹ They will draw your children into Canaanite civil religion.⁵⁰

It is interesting to me that those involved in the historical Christian examples of withdrawal from reality were not heretics. They did not claim new theologies. What they proclaimed were new ways of figuring things out. They were distinct, not in doctrine, but in being communities of *discernment*. That is what set them apart from the realists, who practiced the art of the possible in compromises with worldly power. That is what set them apart from the objectors, who sought to replace power with power. The Essenes were observant Jews, the monks good Christians. The Anabaptists affirmed all of the doctrines of the Nicene Creed; they were different and they provoked lethal suppression because of the way they went about deciding what to do.

Processes of discernment in rabbinic Judaism are also illustrative of this sort of communal discernment. Consider another example: The Lord, after the flood, after He had resolved to let people live, gave everybody a set of seven commandments.⁵¹ These are, according to rabbinical interpretation, commandments against blasphemy, idolatry, incest, bloodshed, robbery, and eating flesh cut from a living animal—and the commandment to establish courts of justice.⁵² Jews have—what?—613 commandments to worry about. Non-Jews are not bound by the

48. Most notably, George Mendenhall and Norman Gottwald. See BRUEGGEMANN, *supra* note 11, at 16 nn.10-12.

49. *Deut.* 7:3-4.

50. Walter Brueggemann argues that Second Isaiah (Isaiah chapters 40ff) is a poem and a liturgy that celebrates a particular communal decision taken by Israel in captivity in Babylon. The poem and the liturgy confirm and celebrate obedience to the command in the Torah that the Chosen People maintain their separateness, even in exile—or, perhaps, *especially* in exile. But the obedience is the result, I think—given the “peace of the city” reading of Jeremiah’s letter to the Jews there—of a particular moral discernment of what the community of faith could counsel its members to do as good citizens in exile. See WALTER BRUEGGEMANN, *CADENCES OF HOME* 119-34 (1997).

51. See *Gen.* 9:1-6.

52. See Bleich, *supra* note 1, at 79-87.

big set, but they are bound by the seven. The Jewish community has to decide what to do about the seven—both as a matter of letting non-Jews know that non-Jews have commandments from God, and, sometimes, as a matter of providing a place for Jewish Law to discern what the seven commandments require. When the Jewish community establishes such a place and such a process, the question arises whether the law of the 613 commandments can be consulted in seven-commandment cases.

The answers to such questions are interesting, and the Jewish authorities are, of course, not in agreement. Not even the most revered of the sages agree.⁵³ The opinions of those whose opinions have been rejected by the community are preserved, so that they can be used again, because a new consideration, at some time in the future, may come out answering almost any question differently. All resolutions are provisional. Jewish Law, here and everywhere, involves processes of discernment. When the community observes biblical procedures it confidently expects to locate the judgment of God. Thus the tradition of Oral Torah in Judaism;⁵⁴ thus St. James telling the Jewish-Christians of Jerusalem, “The Holy Spirit and we have agreed” on dietary rules Christians would soon forget.⁵⁵

IV. TESTING THE ANSWERS

These occur to me as three suggested ways to figure out how to live with the collision that should occur between faith and American civil religion. None of them seems to me exactly right. *Realism* has led—as a matter of history—to the collapse of contrast, to the place where there is no difference between the Christian believer and those who worship the idols of civil religion. It leads to the American flag next to the altar. It led in my former parish church to the Star Spangled Banner as a recessional hymn

53. See *id.*; see also Eisenstadt, *supra* note 17. As an example, Bleich points out that Jewish Law forbids the use of circumstantial evidence in capital cases. (That rule is one of the ways the Jews have virtually abolished capital punishment.) Would that rule bind a Jewish prosecutor in the U.S.? See Bleich, *supra* note 1, at 86. Jewish Law has extensive and conservative teaching on whether a physician may withhold treatment from a person who is dying or is in a permanent vegetative state. Does that teaching apply to a Jewish physician treating a Polish-American Catholic whose family wants the doctor to pull the plug? See *id.* at 87.

54. See ROGER BROOKS, *THE SPIRIT OF THE TEN COMMANDMENTS* 21-27 (1990). For a discussion of the Protestant parallel, see JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* 35-45 (1984).

55. *Acts* 15:28.

for the Sunday after the Fourth of July.⁵⁶ It has led American Catholics to use their traditional just-war theory to manage, always, to find that America's wars are just. It leads to the Catholic finger on the nuclear button, to the Catholic judge who orders the death-house needle as he talks about the sacredness of the rule of law. As my late friend Yoder said, "The . . . house-prophet will, if he stays inside when the crunch comes, be with Herod after all."⁵⁷

What is the matter with *objection*? Essentially the same thing. Objection either has to admit that it seeks the power it revolts against, or that it seeks Utopia, without ground for hope, which is cynicism. Yoder thought that objection seeks too little. Jesus said that his way is to confront power with servanthood, with waiting on tables.⁵⁸ He contrasted his way with the way of those he called Benefactors, those Karl Marx called the ruling class—lawyers mostly, today, in America. Jesus said he was doing something new. The Herodians, the Sadducees, the Pharisees, and the Zealots were not. They all wanted to be Benefactors.

I had a conscientious-objector client during the Vietnam War, a college student at Notre Dame, learning to be a naval officer. He had fallen into the hands of servanthood-type Christians and had decided he could not fight in Vietnam. For a while, he thought about being both an objector and what Garvey and Coney call a cheater. He told me he could have kept his head down, lied a little, and gone on to serve out his three years as a naval officer—some of that time, probably, in combat. But, if he found himself in combat, he would have resolved not to kill anybody. He said he had considered that alternative, but decided he could not deceive his comrades in arms in such a situation—that they would be depending on him to kill when they did not know that he would not kill—and that he would therefore be risking their lives as he risked his own. He decided to resign from naval R.O.T.C., which under Notre Dame's rules at the time meant he was liable to dismissal from the university. He was called before a university board. The chairman asked

56. But only once—the Pastor asked the organist never to play it again. Father Dennis Hamm, S.J., remembers an elderly Roman Catholic pastor who told a beginner, "Don't ever ask people to choose between their country and their church." Dennis Hamm, *Radical Obedience*, AMERICA, Apr. 18, 1998, at 31. Walker Percy exaggerated such a real-life, Sunday morning image when he imagined an American Catholic Church headquartered in Cicero, Illinois, "which emphasizes property rights . . . retained the Latin Mass and plays the Star Spangled Banner at the elevation." WALKER PERCY, *LOVE IN THE RUINS* 183 (1971).

57. YODER, *supra* note 14, at 171.

58. See *Luke* 22:25-27.

him what he would do if he could prevent nuclear war by killing one person. He said he would pray.

The third way: What is the matter with *withdrawal*? The answer is that it takes the community out of participation in the political and legal life of the society in which it finds itself. The objection is scriptural: Jesus did not stay in Joseph's shop, or in Joseph's and Mary's village. He went to town. (Notice, my sister and brother lawyers, that the word "attorney" means somebody who goes to town.) He would have agreed with Rabbi Joseph B. Solovietchik's argument that "the people of Israel must take part in the 'universal confrontation' of man with the cosmos."⁵⁹

I think again of the letter the prophet Jeremiah wrote to captive Israel in Babylon, to the resident aliens who were being kept there. Some of them lived in hope of some day getting out of Babylon and returning to Jerusalem, as their ancestors had been taken out of Egypt and brought to the Holy Land. Jeremiah did not say, "Withdraw as far as you can, keep your heads down, and wait it out." He said:

These are the words of the Lord of Hosts, the God of Israel: To all the exiles whom I have carried off from Jerusalem to Babylon: Build houses and live in them; plant gardens and eat their produce; marry wives and beget sons and daughters. . . . Seek the [peace] of any city to which I have carried you off, and pray to the Lord for it; on its welfare your welfare will depend.⁶⁰

That is social ethics, as it is also a political agenda and a jurisprudence.

V. AN ATTEMPT AT SYNTHESIS

Jeremiah's letter to the exiles in Babylon was not a commandment to individuals; it was a summons to believers to gather together and decide when, where, and how to seek the peace of the city. These three approaches suggest ways to think about what to do when we notice that God has plopped us down in this time and place, a puzzling situation, as you can tell by reading any set of letters to the editor in any newspaper in America—most of them written by Christians and Jews. All three of these positions are *supported* by belief. The realists have included Reinhold Niebuhr and John Courtney Murray, as well as the Emperor Constantine. The objectors have included Dorothy Day, Daniel

59. Bleich, *supra* note 1, at 19 (paraphrasing Rabbi Solovietchik's argument).

60. *Jer.* 29:4-8.

Berrigan, and Gustavo Gutierrez, as well as the Zealots. Those who withdrew included Thomas Merton and Therese of Lisieux, as well as the 16th century Hutterites. All three of these positions have ethical promise. Through all of them, and any of them, as Karl Barth said, "God meets us where He has put us."⁶¹

The question for any of them is how to go about deciding what to do. And the answer is: Do it in the community of the faithful. A community of faith is a place—a thing—a body—that holds us close enough that we can submit to its processes our what-to-do questions, even including so-called professional questions. For a lawyer to even think about a congregation doing this, rather than a bar association or a law faculty, is, as Brueggemann said, strange, peculiar, scandalous, and absurd. (I don't know about sailors and people who work for Social Security. I think I have more hope for them.) But, if we do think about it, most of us Christians will come to realize that our national communities of faith fail us, as Jim Burtchaell noticed when he said the Catholic Bishops have preached to the White House but not to Catholics.

I had a little essay in the Jesuit magazine *America* a couple of years ago, in which I said Christian lawyers should submit their legal-ethics questions to the church.⁶² A Catholic lawyer from New York wrote in, saying in effect that he was damned if he would turn his law practice over to the bishops.⁶³ I agreed with him; I wouldn't either. The trouble with my article was that I was not clear, as my late friend Yoder would have been, about what the church is. The reason I failed is that I was misled by Presbyterians.

That article started out as a talk in Sunday School at the First Presbyterian Church in Bethlehem, Pennsylvania. I didn't fix it up for Catholics. The Presbyterians understood that when I quoted "tell it to the church,"⁶⁴ I meant the sister and brother Christians with whom I prayed, broke bread, cried and argued. Four Presbyterian lawyers were in the Sunday School class. They and I had an edifying time, as members of a group of less than a hundred people—small enough to hear one another, all disposed to listen, many disposed to say something about what a Christian lawyer should do and be.

61. KARL BARTH, *ETHICS* 190 (Deitrich Braun ed. & Geoffrey W. Bromiley trans., 1981).

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

63. See Edward R. Dorney, *Letters*, *AMERICA*, Dec. 14, 1996, at 29.

64. *Matt.* 18:17.

When I converted the Sunday School talk to an essay for Catholics, I failed to say, first, that “church” in the New Testament does not mean the hierarchy; it means—I meant—the local, discerning people of God I found that day among Presbyterians. And, second, I did not mean your standard filling-station-style, Sunday-Mass Catholic parish, either. I should have said I meant what we Catholics would be like if we learned about community from Orthodox Jews, or from Mennonites, or from one of the minute congregations of students that calls itself a Law Student Christian Fellowship.

I don’t want to argue that any of the three positions is a bad idea; I want to argue that the way we believers decide whether an idea is good or bad is more important. I want to argue for communities where we believers can work out what we think God wants of us—where we can second-guess the experts. We Christians fail to take the gospels seriously when we think of the church as an abstraction rather than a particular, distinct community that might work out even if America doesn’t, where—as we used to sing in the Baptist church of my youth—we trust in the promises of God.

