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Stanley Hauerwas

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Christian Practice and the Practice of Law in a World Without Foundations

by Stanley Hauerwas*

I understand that my role in this conversation is to help you understand why Stanley Fish is conservative. I know that Stanley is often thought to be a radical, but in fact I do not think he, or his position, is all that radical. Of course, philosophically he is an anti-foundationalist, he does not believe in free speech as an absolute, he is generally for most of the aims of those that call themselves "multi-culturalist," but none of that is sufficient to make him a radical. After all, no one has been more insistent than Stanley Fish that theory has no consequences.

So, my role is to help you see what a radical looks like. Of course, I am not a radical because I share Fish's antifoundationalist views, I am a radical because I am Christian. I really do not have a theory, but I do find myself claimed by a community of people who have practices that make the practice of law, particularly as we know it, problematic. Christians do not have a theory that leaves everything the way it is, but we are part of the community that changes everything. I think this is particularly the case now that the liberal presuppositions and theories that have so dominated our understanding of law are breaking down.

By liberal I mean those theories of the law that have sought in theory and practice to protect the law from politics. There was every reason for wanting to do that, the law after all claims to be a profession. Politics, at least the politics of this society, certainly does not seem to be a profession, though we now have people that pursue politics as a life-time task, which at one time we took to be one of the characterization that made a professional. So liberal accounts of the law, of the law's autonomy, were and are attempts to save the law, if not lawyers, from the incoherence of

* Professor of Theological Ethics at Duke University Divinity School. His most recent publication is *AFTER CHRISTENDOM* (1991).

the politics in which we find ourselves—that is, to make the law free from manipulation for purposes “beyond the law.”

As a way of making this point, I want to call attention to a recent article by Mary Ann Glendon called *Tradition and Creativity in Culture and Law*.¹ There she characterizes the common law tradition as a method not unlike learning to swim and/or bicycle ride. She does so because to know how to practice law is to acquire a set of habits and practices that can be acquired only by doing. Such know-how is required because the common law is the evolving body of principles built by accretion from countless decisions and individual lawsuits. Since the law emerges from practice rather than theory its principles are fact-sensitive in a manner that can never be captured by general principles. Therefore, the only way to become a practitioner of the law is by being initiated into its discourse by being taught a new language and way of life intrinsic to that language.

In terms of what it means to be initiated into a craft it is instructive to compare the kind of training we give students in law and medical school to those in divinity schools. A student comes to divinity school today and says, “Gee, I am just not into Christology this year, I am really into relating.” We say, “Go take some more courses in clinical pastoral education, after all that’s what the ministry is really about. It is really about relating and you need to learn to do it better.” A student can come to medical school and say, “Gee, I am just not really into anatomy this year, I am really into relating. I would like to take some more courses in psychology.” They say, “Well, who in the hell are you kid, we don’t care about your interest in relating. Take anatomy or ship out.” I suspect a law student would receive similar instructions who wanted to skip contracts.

How are we to understand this difference between law, medicine, and divinity schools. I think the difference is that no one believes that an incompetent priest might damage their salvation since no one believes today anything is at stake in salvation. Yet people do believe an incompetent doctor can hurt them. Now, the reason for this is that, of course, the one thing that people agree upon is that death is a very bad thing and you want to keep it away as long as possible. People wrongly assume that doctors have something to do with keeping them alive—of course forgotten in the process is the reality that every patient a doctor cares for dies.

Yet because medical and law schools can draw on the fear of death and our need for safety they can be morally more serious sites for the transforming of lives than divinity schools. For example, I am associated with the recovery of the significance of the virtues for ethics. Accordingly I am often asked, “If the virtues are so important where are people trained

1. Mary Ann Glendon, *Tradition and Creativity in Culture and Law*, FIRST THINGS, Nov. 1992, at 13.

today to be virtuous?" I always say medical schools, law schools, and Paris Island. Those are places which have the moral intelligibility that makes possible to subject people to the disciplines, not the least of which is learning a new language, that makes them different. The process of such training is meant, moreover, to give them power over all those, who we can call the laity, who have not had such training.

Politics names the ongoing relationship between those with such power and those who would be aided by that power. The complexity of such relationships can be illustrated, perhaps, best in medicine. For example, when I talk to lay audiences, that is people not trained in medicine, I ask them, "How do you want to die?" People generally want to die quickly, in their sleep, painlessly, and without being a burden on anyone. When they say they do not want to be a burden on anyone they mean they do not want to be a burden on their children, because they do not trust their children. It is interesting to contrast the way we want to die with medieval attitudes since the last thing a medieval person wanted was a sudden death. A sudden death meant that you would die without having their soul reconciled to God and your neighbor.

You can see, therefore, that medicine now reflects our preference for a kind of death—namely, we expect doctors to keep us alive to the point that when we die we do not know we are dying. We then get to blame doctors for keeping us alive for no point. It is crucial to recognize that this exchange is political not simply because it involves power but because with such examples we see how the practice of medicine is shaped by the attitudes of the people they serve.

Such "politics" is exactly what I assume those engaged in the law fear. For our attitude toward death no matter how regrettable I find it as a Christian, is clearer than most of our moral practices. Moreover, I take our moral incoherence as a society to be the result of liberalism's aim to make each individual their own tyrant determining for themselves what is good and less good. The result is the creation of a moral order that generally thinks child pornography is wrong, but does not have the slightest idea why. We, thus, expect the law to maintain those practices whose rationale we have lost.

This, I think, is what makes Glendon's account of the law so powerful. For in an interesting way the law is less morally tolerant today than the rest of our lives. Thus when students are initiated into that set of skills we call the law they are in fact receiving their first serious moral training. They are having their lives transformed through the learning of the language and skills that are part and parcel of who they will be for the rest of their lives.

Glendon suggests that this understanding of the law is quite similar to Alasdair MacIntyre's characterization of a living tradition.² To be a traditionalist in a tradition like that of common law is not to be frozen in the past or mired in the status quo, but rather to participate, as MacIntyre puts it, in a community of intense discourse about what it is that gives the tradition in question its point and purpose. Lawyers and judges in such a tradition learn to value this skill as they become, at least to some extent, virtuosos of practical reason.

[W]eaving back and forth between fact and law, striving not only for a fair disposition of the dispute at hand, but to decide each case with reference to a principle that transcends the facts of that case, all with the view toward maintaining continuity with past decisions, deciding like cases alike and providing guidance to parties similarly situated in the future.³

To be part of such a craft, community, and tradition in our times is a wonderful thing. For it brings with it a sense of power and self-esteem as well as the sense that we may actually make a difference in other people's lives. I certainly do not want to romanticize lawyers, but I think one of the attractions of people to the law is the idea that through the practice of the law, through the learning of this craft, you may actually help someone in your life. So, it gives you a sense of moral purpose that is otherwise missing in most of our lives. This becomes magnified in the notion that the law is a public service for the good of a whole society.

I am aware that this account of the law as craft for public service no longer seems compelling. It is hard to know when this happened or why, but certainly I think Glendon is right to call attention to Holmes' attack on tradition as getting in the way of rational policy as one source of the problem. Holmes, as Glendon observes, represents the tendency inherent in the American law based as it is on a kind of ahistorical rationalism derived from the illusion of American Constitutionalism—that is, that the law can be based upon principles abstracted from practices.⁴ I suspect Glendon is moreover right that the tradition began by Holmes is the basis for the carnival of American legal theory that is now culminated in the movement we know as the Critical Legal Studies movement—that is, the Crits.

The Crits rightly maintain that the law is but a disguise for power particularly if Holmes' account of the rationality of the law is accepted. Formalist accounts of legal theories like most liberal, political, and social theories have always been dependant on ways of life for which they cannot

2. *Id.* at 14.

3. *Id.*

4. *Id.* at 15-16.

account on the basis of the theories themselves. In fact, liberal theory is more invidious as its very rationalistic bias then undermines those practices on which it is dependent.

For example, liberal political and moral theories have no way to account for why we should call the taking of our lives suicide or why suicide should have any expression in law. On grounds of autonomy surely the right to take our lives is one of our most basic rights. That the law still contains precepts concerning suicide is remarkable. I suspect that is one of the reasons that moral theorists are so interested in the law. The law has become, just as de Toqueville said it would do, our morality. From this perspective the law is morally a kind of cultural lag forbidding and encouraging forms of life those subject to the law find otherwise incomprehensible.

For example, once I was doing rounds with a class of firstyear residents at the University of Chicago Medical School. They had the previous week discussed abortions and agreed that they would never refuse to perform an abortion since their task was to do what patients asked. I asked them what they would do if someone was brought to the ER having just been pulled from the cold waters of Lake Michigan. The person had a plastic cover on their chest that contained a psychiatric certification that the person was sane. Also included was a well argued essay defending suicide, citing Seneca, as a rationally justified action. The essay requests if they happened to be pulled from the lake before they were dead not to be resuscitated. I asked them what they would do? They said, "We would of course try to save them—our job is to save lives and this person tried to commit suicide." I asked them what right they had to impose their role specifications on this person and even more why did they think this should be described as suicide. It could just as easily be understood as "self-life taking" that has no morally dubious characteristics. The professions, it turns out, continue to rely morally on ways of life that give them direction. The sustaining of those relations as well as the necessary ongoing negotiations about the status of such practices is our most profound political process.

No issue illustrates our current incoherence about such matters particularly for law than the challenge of marriage. For example, America is based on the illusion that we are morally a monogamous society when in fact we are serially polygamous. Marriage law becomes a mass of contradictions exactly because the illusion that the law should serve the practice of monogamous marriage continues to be privileged.

The law, it turns out, is culturally and morally conservative because the rationale for the practice of the law was produced by discourse from the past. In part, lawyers are people intent on preserving language that has been rendered problematic by liberal practice and theory. As I noted

above, liberalism has always depended, and in fact has been parasitic on ways of life which it cannot account for on its own term.

I am aware, of course, that liberalism is a many sided theory. There are quite different forms of that theory not only because it is displayed different in social, political, and religious context, but also because there are many different kinds of liberal theory in each of these contexts. Yet I believe that liberalism can be characterized as the presumption that you should have no story other than the story you chose when you had no story. A society constituted to produce people who get to choose their stories cannot help but be caught in a perpetual double-think. For what it cannot acknowledge is that we did not choose the story that we should have no story except the story we choose when we had no story.

Practices, such as marriage, are rendered unintelligible in such societies since obviously when people get married they cannot know what they are doing. We assume, given our liberal presumptions, that you should not be held responsible for decisions made when you did not know what you were doing. Thus after people discover they married the wrong person, which is a way of saying I did not know what I was doing when I got married, they get divorced and try to get it right the next time. Which usually does not work because they usually marry someone not unlike their former spouse since sadistic and masochistic habits are hard to break.

That we lack the means of explaining our lives morally has much to do with our political ethos. America is the first society that has had the disadvantage of being founded as a philosophical mistake—namely, the notion of inalienable rights. Rights are the trumps we believe protect our freedom to have no story except the one I have chosen. That project undermines significant practices on which the law has drawn to give it moral direction—that is, to make the practice of the law a service to those who embody the practices without which the law is unintelligible. The more such practices are undermined the more the law, like our society, must become in MacIntyre's memorable phrase, a civil war carried on by other means.

The Critics are right that the law cannot help but appear as an arbitrary cover for power as long as you think the law is based on rational principles that can be justified in and of themselves. For the law to be part of the way of life that helps us serve one another it must draw its rationale from practices that are more determinative than the law itself. That is, it must acknowledge that the law is always in service to a politics—a politics, that to be sure involves power, but not as an end in itself but rather in service to goods such as marriage or the peaceful resolution of conflicts.

I think therefore we are in a particularly fruitful time for Christians to consider our relationships to those systems and powers we call the law. I refer to systems and power since we need to remind ourselves that the

very abstraction, the law, hides the complexity of the practices associated with the many things done in the name of the law—that is, from helping some people make a will to the execution of those found guilty of crimes. In particular, I think as Christians we have been given fresh eyes to see how we may have been seduced by powers who promised us freedom in exchange for our souls.

I realize it is the worst possible thing you can do when you are around Southern Baptists “moderates” to read the Bible. But let me remind you what it says in First Corinthians 6:1-11:

When one of you has a grievance against a brother, does he dare go to law before the unrighteous instead of the saints? Do you not know that the saints will judge the world and if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels? How much more matters pertaining to this life if then you have such cases why do you lay them before those who release the steam by the church? I say this to you to your shame and it be that there is no man among you wise enough to decide between members of the brotherhood, but brother go to the law against brother and that before unbelievers. To have lawsuits at all with one another is defeat for you. Why not rather suffer wrong? Why not rather be deprived? But you yourself wrong and deprived and that even that with your brother. Do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived. Neither the immoral nor the idolaters or the adulterers, or the sexual perverts nor thieves nor the greedy, nor drunkards nor revilers nor robbers will inherit the kingdom of God. In such for some of you but you were washed you were sanctified you were justified in the name of the Lord Jesus Christ and the spirit of our God.⁵

I am aware that this is not a text that usually appears over law school portals. I do not think, however, that the text in and of itself implies that Christians must keep their distance from law-like activities. Of course that is partly because I do not think any text in and of itself does anything. Only fundamentalists and higher critics think that.

Rather, I assume this text works in a community determined by the practices of confrontation and reconciliation described in Matthew 18. For notice there is nothing in First Corinthians 6 that suggests Christians are always going to live in happy harmony with one another. There is going to be conflict among a people called out to worship Christ, so you are certainly going to need wise people to make judgements and to resolve disputes. You may even build up a traditional example to help such people do their work. What you do not do is submit your community to the courts sponsored by powers that know not God because in doing so you

5. 1 Corinthians 6:1-11.

give them the status they do not and cannot have. To go to such a court would be like dragging the whole church to a prostitute.

Behind Paul's views on such matters is the assumption that there can be no public/private split in relations between Christians. I once had a colleague at the University of Notre Dame, who taught Judaica, who as a good Jew liked to remind Christians that any religion that does not tell you what to do with your pots and pans and genitals cannot be interesting. I think that is true. Paul certainly thought such was the case. Thus his view that the Church was constituted by practices that would occasionally conflict and the resolution of those conflicts.

I was giving a lecture a year ago at the business school at a Baptist University. My lecture was called, "Why business ethics is a bad idea." And after I finished one of the associate dean's of the school said, "this sounds awfully pessimistic. Is there anything we can do." At the dinner before the lecture she had been telling me that she was a member of Second Baptist Church in Houston, Texas, which increases its membership by 200 members every Sunday. And I said, "yes, I think there is something. Before you let anyone join Second Baptist Church in Houston, Texas, you ought to have them turn around in the congregation to declare what they make in public. 'I make \$135,000 a year; I make \$200,000 a year; I make \$35,000 a year.'" She said, "Well we couldn't do that." I said "why?" She said "that's private." I said, "have you read the book of Acts lately? Where do you get this idea of this privacy among Christians?" If Christians should be constituted by such a community shaped by such practices it is extremely interesting to ask whether they can practice the law in our current society. I realize the question seems absurd. Obviously Christians do practice law. I must admit however, I am not overly impressed by such descriptive generalizations since those engaged in such practices, exactly because they are so intellectually compelling and promised to help some, may in fact be going straight to hell. That the very question of whether Christians can practice the law now appears absurd is but an indication of how accommodated Christians and in particular southern Baptists have become to our culture.

I know that Southern Baptists in principle think of themselves as free church yet as I often point out, Southern Baptists are the only free church people that have created their own civilization; it's called "The South." Moreover, they think they have a stake in preserving it. Accordingly, they with other Christians have lost a sense of the practices in their community that would at least create the tension to subject this coercive power of the law to the discipline of the gospel exactly because we do not practice law among ourselves.

It is very interesting that as Christians we do practice law among ourselves. I suspect that most lawyers like to think that their practice really is an exercise in peace making. After all the law is an attempt to settle

disputes short of blood shed. That is one of the reasons that lawyers become so upset with the idea that the law might be politicized. But the law is politicized by practices that are all the more violent just to the extent that they are not acknowledged as such.

Where then does this leave us? Certainly there are consequences to this "Christian thing." For if Christians are constituted by practices aimed at the creation of a community that requires us to risk conflicts and yet can hope in reconciliation, that how we relate to other practices that cannot envision or even imagine such a hope becomes a decisive question. So I cannot leave you where you are but rather must ask, given the current character of the law, how people can practice that law and yet remain good readers of First Corinthians 6? I suspect, if we press that question you will begin to understand why Stanley Fish is a conservative—and why, ironically, what he must conserve is a liberal account of the law. There is, after all, no alternative given the world in which we find ourselves.

