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Two Stanleys and Two Types of Talmudist: Comment on the 1992 Carl Vinson Lecture—"A Conversation between Profs. Fish and Hauerwas on the Character of the Law"

by Michael Goldberg, Ph.D.*

The Talmud tells of a dispute among the Babylonian sages over who should head the rabbinic academy at Pumbedita. One side stumped for Rav Joseph. Alluding to his encyclopedic knowledge of traditional teachings stretching all the way back to Mount Sinai, it proclaimed, "Sinai takes precedence!" To that, the other side countered, "The uprooter of mountains takes precedence!" Its choice was Rabbah, a scholar of legendary skill at argumentation—sharp enough, it was said, to overturn even practices enjoined at Sinai long ago.¹

Wonder what Rabbah's conception of law practice might look like seventeen centuries later? Then take a look at Stanley Fish's notion that a practice *earns* its distinctive place in the world through acts of intellectual *inventiveness*. Says Fish, the practice of law does not stand or fall on some correspondence to an "ideal template or model, whose true home is the mind of God, or a realm of Platonic ideas."² Instead, practices like

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I want to thank Rabbi Marc Wilson for his help in drawing my attention to the Talmudic passages discussed in this Article.

1. Berachot 64a; *cf. also* Horayot 14a.
2. Stanley Fish, *On Legal Autonomy*, 44 *MERCER L. REV.* 737, 740 (1993).

law depend for their continuing existence on a kind of performance art, a linguistic tour de force of elaborating "the vocabulary which rather than matching up to antecedent facts, obligations, interesting problems, produces facts, obligations, and interesting problems."³

No surprise, therefore, that Fish compares practices like law to games like baseball, a rule-governed, *rule-constituted* activity—upon whose playing absolutely nothing else in the wider world necessarily depends. Hence, true practitioners, whether of baseball or law, are not those with some well-developed sense of fair play, but instead those with some well-developed set of skills that make them technical virtuosi of their respective "arts." Thus, Ty Cobb, Babe Ruth, and Pete Rose were all masters of the game—their moral characters notwithstanding.

And yet, what might "learned *counsel*" mean, and what might law practice become, if reduced to nothing more than the skillful manipulation of principles, precedents, and procedures? Grant Gillmore, for one, conjures up a vision as disquieting as any conceived by Dante or Bosch: "In Heaven there will be no law . . . In Hell there will be nothing but law, and due process will be meticulously observed."⁴ How ironic that such a picture of contemporary law practice—and of current practice in many academic disciplines—should fit so well the views of Stanley Fish, a figure who has built his professional reputation in no small part on the study of *Paradise Lost*.⁵

Meanwhile, these late results from Pumbedita!: Not Rabbah, but Rav Joseph, was chosen to lead the academy. The voters' rationale? "All are dependent upon the owner of the wheat."⁶ The medieval commentator, Rashi, explains that enigmatic phrase as meaning that "all are dependent upon the one who gathers the produce to sell"—i.e., upon the one who collects and preserves the traditions so that there might be something of substance, of *sustenance*, to discuss and interpret in the first place!⁷ In other words, a Rabbah's talents, no matter how skillfully employed, are always parasitic upon the *gifts* (in both senses) of a Rav Joseph.

For someone like Rav Joseph reminds us that a practice like law is *not* a practice like baseball. Whereas the practice of baseball, like that of most games, has no point beyond itself, practices such as law, medicine, teaching, and ministry *do* point beyond themselves to such goods as justice, health, wisdom, and salvation. That's why we take such practices, such *professions*, to be more than *games*. Forgetting that, practitioners become mere technicians with no goal other than to show off their virtu-

3. *Id.* at 7.

4. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

5. *Cf.*, e.g., STANLEY FISH, *SURPRISED BY SIN: THE READER IN PARADISE LOST* (1971).

6. Berachot 64a; Horayot 14a.

7. Berachot 64a, *ad loc.*

osity. In fact, nothing may be more revealing of the practice current among Fish's own professional guild of literary critics than his failure to raise any objection whatsoever when Stanley Hauerwas described him as a conservative, noting that "no one has been more insistent than Stanley Fish that theory has no consequences."⁸ Little wonder that Fish sees his professional task *qua* Miltonist literary critic as getting at the truth *about Paradise Lost*—rather than the truth *of* it.

By contrast, Hauerwas describes himself as a radical, precisely because as a Christian, he is "part of the community that changes everything"—including *the truth of who we are*.⁹ One might, of course, view entry into the legal profession as a baptism into a similar kind of community. After all, at law school, lives and identities are transformed by initiation into a particular community's distinctive language and skill set. Like Christians, lawyers, too, become part of a living tradition; they participate in "a community of intense discourse about what it is that gives the tradition . . . its point and purpose."¹⁰

And yet, cautions Hauerwas, it is the legal community's very sense of purpose that may well put it at cross-purposes with that community called Christian. For Christians are called to be those people "who have been given fresh eyes to see how we may have been seduced by powers who promised us freedom in exchange for our souls."¹¹ So what counsel would Hauerwas give to all those counsellors and would-be counsellors-at-law unsure about the implications of the character of the law for the church's character—and *vice-versa*? Listen as Hauerwas summons Paul in I Corinthians 6 to the witness stand:

It is God's people who are to judge the world; surely you know that If therefore you have such everyday disputes, how can you entrust jurisdiction to outsiders with no standing in the church? . . . Can it be that there is not among you a single person wise enough to give a decision in a fellow-Christian's cause? Must Christian go to law with Christian—and before unbelievers at that? . . . But you have been washed clean, you have been dedicated to God, you have been justified through the name of the Lord Jesus and through the Spirit of our God.¹²

Though the church, like the world outside the church, will know conflict, it will also know a way to effect conflict resolution virtually incomprehensible to the outside world: through forgiveness and the hope of reconcilia-

8. Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 MERCER L. REV. 743, 743 (1993).

9. *Id.*

10. Hauerwas, *supra* note 8, at 746.

11. Hauerwas, *supra* note 8, at 749.

12. 1 *Corinthians* 6:2, 4-6, 8, 11.

tion. As Hauerwas wryly (and rightly) observes, we ought not to be surprised that I Corinthians 6 "is not a text that usually appears over law school portals."¹³

As for Rav Joseph, despite his election as head of the academy, he declined the post, whether out of fear of unfavorable astrological charts or out of a sense of humility.¹⁴ In the end, one can only speculate. Perhaps Rav Joseph simply believed that given his character on the one hand and the academy's on the other, it would not have been a good "fit." Maybe Rabbah provided a better fit—perhaps even one approaching the almost perfect fit between the academy of our own day and the likes of Stanley Fish, especially between a Fish and the typical law school within the academy. And, finally, what of Stanley Hauerwas and that part of the academy in which he labors?

[I]t is instructive to compare the kind of training we give students in law and medical school to those in divinity schools. A kid 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 . . ." A kid 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? . . . Take anatomy or ship out."

. . . [T]he difference is that no one [today] believes that an incompetent priest might damage their salvation.¹⁵

In the end, how could there possibly be any true fit between such a Christian and Duke Divinity School?

13. Hauerwas, *supra* note 8, at 749.

14. Berachot 64a.

15. Hauerwas, *supra* note 8, at 744.