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Milner S. Ball

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Stanley Steamers

by Milner S. Ball*

Mercer Law School generously invited me to attend the 1992 Carl Vinson Lecture with its accompanying festivities and to submit a brief, responsive impression of the occasion. I was delighted to accept. The Vinson series has a distinguished history suitably advanced by this year's lecturers.

For the event, Stanley Fish and Stanley Hauerwas were furnished with comfortable-looking easy chairs in stage center of the law school's moot courtroom. After each had presented his opening remarks, they settled in for a late afternoon's extended conversation. The audience was to ask questions, but the two gentlemen of Durham required no external stimuli. They had plenty to say to each other and left openings for only three questions, maybe four.

They gave a good show. The talk between them was robust, instructive, often funny. The central performance was of argument. Perhaps courtrooms, especially moot courtrooms, their wood panelling and furniture seasoned with disputation, naturally draw colleagues into disagreement, even when they are friends and vote the same way on most issues, even when they occupy soft chairs that have been turned away from the great oak bench and angled toward each other and the audience.

Or argument may inhere in the announced subject: two outsiders taking a look at religion and law, although neither man is a stranger to the legal academy, and the theological nature of their conversation emerged only gradually.

I do not recall that Professor Fish uttered the words "theology" or "religion" or ever spoke expressly of theological or religious subjects (not counting his reference for other purposes to *Paradise Lost*). He was not patently engaging in religious talk. However, it was not a non-sequitur when, in response, Professor Hauerwas made confession of his own religious commitment.

* Caldwell Professor of Constitutional Law, University of Georgia School of Law.

The exchange between the two of them sharpens once more a question that warrants the serious, regular attention of believers who are in law: what are we doing here? I came away from Mercer troubled, feeling once again the tension between profession and vocation.

Professor Fish advises, as much descriptively as prescriptively, that we either love law or leave it. And he says that we love law only when we lay aside questions about its fundamentals. He has a good point. The language of law, the craft, the thoughtforms, the methods, the traditions, command the lawyer's commitment and deserve it. There is no more room for trifling here than in the United States Marine Corps: either all the way in or out.

The pointedness of Fish's argument should not be lost simply by considering the ungenerous sources for some of his material, Robert Bork and Paul Carrington. Nor should it be dulled by questions that might be raised about its terms.

One such question concerns those he means to disqualify as doing law because they do it intending to advance the cause of groups or individuals. Lawyers are advocates, counsellors, lobbyists, politicians, and legislators. As such are they not enjoined exactly and zealously to take up causes, intend political results, and achieve them?¹

Perhaps he means not most lawyers, but another kind, academic lawyers. His talk of disciplines does have about it the air of the school. Are his comments, then, directed against those who teach with political intention and so belong in some other department? I wonder. Should a law teacher not identify the political nature of law, raise questions about the underlying political choices, and teach students to confront the choices? And should a teacher then not be open and truthful about her own choices and intentions and the means for realizing them? Should she not, can she not have such choices and intentions and means? Or should she have them only in the evening after work? Are not teachers of law exactly those who are charged with addressing the fundamentals? And besides, if they leave law, what other department can afford to grant them refuge?

Perhaps Professor Fish's notion about not advancing causes is meant to embrace not so much practicing lawyers and professors of law as judges. They are the ones who, when they do law, cannot further the agenda of the Republican Party, labor unions, or opposition to abortion. Well, if he means only or primarily judges, he may be about right.

But even with regard to judges, there is question about the fit of his theory (and it is that) to actual practice. For example, is not politics often

1. An attorney's zeal is to be exercised within the bounds of law. But what are the bounds of law? No political intentions? Does not every real case raise the question: What is the law? Are not the fundamentals always in issue from the start?

included in the "panoply of resources" he refers to as properly included in the domain of the judge? (Think of equal protection, for example.) And are judges not legitimately thought of as bound to protect discrete and insular minorities, that is, to advance the cause of particular groups? Are not courts of law first and last to be courts of justice? And isn't justice particularly and pre-eminently political? If politics is not included in the panoply of judicial resources, it will sooner or later take revenge on the courts.²

In addition to the question about who is excluded from law because she does politics, there is another: Why the conspiracy of silence? Is holding our tongues and keeping our fingers crossed in the best interest of the law and the state?

A discipline, in Fish's account, fills a hitherto nonexistent void and then pretends that it and the void were there all along. Maintained well enough and long enough, the pretense will no longer be necessary for it will have become commonplace. The participants will forget they are pretending because they will not be.³

How does he know there was an original condition of pretense for which there is no remaining evidence? Is it, like all other states of nature, imagined? How could an imagination create such a myth? What standing has it?

If Professor Fish is right about disciplines—and he may well be—how did he make the discovery? The only outside points of view are other disciplines, and each has an equivalent history (or non-history) of origins and maintenance. They afford no higher viewpoint.

If law is a discipline in his terms, functioning according to his terms, how can he tell? Especially since he is one of us: The Association of American Law Schools *Directory of Law Teachers*,⁴ the profession's analog to The Book of Life, lists Fish among the included. He has not removed his name from the list, although, like critical legal scholars, he has leaked to the public the information that law is only a discipline with a possible end but no essential beginning.

2. Of course, following the line of Professor Fish's argument, it could be said that a judge would not have to advance the cause of the Republican Party, labor unions, or anti-abortion because she would do so naturally and not expressly. A judge is a judge because she has demonstrated that she is adept in the discipline. Having successfully pretended she is not advancing causes, she no longer has to pretend. She really believes she is doing law, and she is. She has met the enemy and the enemy has become her, without committing disciplinary treason.

3. This is a version of the emperor's new clothes: given enough time and no announcement of his nakedness, the emperor and his subjects will no longer have to pretend he has no clothes. They will have invented a vocabulary to cover his body and keep him warm, naturally. The garment is a put-on.

4. The Association of American Law Schools *Directory of Law Teachers* (1991-92).

Still and all, the questions about his argument notwithstanding, Fish makes a good and troubling point: if you intend politics, you are not doing law: if you are not doing law, why are you here?

Professor Hauerwas added cold comfort to Professor Fish's disquieting message. He intensified by a degree or two the troubling tension I feel between vocation and profession. Law is politics, he says. And by knowing and saying so, he identifies himself as one of the spoilsports Fish says is excluded by the nature of the game. Only for Hauerwas, it is not a game but something else.

He read from I Corinthians Paul's remonstrance against Church members for taking their disputes to court and so becoming involved with lawyers and other low life and thereby conferring reality and legitimacy where none is due. This reading allowed me to see how Fish had been presenting a profoundly theological subject.

Disciplines, as Fish spoke of them, are artifacts that hold themselves out as necessary, natural, essential. Or at least they do not let on that they are artifacts. Disciplinarians who are adept at the requisite pretense end up not pretending. They settle into their discipline.

Fish's disciplines are demi-gods: demi because they are made; gods because no one tells and then forgets and then does not have to forget they are made by us. Are disciplines, then, religious? A form of idolatry with idolatry's narcotic effect?

What does law demand of me? What am I doing when I yield to its demands? Must I renounce law? If I leave, where will I go? It has been observed that American culture is thoroughly permeated with law and the language of law. How be American without, for example, an operative idea of rights and some notion of courts as places for the vindication of rights? Fish's prescription will not work. I cannot find a cure by walking across from the Law School to the Department of Philosophy. According to Hauerwas, there is less chance of a cure in the Divinity School. And I cannot escape if I then walk out the doors of Philosophy and Divinity and proceed on into American society, this singularly juridical society.

So the Mercer conversation was very upsetting. And there was no comfort for me when I returned home and found Hauerwas's name, too, still included in the *Directory of Law Teachers*. Is that how those guys manage? Take a turn or two in the Law School, then, for relief, a turn in English or Divinity, and then repeat as needed? Does it work?

A week or so after the event, the Mercer Law Review sent me a copy of the opening statements made by Fish and Hauerwas. It had been transcribed from tapes, a difficult and chancy undertaking in any circumstance. In this instance there was one interesting difference between what was spoken into the tape and what the ear took from it.

Hauerwas was reading from I Corinthians the passage in which Paul admonishes Corinthian Church members for taking their internal com-

munity disputes to courts, for laying them "before those who are least esteemed by the church."⁵ The transcription of this passage reads, wonderfully, "before those who release the steam by the church." I was seated before Fish and Hauerwas who released the steam by the law school. My conscience was seared.

5. I *Corinthians* 6:4.

