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HAUERWAS AND THE LAW: FRAMING A PRODUCTIVE CONVERSATION

CATHLEEN KAVENY*

I

INTRODUCTION

The title of this symposium is “Theological Argument in Law: Engaging with Stanley Hauerwas.” When I discussed the project with colleagues specializing in Christian theological ethics, they were interested, even intrigued. Truth be told, however, they were also rather skeptical.

Why the skepticism? It is universally acknowledged that Hauerwas is both engaged and engaging, actively involved in wide-ranging conversations with academics, pastors, doctors, and—yes—even lawyers. Furthermore, no one would deny that arguments rooted in the Christian theological tradition have made their way into American law over the years. Indeed, in 1892, a Supreme Court opinion unselfconsciously proclaimed that “this is a Christian nation.”¹

“A Christian nation”? Ah-ha! Many Christian theologians would say *there* is the problem in a nutshell. Throughout his career, Stanley Hauerwas has tirelessly protested all efforts to embed Christianity, as either an intellectual system or social group, into the framework of worldly power. Such efforts, in his view, inevitably corrupt the thought and the practices of Christians, twisting both toward the goal of sustaining the kingdoms of this world, rather than building the kingdom of God that was inaugurated by the life, death, and resurrection of Jesus Christ. Unlike the “peaceable kingdom” of Jesus, earthly kingdoms are inherently built on violence—not only the violence of warfare, but also the threats of coercive force that ultimately and undeniably back any system of positive law.² The law, in other words, describes and implements the operating system of the strikingly unpeaceable secular world. Upon what basis could Hauerwas possibly engage it?

Like lawyers, theologians are not generally content to raise only one objection to a project or proposal. Those schooled in divinity would also point

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1. Rector of Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892).

2. See generally STANLEY HAUERWAS, THE PEACEABLE KINGDOM: A PRIMER IN CHRISTIAN ETHICS (1983).

out that Hauerwas has vociferously articulated additional concerns about Christian involvement in the particular type of secular polity the United States has become since 1892—a modern liberal democracy. Hauerwas maintains that the United States has generated a political discussion that presses all citizens to adopt a first-order moral and political framework that is meant to be neutral among competing worldviews, and then calls upon them to recast their particular religious beliefs in terms of that neutral framework when they enter the public square. According to Hauerwas, playing this game saps Christians of the confidence they need to proclaim the good news of the Gospel to all nations in their own, distinctive first-order language. They need to remember that the main purpose of the Christian community is to witness to the distinctive story of God's salvific intervention in history through Jesus Christ. Ultimately—Hauerwas insists—the Christian story *judges*, it is not judged *by*, secular standards of epistemology and ethics. To hold otherwise is to sell both the Christian community and the world itself short, for the Christian message is true for the world too, though it knows it not.

So the issue many Christian theologians would raise about this symposium is this: Is there a way in which the type of theology Stanley Hauerwas finds congenial can engage American law? I would like to explore this question in this essay. More specifically, my plan is as follows: Drawing primarily upon Hauerwas's Gifford Lectures, part II will explicate his view of the nature and purpose of Christian theology, as well as the dangers he believes it to face in the contemporary American context. The purpose of this section is to clarify the theological challenges any adequate Hauerwasian engagement with the American legal system will need to meet.

Taking into account these clarifications, part III will sketch a normative framework for the engagement of theology with the secular law that Hauerwas would, I hope, recognize as legitimate. The centerpiece of this framework is Karl Barth's account of the relationship of covenant and creation, and the possibilities for *ad hoc* engagement of theology and secular disciplines that it enables, according to the perceptive interpretations of Barth offered by Hans Frei and William Werpehowski.

In part IV, I will turn from broader issues of theological method to more particular questions of the relationship of theological ethics to law. I will draw upon Paul Ramsey's engagement with the thought of Jacques Maritain and Edmond Cahn to suggest that the common-law tradition, in which legal and moral norms are articulated and applied in the context of concrete cases, can provide a fruitful basis for conversation between theology done in a Hauerwasian way and the secular legal system. Hauerwas is often called a narrative theologian, precisely because he resists treating moral norms in isolation from character, narrative, and tradition. For this reason, he has a natural conversation partner in the common law. The common law, however, is a vast domain. Where should the conversation begin? I will suggest that contract law—the body of statutes and cases dealing with making and enforcing

promises—might serve as a natural starting point, given the historical and normative overlap between the notions of “covenant” and “contract.”

My own theological framework is somewhat different from Hauerwas’s. I approach questions of political theology from the Roman Catholic tradition, which tends to recognize more continuities between nature and grace, and therefore more possibilities for natural theology and natural ethics (sometimes called natural law) than Hauerwas ordinarily acknowledges. In what follows below, I am writing, so to speak, as Hauerwas’s theological lawyer and advocate, not in my own name. Putting myself in his shoes, I am attempting to develop a position justifying Christian engagement with the secular law that is consistent with his fundamental theological premises, which are not in every case my own. Why engage in such an exercise? Because grappling closely with Hauerwas’s perspectives on the relationship of the church to the world is a fruitful exercise for Christians of all stripes. Moreover, it is a mistake to avoid the challenges his work poses to competing strands of Christian political thought by dismissing him as a “sectarian” whose perspective has no real point of contact with political life in a broader, pluralistic society. Before Christians of other viewpoints can responsibly engage a Hauerwasian vision of the relationship of theology and law, we need to work out his position as carefully and sympathetically as possible. That is the goal of this article.

II

WITH THE GRAIN OF THE UNIVERSE: HAUERWAS ON THEOLOGY, CHURCH, AND WORLD

Stanley Hauerwas is a staggeringly prolific writer. As the essay titles in this symposium issue testify, he has offered perceptive reflections on a range of key topics at the intersection of theology and ethics. In part because so much of his writing has taken the form of occasional essays, it can be difficult to formulate an accurate and comprehensive account of his overall approach to theology, ethics, and contemporary culture. My own strategy will be to draw upon his Gifford Lectures, *With the Grain of the Universe: The Church’s Witness and Natural Theology*,³ in constructing such an account because it offers his most extensive account of the relationship of the church and the world.

Like most of his work, *With the Grain of the Universe* is dialogical; Hauerwas develops his own views about the proper relationship of Christian theology to broader secular philosophical and political currents in conversation with three prior Gifford lecturers: William James, Reinhold Niebuhr, and Karl Barth. James, Niebuhr, and Barth, of course, were and remain key figures in their own right. Barack Obama’s well-publicized admiration for Niebuhr has influenced his decision-making regarding both foreign and domestic policy.⁴

3. STANLEY HAUERWAS, *WITH THE GRAIN OF THE UNIVERSE: THE CHURCH’S WITNESS AND NATURAL THEOLOGY* (2001).

4. John Blake, *How Obama’s Favorite Theologian Shaped his First Year in Office*, CNN POLITICS

Although it is certainly worthwhile to consider whether Hauerwas's interpretation of their writings is accurate, let me emphasize that doing so is beyond the scope of this project. My goal is to glean Hauerwas's position, as he articulates it in conversation with them, in order to build a platform for engaging the law from there. My aim is not to defend James, Niebuhr, or Barth against any purported misinterpretations of them by Hauerwas.

What, then, is Hauerwas's argument in *With the Grain of the Universe*? Centrally, he contends that the project of the Gifford lectures—to develop a natural theology, an understanding of God, humanity, and morality that is defensible and intelligible on grounds fully independent from the complete and vigorous account of reality offered by Christianity—is a serious mistake. Hauerwas thinks it is wrongheaded for *anyone* to try to develop a natural theology, because he is convinced that the goal of producing a context-free foundation for knowledge, or a context-independent account of morality, is thoroughly misguided. Moreover, he believes it is a terrible misfire for *Christians* to pursue this strategy because the epistemological and moral power of their tradition is inextricably entwined with the very particular story of God's intervention in history contained in the Bible. In short, Hauerwas thinks Christians who go the way of natural theology are selling their birthright for a mess of pottage.

A. William James

Hauerwas devotes the first two chapters of his book to William James, concentrating centrally but not exclusively upon the views James developed in his own Gifford Lectures, which became *The Varieties of Religious Experience*.⁵ He takes James to represent both the harbinger and the parent of modern secular liberal democratic thought with regard to Christianity. Hauerwas argues that James's work was infused with an ulterior political purpose: to reshape religion in general and Christianity in particular to support the emerging liberal, democratic *polis* in the United States and elsewhere. He charges that James “thinks democracy is not just a social and political arrangement but the very character of the emerging universe.”⁶ According to Hauerwas, Christianity threatened to impede what James saw as cosmic progress:

What really bothered James was not that Christianity seemed to entail false views about the world, but that Christianity challenged the moral and political arrangements necessary to sustain the human project without God. James was profoundly right to see Christianity as the enemy of the world he hoped was being born. That James's world has come into being, a world about which he had some misgivings, makes it all the more important to attend to this aspect of his thought. Many Christians today want

(Feb. 5, 2010), http://articles.cnn.com/2010-02-05/politics/Obama.theologian_1_reinhold-niebuhr-president-obama-pastor?; see also David Gibson, *Of Niebuhr and Nobels: Divining Obama's Theology*, POLITICS DAILY (Dec. 12, 2009), <http://www.politicsdaily.com/2009/12/12/of-niebuhr-and-nobels-divining-obamas-theology>.

5. WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

6. HAUERWAS, *supra* note 3, at 80.

the world James wanted, while assuming that they can continue to have the Christian God. But James was right to think that you cannot have both.”⁷

To suit and serve the emerging democratic world, James attempted to soften and reframe the hard, distinctive claims of Christianity. In fact, Hauerwas charges that James virtually evacuated the religious content from Christianity, leaving only a shell containing a disguised humanism.

More specifically, Hauerwas identifies three specific problems with James’s thought from a Christian perspective. First, influenced by Ralph Waldo Emerson, James frames religious belief as essentially a matter for individuals in their solitariness, rather than a communal matter. According to Hauerwas, this approach wrongly discounts the primacy of communities of believers as the context in which individuals learn the language and grammar of faith.

Second, James separates religious feelings from convictions about religious truths, identifying the former with religious belief and discounting the latter. This separation, according to Hauerwas, wrongly suggests that the feelings are separable from the religious propositions that support them.⁸ In Hauerwas’s view, James’s account fails to do justice to the intellectual content of Christianity, and fails to highlight the degree to which religious affections are shaped by that content.

Third, James fails to recognize the irreducible particularity of Christian claims, reconceptualizing Christianity as simply one example of the more common human phenomenon of “religion.” Hauerwas notes that for James, religions are characterized by their sets of “over-beliefs”—philosophical and theological formulas that cannot be proven and that are also not justified on the basis of James’s pragmatic theory of knowledge.⁹ Moreover—and this is key—because over-beliefs are not pragmatically justified, they cannot serve as a basis for acting, or at least acting in ways that affect the interests of those who do not share the beliefs. Hauerwas opposes James on both counts. He rejects James’s claim that Christian beliefs are not pragmatically justified—justified, that is, by their place in a broad network of workable assertions about how the world operates. He also, therefore, repudiates the implication that Christian beliefs can have no bearing upon one’s actions in the public sphere of politics and public policy, but instead must be relegated to the realm of private interests and pursuits.¹⁰

7. *Id.* at 78–79.

8. Hauerwas claims that what matters for James in matters of religion is not intellectual beliefs, but “immediate and intuitive . . . assurance.” *Id.* at 71 (quoting WILLIAM JAMES, *VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 214 (Mentor Book 1958)). Hauerwas goes on to object that this position is inconsistent with James’s own pragmatism, which holds that “[t]he reasons why I find it satisfactory to believe that any idea is true, the *how* of my arriving at that belief, may be among the very reasons why the idea *is* true in reality.” *Id.* at 72 (emphasis in original) (quoting WILLIAM JAMES, *THE MEANING OF TRUTH* 275 (Harvard Univ. Press 1996)). Hauerwas remarks, “It does not seem to occur to James that attending to the how of what it might mean to be forgiven is not separable from what Christians think God has done for the world in Christ.” *Id.*

9. *Id.* at 68.

10. “My concern at this point, however, is not why James thought he was justified to call his over-

In a nutshell, Hauerwas argues that a central aim for William James was to resize Christianity to fit the nascent liberal democratic project, which can admit of no moral authority higher than human consensus. In Hauerwas's view, James's conceptual Procrustean bed would ultimately prove lethal to Christian belief and community. Hauerwas laments that not all Christians living then were able to see the effects of James's views upon their communities of faith. Moreover, Hauerwas contends that Christians living in our own time are equally blind about the harm caused by James's successors: the economists, philosophers, and public intellectuals who defend America's emphasis on economic freedom in the era of globalized capitalism. I can only imagine what Hauerwas would say about the current fascination with Ayn Rand expressed by many leaders of the religious right, such as Glen Beck and Rush Limbaugh. That admiration is not limited to pundits; it is also shared by powerful legislators, such as Paul Ryan (R-Wis.), a practicing Roman Catholic who chairs the House Budget Committee.¹¹ Moreover, I doubt that Hauerwas would be either sympathetic to or shocked by the hostility that conservative Catholic commentator George Weigel expressed regarding a recent document from the Vatican calling for the establishment of a global economic authority.¹²

B. Reinhold Niebuhr

What would theology look like if it capitulated to the demands of James and his ilk to resize Christianity to fit comfortably within the epistemological and political constraints of liberal democracy? In order to answer this question, Hauerwas turns to Reinhold Niebuhr, arguably the towering figure of twentieth century American Protestantism. In Hauerwas's estimation, Niebuhr's normative commitments are uncomfortably close to James's; he maintains that "Niebuhr's Gifford lectures are but a Christianized version of James's account of religious experience."¹³ Moreover, like James, Hauerwas believes Niebuhr's ultimate purpose was to reconfigure Christianity in a way that would be useful to prevailing American commitments to individualism and the exercise of national power in order to protect America's ideological and economic interests. Hauerwas charges that "[t]he animating center of Niebuhr's life and work was the crafting of an account of liberal Christianity acceptable to a liberal culture and politics."¹⁴

What, in Hauerwas's view, was Niebuhr's key methodological mistake? It was to relativize Christian claims about God's way of acting in the world by

belief 'god.' Rather, my concern is to understand why James thought that what Christians believe about Christ, the Trinity, or the church are over-beliefs that can have no pragmatic justification." *Id.* at 71.

11. See Stephen Prothero, *You Can't Reconcile Ayn Rand and Jesus*, USA TODAY (June 5, 2011), available at http://www.usatoday.com/news/opinion/forum/2011-06-05-Ayn-Rand-and-Jesus-dont-mix_n.htm (noting that Ryan cites Rand as "the reason" for his involvement in public service).

12. George Weigel, *The Pope, Chaplain to OWS? Rubbish*, NAT'L REV. ONLINE (Oct. 24, 2011), <http://www.nationalreview.com/corner/281140/pope-chaplain-ows-rubbish-george-weigel>.

13. HAUERWAS, *supra* note 3, at 87.

14. *Id.* at 88.

treating them as metaphorical statements about more-fundamental, common human experiences and longings. By attempting to make Christianity more widely appealing and accessible, Niebuhr drained it of its distinctive content and power. Hauerwas charges that

[f]or Niebuhr, Christ and the cross are not realities limited to the specific revelation found in Christianity; rather they are symbols of the tensions we must endure as people who expect history to be fulfilled, who expect a “Christ.” Just as sin describes our nature, so Christ and the cross describe our destiny.¹⁵

For Hauerwas, Niebuhr treats Christianity as merely one instantiation of a common human phenomenon, which can be appreciated and understood apart from Christian claims, albeit maybe not as easily or as well. In the end, Hauerwas doubts “we have anything more in Niebuhr than a complex humanism disguised in the language of the Christian faith.”¹⁶

Hauerwas acknowledges, of course, that most people do not think of Niebuhr as a *liberal* because of his emphasis on human sin in his ethical and political writings. Many previous Christian public intellectuals on the American scene, such as Walter Rauschenbusch, a key figure in the “Social Gospel Movement,” were far more optimistic about the capacity of human beings to improve their collective moral lot. Hauerwas responds by calling his readers’ attention to the distinction between theological liberalism and political liberalism. Niebuhr is a *theological liberal*, because the ultimate ground and test of his theological claims is human experience. Moreover, his *political conservatism* is firmly rooted in his theological liberalism; in Niebuhr’s view, common human experience shows that human beings cannot avoid the exercise of political responsibility, sometimes by exerting military force even in morally murky situations. It is futile and dangerous for nations to pursue or expect pure justice in their military endeavors. In most cases, relative justice is all that can be expected. For Hauerwas, the decisive weight that theological liberalism gives to common human experience supports a policy of war-making as the only “realistic” response to political and military threats. Hauerwas writes,

Niebuhr’s ethics and his theology were of a piece. His theology sought to make Christian belief intelligible within the naturalistic presumptions that he thought were a prerequisite of modern science. His ethics sought to make Christian belief intelligible and even useful within the presuppositions of political liberalism. Theological liberals after Niebuhr often want his theology without his ethics; and political conservatives, like the “atheists for Niebuhr,” often want his ethics without his theology. Yet Niebuhr, I think, rightly saw that you cannot have one without the other.¹⁷

Sorting through Hauerwas’s criticism of Niebuhr’s theological method is important here because it will help us avoid analogous methodological mistakes in constructing a Hauerwasian theological approach to American law. Hauerwas, for example, does not object to Niebuhr’s emphasis upon the pervasiveness of sin in human life. He strongly rejects, however, Niebuhr’s

15. *Id.* at 127.

16. *Id.* at 131.

17. *Id.* at 137.

account of how sin can be perceived, identified, and defined. What is that account? Niebuhr's fundamental methodological decision is to begin with general human experience, focusing upon the lived contradiction between finiteness and freedom, and then to identify that contradiction with the experience of original sin. From there, Niebuhr goes on to defend Christianity as the best way of understanding and responding to general human experience, even as he revises the content of Christianity in the process. In other words, Niebuhr first articulates a general human problem, and then proposes a Christian account of sin and redemption as both an explanation and a solution to that problem.¹⁸

In Hauerwas's judgment, then, the key flaw in Niebuhr's strategy is its *directionality*: In fact, he would say that, from an epistemological perspective, Niebuhr's approach is entirely backward. According to Hauerwas, persons must *first* be transformed by the redemptive story of the Bible before they can recognize sin *as* sin—as the breach in the relationship between God and humanity, between God and oneself, that Christ died to overcome. No twentieth-century theologian, in Hauerwas's estimation, proclaimed this point more firmly than Karl Barth.

C. Karl Barth

The chief achievement of Karl Barth, in Hauerwas's estimation, is that he accurately grasped the proper directionality required to know the truth about “the nature and destiny of man” (to borrow from Niebuhr); it is a directionality that moves from church to world, rather than from world to church.¹⁹ In the order of the biblical narrative, sin precedes redemption. In the epistemological order, however, the reverse is true. Redemption precedes sin because we can know sin for what it is only if we know it from the vantage point provided by faithful witness to the redemptive activity of God. We are able to accurately interpret the beginning of the biblical narrative of salvation—the fall—only in light of the end—the resurrection of Jesus. Barth clearly proclaimed that Scripture is the primary source of knowledge about God and God's relationship to humanity. He also recognized that Christians cannot learn to read Scripture on their own, but must learn to do so in the context of a believing and worshiping community—the church. Shaped by this ecclesiastically transmitted knowledge, Christians can then interpret the situation in the world correctly; for the story of Scripture actually applies to all people, although not everyone acknowledges it.

18. “Thus Niebuhr's account of original sin is his attempt to do natural theology. Christians may not be able to convince agnostics and nonbelievers that God exists, but Christians can convince nonbelievers that sin exists. Moreover, if sin exists, it makes some sense to think that God exists. Niebuhr's project is to provide an account of the human condition that is so compelling that the more ‘absurd’ aspects of ‘orthodox Christianity’—such as the beliefs that God exists and that God is love—might also receive a hearing.” *Id.* at 120.

19. *Id.* at 176.

Hauerwas emphasizes that the core message of Barth is simple; Barth himself summarized it as “Jesus loves me, this I know, for the Bible tells me so.”²⁰ Why then did Barth write the fourteen immense volumes of the *Church Dogmatics*? That work is a mighty effort, Hauerwas would say, to reverse the powerful currents of theological liberalism, not only (or even primarily) by mounting a syllogistic argument against those currents, but by comprehensively modeling sound theological reflection. What might that be? According to Barth, practicing good theology is not an abstract academic exercise, but rather a practical endeavor in service of the church’s saving pedagogy. According to Hauerwas, “[t]he *Church Dogmatics*, with its unending and confident display of Christian speech, is Barth’s attempt to train us to be a people capable of truthful witness to the God who alone is the truth.”²¹ Faithful witness—Hauerwas’s understanding of the central Christian activity—requires transformation of the speaker, not only the speech. Barth trains Christians to see correctly by building up, through sheer volume and repetition, a rich account of how the church and world look from the confident perspective of those who believe in the life, death, and resurrection of Jesus Christ.

Despite its length, Hauerwas argues that Barth’s *Church Dogmatics* is not rightly considered systematic theology—an exhaustive account and orderly arrangement of true propositions about God and humanity from the Christian perspective. Hauerwas thinks this is a virtue, not a vice of the work. Theology is not a desiccated academic *topos*, but the free response of a believer to the claims of the living God. One problem with systematic theology, from his view, is that it wrongly constricts the believer’s response; another is that it futilely attempts to chain God down to a preconceived organizational or philosophical structure. Furthermore, precisely because theology is properly construed as a written reflection of an ongoing relationship between God and His people, theology can have no formal beginning or end in the way systematic accounts of any merely academic subject necessarily have.

For Barth, theology’s natural structure is narrative, reflecting the narrative structure of the Biblical account of creation, sin, and redemption through the life, death, and resurrection of Jesus of Nazareth. Theology is properly seen as an ongoing attempt to retell the Biblical story of God and humanity from various angles and perspectives:

“Who and what Jesus Christ is, is something which can only be told, not a system which can be considered and described.” The gospel, according to Barth, is just that simple, but because it is just that simple it requires a complex telling, since we are telling a story about the beginning of all beginnings whose end has come and yet is still to come.²²

20. *Id.* at 182 (quoting Martin Rumscheidt, *Epilogue to KARL BARTH, FRAGMENTS GRAVE AND GAY* (Eric Mosbacher trans., 1971)).

21. *Id.* at 176.

22. *Id.* at 180 (quoting 2 KARL BARTH, *CHURCH DOGMATICS*, pt. 2, at 188 (G.W. Bromiley & T.F. Torrance trans., 1957)).

Accordingly, Barth's *métier* is not syllogistic argument, as both Hauerwas and Hans Frei²³ have noted. Hauerwas, however, points out something that Frei did not grasp: Not all argument, understood loosely as persuasive speech, takes the forms of syllogistic argument. According to Hauerwas, "as Barth uses it, the language of the church is itself already an argument just to the extent that his descriptions and redescriptions cannot help but challenge our normal way of seeing the world."²⁴ Here, I think, is a strong point of contact between Hauerwas and the common law. The "facts" of the case both in lawyers' briefs and in court opinions are not neutral. Some elements are highlighted, whereas others are downplayed. If a brief or opinion is well written, the narrative of the controversy naturally suggests that the action the narrator asks of the audience is the next logical and suitable step in the story. The gravitational force of a plaintiff's lawyer in a closing argument in a tort case can push the jury toward awarding generous damages to compensate the plaintiff for the wrong he suffered. The gravitational force of the facts presented in an appellate opinion can prompt the legal community toward accepting the decision as a sound specification of the requirements of justice. Hauerwas and Barth would say that the gravitational force in the biblical narratives pushes believers toward repentance, gratitude, and witness to the power of God's mercy.

In the Reformed tradition out of which Karl Barth writes, gratitude is the first and proper response of the Christian who realizes that he is forgiven because Christ died and rose again. Other good works, the works of sanctification, are concrete signs of our gratitude and joy at our redemption. For Hauerwas,

[o]ur participation in God's revelation consists in our offering thanks; such is the very condition of our speaking truthfully about God and ourselves. In every aspect of our lives, we cannot try to be anything other than a grateful response to God's revelation. As Barth says: "The work of the knowledge of God as man's participation in the veracity of the revelation of God certainly involves a witness, a question and a summons to all other works. But it takes place as such, as human work, with the same unpretentiousness with which they must take place, and alone can take place as good works."²⁵

For both Barth and Hauerwas, truthful witness to the story of redemption is the central element of Christian ethics. Neither thinks that this witness will be easily accepted—even the joyful, non-coercive testimony that Barth thinks will be a fruit of God's gracious movement of the human heart. Barth maintains that a true Christian will be considered by the world to be "a strangely human person."²⁶ Perhaps too vividly, Barth suggests (and Hauerwas agrees) that "what the 'world perceives when it hears the witness of the Christian is the

23. See generally HANS W. FREI, *TYPES OF CHRISTIAN THEOLOGY* (George Hunsinger & William C. Placher eds., 1992).

24. HAUERWAS, *supra* note 3, at 182.

25. *Id.* at 191 (quoting 2 KARL BARTH, *CHURCH DOGMATICS*, pt. 1, at 216 (G.W. Bromiley & T.F. Torrance trans., 1957)).

26. *Id.* at 196 (quoting KARL BARTH, *THE CHRISTIAN LIFE: LETTER FRAGMENTS 203–04* (Geoffrey Bromiley trans., 1981)).

opinion of a fanatic who has obviously broken his bridges and burned his boats behind him and demands that it should do the same.”²⁷

Why bother, then? Why should Christians witness to those who scorn their message? Because the message is true for them, too, despite their resistance. For Hauerwas and Barth, “[t]he truth that makes Christians distinct is not a truth that is peculiar to them. It is not *their* truth but *the* truth for anyone.”²⁸ They both agree that the vocation of a Christian, which can take different forms in different social contexts,

“implies a responsibility of every man and thus compels the Christian to see and understand not only himself but also the non-Christian in his responsibility, and to address him in terms of it.” The Christian, in other words, cannot address the non-Christian on the basis of a general or human responsibility interpreted as the responsibility to conscience or to supposed or real orders and forces of the cosmos. Rather, every person is to be addressed as one who exists and stands in the light of Jesus Christ.²⁹

For Hauerwas, as for Barth, Christians must speak to the world out of the truth of the Gospel. Not every person believes in Jesus Christ, but Jesus Christ died and rose again for every person. That, I think, is the key both to Hauerwas’s resistance against and engagement with the world beyond the church.

III

TOWARD CRITERIA FOR A HAUERWASIAN ENGAGEMENT OF THE WORLD AND THE LAW OF THE WORLD

According to Hauerwas, then, the primary task of Christian theology is not to recast its claims in the language of the secular world in general, or secular liberal democracy in particular, but confidently to proclaim the truth it bears in its own language—the language of Scripture and the church’s prayer-filled reflection on Scripture over the centuries. Given the primacy of the kerygmatic role of theology, for what reason—and on what basis—would it engage secular law?

A. Church and World

Before we turn to these questions, some terminological clarification is necessary. What exactly does Hauerwas mean by “church”? And what, in his view, is its relationship to the “world”? Although they are terms Hauerwas uses frequently, he does not grace us with full explanations of their meaning in his Gifford Lectures. Both terms, of course, have long histories in Christian thought. Some (for example, Roman Catholics) frequently have used the term “church” to refer to the institutional structure of their religious community,

27. *Id.* at 198 (quoting 4 KARL BARTH, CHURCH DOGMATICS, pt. 3, second half, at 623 (G.W. Bromiley & T.F. Torrance, trans., 1961)).

28. *Id.* at 200 (emphasis in original).

29. *Id.* at 200–01 (quoting 4 KARL BARTH, CHURCH DOGMATICS, pt. 3, second half, at 494 (G.W. Bromiley & T.F. Torrance, trans., 1961)).

which is deeply embedded in worldly structures. Others (for example, the American Puritans) have used it centrally to refer to the “elect”—those who have evidently been saved from eternal damnation by divine decree. Some Christian religious groups (for example, the Amish) have set up distinctive communities apart from the larger world, or with limited interaction with it (the Mennonites). Other Christians, such as Catholics and mainline Protestants, have not viewed faithfulness to the Gospel as requiring withdrawal from the world.³⁰

What about Hauerwas? Sorting through the full meaning and implications of his ecclesiology is not an easy task. Apparent tensions, if not outright contradictions, are easy to identify. Why, for example, does a theologian who emphasizes the distinctiveness of Christian claims and highlights the inimical nature of liberal democratic society to Christianity find himself in *Time* magazine as America’s best theologian?³¹ How can Hauerwas see both John Howard Yoder, a Mennonite, and Pope John Paul II as theological heroes, when they would have deep disagreements about morality (for example, the moral legitimacy of war), worship, and church membership (for example, the role of baptism)? He does not say. It is not clear, in other words, what robust definition of “church” he could offer that would encompass both men. While Hauerwas may on some level presuppose that there is a sociological group called “church,” in which both Yoder and John Paul II can be counted as members, he does not give us a way to identify that group, nor any reason for confidence that all its members will recognize one another as belonging to it. They may, of course, belong to the “invisible church” that will be gathered around Christ at the end of time. But what about a visible ecclesiology for here and now?

I would like to propose that many of these definitional challenges can be ameliorated, if not resolved, by treating Hauerwas as largely working with a functionalist rather than an essentialist ecclesiology. I think that for Hauerwas, “church” points primarily to what we *do*—Christians give thanks to God in worship and witness to God’s saving activity in truth—rather than who we *are*. To put it another way, within his framework, “church” should be understood as more of a verb than a noun; it is a distinct activity, rather than a distinct membership group. If this is the case, then Hauerwas does not need to draw sharp boundaries between various branches of Christianity, labeling some true churches and some false. *Both* Yoder and John Paul II *enact* (rather than *belong to*) the one true church when and to the extent they are truly witnessing to the biblical story of salvation.

Furthermore, by adopting a functionalist conception of church, Hauerwas does not need to act as a sectarian to sharply divide Christians from the world in

30. Needless to say, sociologists of religion (for example, those operating with a Weberian “church”–“sect” distinction) would offer a different analysis of what the term “church” means than an ecclesiologist working within a particular religious tradition.

31. Jean Bethke Elshtain, *Christian Contrarian*, *TIME*, Sept. 17, 2001, at 74.

every respect in order to preserve its distinctive message. Witnessing is an activity that can take place anywhere, as the account St. Paul's witness to the Athenians evinces.³² Paul did not protect the Christian message from encounters with cosmopolitanism; in fact, he embraced such encounters. After preaching against idolatry in the marketplace (agora) and the synagogue, and debating Jews and Epicurean and Stoic philosophers, Paul was invited to speak at the Areopagus, a region of Athens on the Acropolis that at one time was comprised of temples, associated cultural activities and facilities, and the supreme Athenian council (their supreme court).³³ There, Paul preached the Gospel message in terms the Athenians could understand, proclaiming to them that the "unknown God" they worshiped was in fact the God who would raise them from the dead.

I suggest we think of the "world" in Hauerwasian terms as analogous to Athens, the agora, and the Areopagus—as the locus of joint *activity* for all people, including those people who do not know that Jesus died for their sins. For Hauerwas, they are the people who need to hear the truth about themselves, which they can only do if Christians work and live and profess their faith in their midst. To the extent that Christians are incompletely converted—and all Christians are that—they need to receive the same message.

Moreover, interpreting the distinction between church and world in this functionalist rather than essentialist manner allows us to push Hauerwas's framework constructively, in a way that may help clarify the relationship between two sets of terms that are key for our discussion. At times, it can appear that Hauerwas thinks the relationship between church and world is analogous to the relationship between theology and liberal democratic politics and philosophy:

Church : World :: Theology : Liberal Democratic Political Philosophy

Furthermore, it sometimes appears that Hauerwas is willing to turn these analogical relationships sideways, so the relationship between the church and theology, on the one hand, is analogous to that between the world and liberal democratic politics and philosophy:

Church : Theology :: World : Liberal Democratic Political Philosophy

Presuming that Hauerwas accepts the account of the relationship of the church to the world described above, he would do well to reject both analogies. The church's fundamental role, in his view, is to witness to the world. The task of theology, however, is not to witness to liberal democratic political philosophy. Furthermore, flipping the analogy on its side entails even more relational distortions. The point of theology, as Hauerwas understands it, is to

32. See Acts 17:22.

33. According to biblical scholars, the Areopagus, the "hill of Ares," was no longer the setting of the supreme Athenian council in Luke's day. Luke meant that Paul was invited to a learned disputation in the former setting of the council, not subpoenaed to appear at a trial. See generally Richard J. Dillon, *Acts of the Apostles*, in THE NEW JEROME BIBLICAL COMMENTARY 755 (Raymond E. Brown et al. eds., 1990).

help the church recover its kerygmatic voice. Theology's task consists primarily of redescription of the web of Christian commitments, and secondarily, of offering critical, internal reflection on the current practices and challenges faced by the church. Liberal democratic political philosophy does not function in the same way for the world that theology (in Hauerwas's view) does for the church. To suggest that it does is to make two mistakes: (1) it is to reduce the world to the American state, and (2) it is to assume the normative commitments of the American state are largely captured and reflected by liberal democratic political philosophy.

But the world—the broader practices and activities in which Americans and others live their lives—includes far more than the apparatuses of the state. And liberal democratic philosophers are not philosopher kings, with the power to transform American society in the manner in which they wish to do. They sell their ideological wares in the agora and on the Areopagus, just like everyone else—including theologians. Religious language is far from on the wane in American political speech: Witness Rick Perry's recent stadium-sized day of fasting and prayer,³⁴ which echoes the day of fasts that New England Puritan divines held at the behest of the state in the seventeenth century in order to insure national prosperity through obedience to divine law.³⁵

The intricate web of state and federal law clearly and directly shapes the activity of the agora and the Areopagus—including the activity of political theorists. For example, it is in large part because of the Supreme Court's broad interpretation of the First Amendment right to free speech that even radical denunciations of American policy are not generally suppressible or punishable as sedition. Precisely because it immediately and sometimes coercively influences behavior, the law has a far more direct role than academic political theory in expressing, shaping, and teaching the values of our political society. Political theorists of all stripes may make their proposals, but it is the lawmakers who make the ultimate dispositions. I do not deny that it is important for theologians to pay attention to the philosopher John Rawls's account of the difference principle, which sketches the framework for a theory of distributive justice.³⁶ It is equally if not more important, however, for them to examine the theory of distributive justice that is coercively implemented through the tax code.

When most people think of legal norms, they think of the requirements and prohibitions of the criminal code. Lawyers know, however, that what the law enables and encourages, or impedes and discourages, is at least as important as what it straightforwardly requires or prohibits under the threat of penal sanctions. The law has a channeling function, highlighting certain activities as worthwhile (for example, home ownership), and marking clear paths that can

34. See Manny Fernandez, *Perry Leads Rally at Stadium for a 'Nation in Crisis'*, N.Y. TIMES, Aug. 7, 2011, at A12, available at <http://www.nytimes.com/2011/08/07/us/politics/07prayer.html>.

35. See, e.g., HARRY S. STOUT, *THE NEW ENGLAND SOUL* (1986).

36. See JOHN RAWLS, *A THEORY OF JUSTICE* 60–83 (1971).

lead to achieving them. Much of the law curriculum, in fact, deals with bodies of law that are essentially positive in function: contract law, corporate law, property, and constitutional law are all meant to enable the orderly interaction of human beings with one another. As John Finnis has often said, a major point of the law is to solve “coordination problems”—not always to say “no,” but frequently to say “how” and “when” certain activities may take place.³⁷

Moreover, the web of law does not manifest, at either the state or federal level, the coherence of systematic political theory. Particularly in common-law countries such as the United States, the law is not like a suburban McMansion built all at once six months ago, but rather like an old farmhouse with additions and renovations from different periods clinging together in a rough and wary harmony. Liberal legal theory may be systematic, ahistorical, and thematically coherent; but the law of the United States of America—federal law and the law of the fifty states—most definitely is not.³⁸ It is, to borrow from Jeffrey Stout’s borrowing from Claude Lévi-Strauss, a “*bricolage*.”³⁹ We see coherence and functionality, but we also see tension, and sometimes even contradiction. We see development—or devolution—over time.⁴⁰ This is particularly true of the common-law tradition, which grows over time as an accretion of decisions made in the context of particular cases. The common law does not entirely shuck off the past, but highlights some aspects while playing down others.

I think Hauerwas’s own approach to theology, which eschews systematic reflection and places a high priority on narrative, would find a natural conversation partner in American case law. It is the compilation of narratives of actual controversies, which was settled by the judicial articulation of a governing rule “in the prism of the case.”⁴¹ Norm and narrative are interrelated in the common law; law students do not learn merely how to apply the rule to the facts, but also how to appeal to facts to argue that the rule in one case should not apply in a facially similar case. Methodologically speaking, in other words, the common-law tradition resonates greatly with the type of theology advocated and practiced by Hauerwas himself. It provides, in my view, a better point of contact for Hauerwasian theology with the agora and the Areopagus of America’s particular, historically conditioned liberal democracy than most work in liberal democratic theory. Let the systematic theologians talk to the systematic political theorists; theologians working in a Hauerwasian key will

37. See the following works by John Finnis: INTENTION AND IDENTITY 85–86 (2011); NATURAL LAW AND NATURAL RIGHTS 253–54 (1980); PHILOSOPHY OF LAW ch.3 (2011).

38. See, e.g., KARL LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (11th prtg. 2008) (1930) (providing an introduction to the messiness of legal reasoning).

39. JEFFREY STOUT, ETHICS AFTER BABEL 74–77 (1988).

40. For example, enforcement of the Civil Rights Act of 1866 was undermined by political factions and the actions of groups such as the Ku Klux Klan. See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 (1988).

41. PAUL RAMSEY, NINE MODERN MORALISTS 195 (1962) (quoting EDMOND CAHN, THE SENSE OF INJUSTICE (1949) and EDMOND CAHN, THE MORAL DECISION (1955)).

find a more congenial conversation partner in the common law.

Thus far, I have made a case for Hauerwas's engaging the common-law tradition in general as part of Christian theology's engagement with the world. The next question pertains to the theological justification for such engagement: Why ought Hauerwas to consider it a legitimate endeavor, rather than a mere useless distraction from straightforward witnessing to the risen Christ? To address these questions, I think Hauerwas would do well to draw upon further resources from the thought of Karl Barth and Hans Frei, both of whom appear in his Gifford Lectures.

More specifically, I would like to suggest that Hauerwas might justify his theological engagement with the world by drawing upon the framework with which Karl Barth organizes the relationship of God and humanity, as well as relationships of human beings to one another: the framework of covenant theology, which is a key aspect of the Reformed tradition in theology to which Barth belongs. Somewhat surprisingly, Hauerwas does not explicitly mention the covenantal aspect of Barth's thought in his Gifford Lectures, although I think many of his remarks are consistent with its insights.

B. Creation and Covenant

In general terms, covenant theology understands the relationship of God and humanity in terms of the exchange of solemn promises, repeatedly enacted in the Old Testament in the covenants between God and Adam and Eve, God and Noah (a renewed covenant for all humanity), and the covenant between God and Abraham (the covenant between God and the Jewish people). God freely chooses to make human beings his covenant partners, and confers upon humanity the power freely to accept his offer. Furthermore, in Jesus Christ, whom Christians believe to be both fully human and divine, humanity's repeated breach of the covenant was decisively overcome by Christ's fidelity, and obedience, to God's call.

Barth sees the creation—the entire created world—as the *external basis* of the covenant between God and humanity that is sealed by the death and resurrection of Jesus Christ, and the covenant as being the *internal basis* of creation. Barth writes,

Creation comes first in the series of works of the triune God, and is thus the beginning of all the things distinct from God himself. Since it contains in itself the beginning of time, its historical reality eludes all historical observation and account, and can be expressed in the biblical creation narratives only in the form of pure saga. But according to this witness the purpose and therefore the meaning of creation is to make possible the history of God's covenant with man which has its beginning, its centre and its culmination in Jesus Christ. The history of this covenant is as much the goal of creation as creation itself is the beginning of this history.⁴²

42. 3 KARL BARTH, CHURCH DOGMATICS, pt. 1, § 41, at 42 (G.W. Bromiley & T.F. Torrance trans., T&T Clark 2d ed. 2004) (1958).

To put it another way, according to Barth, God created the world *for* covenant partnership with him, a covenant partnership that was first enacted fully with the Jewish people and then expanded to encompass all humanity through the message of the Gospel. Consequently, theologians do not need to construct a bridge between the Christian community and the broader world, as if they are two distant bodies. The two are intertwined, because they were divinely oriented toward one another from the beginning. Nonetheless, the two do not have equal status in interpreting the terms of the relationship. The true meaning of creation, and its orientation toward covenant relationship with God, can be only identified from the perspective of those who acknowledge the saving activity of Jesus Christ. The directionality of the interpretation has to remain one-way.

So a covenantal framework provides the theological *basis* for Hauerwas to allow the church to engage the world. What is the appropriate *method* of engagement? This is a difficult question. Christian theologians, according to both Barth and Hauerwas, cannot detach Christian claims from the biblical narrative in which their intelligibility rests; they therefore need to resist the futile endeavor to translate Christianity into other normative frameworks or systems. Both Hauerwas and Barth reject the project of natural theology as a comprehensive attempt to justify the belief in God on neutral philosophical or theological ground. Relatedly, they also reject a full-blown project of apologetics, understood as attempting to provide reasons not rooted in faith that are themselves sufficient to justify belief in Christianity.

C. *Ad Hoc* Correlations

The fact that there are no well-paved, well-established highways between the church and the world does not mean there are no byways whatsoever. Theologians are free to make use of whatever intellectual or social material from the world—from the agora and the Areopagus—that helps them in their task of showing how the world is rightly known only from the perspective of the Christian story. As William Werpehowski argued, this task involves revealing how certain practices and patterns of activity engaged in by non-Christians are illuminated and assisted when set in the context of Christian claims. These efforts are not driven by intellectual system, but by context, need, and opportunity. They are, in Werpehowski's term, "*ad hoc* apologetics":

The attempt to describe some feature of Christian faith in order to make it sensible and credible (i.e., "reasonable") to a non-Christian must itself be expressive of the character of one who would stand faithfully in relationship with God in Christ. The substance, moreover, at least has to involve an appeal to the unbeliever that takes seriously his or her status as a creature of God, that is, as one whose own characteristic patterns of action and purpose bear some uneradicable relation to an origin in God. The Christian apologist thus seeks to establish common ground with the non-Christian as creature with reference to a particular context of action or a particular contested question or belief. That Christian identity is sustained thereby is what makes the apologetic *theological*. At the same time, the common ground sought and supportive of Christian identity also must be seen really to sustain and nurture the non-Christian in some particular area of belief or practice. The latter's projects and purposes would

be advanced and would make more sense with the introduction of the theological factor securing the common ground. This is what makes the theological activity *apologetic*; reasonableness is⁴³ displayed through conversation in a way that supports the non-Christian's identity.

The project of *ad hoc* apologetics depends upon a broader, *ad hoc* account of theology's correlation to secular disciplines in its working out of the Christian story of redemption. What does this account entail? According to Hans Frei,

it argues that Christian theology is a nonsystematic combination of normed Christian self-description and method founded on general theory. But . . . it does not propose a correlation between heterogeneous equals. . . . [T]he practical discipline of Christian self-description governs and limits⁴⁴ the applicability of general criteria of meaning in theology, rather than vice versa.

Although secular thought is frequently an aid to the task of Christian theology, theologians must guard against allowing the servant to become the master.

Not surprisingly, Frei takes Barth as a prime example of the *ad hoc* correlationist approach. How does this approach relate to the Barthian account of the relationship between covenant and creation?⁴⁵ In my view, it tacitly presupposes it. Since creation is the external basis of the covenant, theologians are free to make use of any intellectual tools they find in order to illuminate the Christian narrative, to make it more intelligible to persons within and outside the church. The history of Christianity is replete with fortuitous "borrowings" from secular thought in order to communicate truths rooted in the biblical narrative. The creeds themselves, for example, articulate the nature of God in the terms of Greek philosophy. One could argue that St. Paul himself engaged in *ad hoc* apologetics in his conversations on the Areopagus, showing the Athenians how his conception of their "unknown god" made more sense of their aspirations and purposes than their own religious beliefs did.

The Reformed tradition of Christianity, from Calvin to Barth, has expressed great skepticism about the capacity of human wisdom to understand the truth of the human condition, due to the enduring effects of sin on the intellect as well as the will. Although relation can ameliorate those effects, it cannot eradicate them entirely. An *ad hoc* correlationist account is consistent with the heightened sense of epistemological limits in the Reformed tradition. Frei notes, "There can be no ultimate conflict between them [the truths of revelation and the truths of secular knowledge], but in finite existence and thought we cannot know how they fit together in principle."⁴⁶ The relationship of Christian doctrinal claims "to the broader or even universal linguistic or conceptual context within which they are generated remains only fragmentarily—perhaps

43. William Werpehowski, *Ad Hoc Apologetics*, 66 J. RELIGION 282, 286–87 (1986) (emphasis in original).

44. FREI, *supra* note 23, at 3–4.

45. For a careful examination of Frei's thought, see JASON A. SPRINGS, TOWARD A GENEROUS ORTHODOXY (2010).

46. FREI, *supra* note 23, at 4.

at times negatively—specifiable; yet it is important to keep that relationship open and constantly restate doctrinal statements in the light of cultural and conceptual change.”⁴⁷

How do we situate Hauerwas with respect to Barth, Frei, and Werpehowski on an *ad hoc* correlationist approach to the disciplines of the word? In my view, Hauerwas has on occasion so emphasized the distinctiveness of Christian theological claims that he has led some readers to think that he would not admit the legitimacy of even an *ad hoc* correlation with secular disciplines. If this were in fact his opinion, then Hauerwas would have no legitimate point of contact from which to engage the world; he could simply preach to it in distinctively Christian terms and pray for its conversion. Yet I do not believe that this is in fact Hauerwas’s opinion. In his Gifford Lectures, Hauerwas has more fully integrated his approach with the Barthian approach of his teachers at Yale, particularly Hans Frei.⁴⁸ In so doing, he has also, in my view, placed his engagement with the secular world and its disciplines on a firmer theoretical basis.

IV

CONVERGENCES BETWEEN A “PROTESTANT” NATURAL LAW AND THE COMMON LAW

One more bridge needs to be crossed. Frei’s focus is dogmatic theology; he says comparatively little about questions of ethics. How should Christian theologians interested in appropriating an *ad hoc* correlationist methodology address applied questions of ethics and political theology? The Barthian notion of creation as the external basis of covenant would support the *existence* of a set of norms that is binding on all persons and communities simply by virtue of their basic human nature—which is created for redemption in Jesus Christ. Yet, at the same time, Barth’s insistence upon the primacy of the Christian narrative would reject both the legitimacy and effectiveness of any attempts to deduce these norms from universal first principles of morality. Both Barth and Frei would consider any attempt to formulate a neutral set of abstract moral principles that transcend Christianity and every other normative intellectual–moral system to be both theologically mistaken and intellectually false. Finally, a Barthian approach to generally applicable moral norms would need to take into account the Reformed tradition’s insistence upon pervasive effects of original sin, which not only impedes the human ability to conform to true moral norms, but also and more fundamentally darkens our capacity to grasp those norms.

Here, of course, we are verging into the complicated question of the relationship of the Protestant branch of Christianity to the natural-law tradition.

47. *Id.*

48. I am indebted to a conversation with Bill Werpehowski for crystalizing this point for me.

Some might ask, “What relationship?” To say categorically that all Protestants have always been opposed to natural-law methodology is a grave mistake. In the early modern period, Protestants did not reject “natural law” as providing a roughly workable basis for interactions in the secular world, although they denied that it could provide any kind of knowledge of morality sufficient for salvation. In fact, two of the fathers of international law, Hugo Grotius (d. 1645) and Samuel von Pufendorf (d. 1694), were Protestants.

In the twentieth century, however, the situation was very different. Seared by the experience of the First World War, and appalled by the rise of the Third Reich, Barth rejected “natural law” as a sufficient basis to formulate a sound morality that would prevent Christians from committing, endorsing, or passively accepting atrocities.⁴⁹ Moreover, in the United States in the first part of the twentieth century, many mainstream Protestant ethicists tended to associate natural law with the form it took in the Catholic neoscholastic tradition. In so doing, they assumed that natural law operated as a universally applicable and universally understandable set of moral norms that could be applied deductively and with certainty to an infinite range of factual circumstances. Protestant rejection of natural law became increasingly intertwined with its rejection of Catholic accounts of morality as too dependent upon unregenerate reason rather than Scripture.

That rejection, however, provided an opportunity for rediscovery. In the mid-twentieth century, the Protestant ethicist Paul Ramsey groped toward a reconceptualization of the natural-law tradition that would allow Protestants to appropriate the tradition’s insights on their own terms. More specifically, in *Nine Modern Moralists*,⁵⁰ Ramsey resists attempts to interpret the natural law in too rationalistic and deductivist a way. Instead, he draws upon Jacques Maritain’s understanding of the knowledge of natural law through inclination, through “connaturality,” not through pure, disembodied reason. In this schema,

knowledge of the natural law no longer is a matter of reflecting upon essential human nature in abstraction from variable factual conditions and social relationships. Knowledge by connaturality, congeniality, inclination arises only vis-à-vis quite concrete conditions of fact. Judgments as to the fundamental law, quite as much as any other sort of law, are made only *in medias res*.⁵¹

It seems to me that Ramsey’s account of natural law is congenial to the *ad hoc* correlationist approach suggested by the work of Barth and Frei. Moreover, I think it could furnish a platform for conversation between Hauerwas and the law, particularly the common law. In 1977, Hauerwas coauthored an article with David Burrell, entitled *From System to Story: An Alternative Pattern for Rationality in Ethics*,⁵² which perceptively reflects on the relationship between

49. For Barth’s debate on this topic with Emil Brunner, see EMIL BRUNNER & KARL BARTH, *NATURAL THEOLOGY* (2002).

50. RAMSEY, *supra* note 41.

51. *Id.* at 220.

52. STANLEY HAUERWAS, RICHARD BONDI & DAVID BURRELL, *TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS INTO CHRISTIAN ETHICS* (1977).

norms, narrative, and character. Hauerwas and Burrell argue that “quandary ethics,” a genre of moral reasoning that applies abstract moral norms to stripped-down descriptions of controversial cases, are too abstract to reflect the richness and complexity of actual moral decisions.⁵³ Although some might think the case-based reasoning in quandary ethics reflects the case-based approach in the common-law tradition, in fact, that is not so. Many key cases contain rich narratives, in which a legal norm is only understandable in light of the identity and character of the parties, as well as their broader social context. Very often, these narratives provide the basis not only for supporting the judgment of the court, but also for calling it into question, as the work of John T. Noonan, Jr. demonstrates.⁵⁴ In my view, Ramsey’s retrieval and reformulation of a Protestant account of natural law is congenial to the insights of Hauerwas and Burrell, in part because it privileges the context-dependent, narrative-oriented approach of the common law as a locus for the articulation of moral norms.

Ramsey developed his account of natural law in conversation not only with Maritain, a revisionist Catholic philosopher, but also with Edmond Cahn, a secular Jewish law professor. Drawing upon their insights, he struggled to formulate an historically embedded, inductive account of natural moral norms that could be identified “in the prism of the case,” and which were inextricably intertwined with both the cultural norms instantiating them and the facts of the particular controversy.⁵⁵ There was, in Ramsey’s view, no way to strain and purify the natural law of these elements; one engaged the natural law in and through engaging its operations in cases and contexts. Of necessity, this engagement was always tentative and partial; another case could come along that could force revision or even abandonment of the principle articulated to decide the case. Hauerwas and Burrell would doubtless agree.

Moreover, Ramsey does not want to separate inclination (which he identifies with natural law) from practical reason (which he identifies with human law, including the *jus gentium*). Nor does he want to separate inclination and natural law from their social embodiment. He sees “the straddle position” of *jus gentium*, containing “both characteristics which belong also to natural law (that is, known not only as rationally inferred but also through inclination), and characteristics that go beyond the content of natural law (that is, *only* rationally

53. *Id.* at 15–39.

54. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, AND WYTHE AS MAKERS OF THE MASKS* (2d ed. 2002).

55. RAMSEY, *supra* note 41. In particular, see chapter eight, “Jacques Maritain and Edmond Cahn: The Egypt of the Natural Law,” and chapter nine, “Jacques Maritain and Edmond Cahn: Man’s Exodus from the Natural Law.” Ramsey was one of the first American Protestants to engage the Catholic tradition in an interested, appreciative, although critical way. Ramsey recognizes that Maritain is attempting to reject the rationalistic, deductivist account of natural law that he himself associates with Roman Catholicism. Ramsey does not, however, appreciate the variety in the Catholic tradition, although he does have an inkling that Aquinas himself is not subject to the criticisms he mounts. This book was written in the early 1960s; his interest and familiarity with Catholic moral theology grew over the next several decades.

inferred, and not known through inclination).”⁵⁶ He asks rhetorically,

Is the legislative decision against murder really strengthened or better understood when it is broken down as follows: “The prohibition of murder, insofar as this precept is *known by inclination*, belongs to natural law. The same prohibition of murder, if this precept is known as a conclusion inferred from a principle of natural law, pertains to *jus gentium*.” The judgment here being made is indivisibly tendential, decisional, and conceptual; it is at once natural and positive law.⁵⁷

Ramsey rejects the attempt to distill the natural law from its instantiations in the particularities of various societies and to separate it from the concrete, fallible decisions made by persons in those societies. This is precisely the reason he is open to the possibility that biblical morality has influenced the articulation of norms of justice that we now interpret as ecumenical or secular, rather than as specifically influenced by the biblical tradition. Here, Ramsey quotes Cahn:

“The stubborn survival of some sort of faith in *natural* justice,” he [Cahn] wrote, “should point to a nucleus of truth.” The sense of injustice, knowledge through inclination, is that nucleus. “Judges may speak of ‘due process,’ ‘equal protection,’ ‘general welfare,’ ‘reasonableness’—all somehow cleansed of natural rights or higher law. But would the decision be the same if twenty-four centuries had not preached an indwelling justice?”⁵⁸

Ramsey’s account of natural law both validates and challenges Hauerwas’s insistence that faithful commitment to the distinctive story of Christianity makes a difference to the identification and articulation of moral norms. For Ramsey, it has mattered that the basic norms of the Western legal tradition were formulated, implemented, and enforced by those committed to the salvific death and resurrection of Jesus Christ. It might have been otherwise, he concedes. But Ramsey would doubtless ask Hauerwas whether it would have been *better* otherwise, particularly for the weak and vulnerable.

Furthermore, Ramsey incorporates a characteristically Protestant distrust of postlapsarian moral reason by emphasizing the fundamentally negative nature of natural moral knowledge: after the fall, human beings tend to have a sense of *injustice*—of what is wrong to do in concrete circumstances, not a full, positive sense of justice that could fully outline in advance the requirements for morally correct action in all situations. Accordingly, he highlights Maritain’s understanding of natural law as “knowledge through *disinclination*,” along with Cahn’s insistence that moral analysis should “focus not only on an *act* but an act of *wrong*” identified by “the sense of *injustice*.”⁵⁹

In Ramsey’s view, the common-law tradition also reflects the provisionality about specific judgments that accords with the Protestant sensibilities about the limitations of moral reasoning. He writes that “a possible Protestant view of the fundamental nature of moral and legal decisions based on natural justice (or

56. *Id.* at 221 (emphasis in original).

57. *Id.* (emphasis in original).

58. *Id.* at 226 (quoting EDMOND CAHN, *THE SENSE OF INJUSTICE* 11 (1949)) (emphasis in original).

59. *Id.* at 224 (quoting EDMOND CAHN, *RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 11, 34 (1955)) (emphasis in original).

law) has a great deal in common with the jurisprudential understanding of judicial reasoning and moral decision in legal cases.”⁶⁰ Key for Ramsey was the possibility of “unlimited discussion,” by which he meant that the conversation about the right way to resolve a particular case was never in principle closed, although the judicial decision settled the matter practically.⁶¹ His objection to the Catholic natural-law tradition has to do with its propensity, in his view, to use Church authority to shut down questions prematurely.⁶²

It seems to me that Hauerwas, committed as he is to the kerygmatic function of Christianity, ought to find Ramsey’s approach congenial. Although Hauerwas may be opposed to “Christendom,” he ought not to dismiss the efforts of Christians to discern, over the centuries, the concrete requirements of morality in particular cases and controversies, in light of the demands of justice, demands that are themselves shaped by the biblical narrative. It may or may not be true that the members of the contemporary bench, bar, and legal academy are irredeemably secularist. Nonetheless, in the Anglo–American common-law tradition, today’s legal minds must grapple with authoritative authors, sources, and subjects who were not secularists, but who were Christian believers—in fact, who were in the main Protestant Christians. The values and commitments of these earlier participants in the American legal tradition are embedded not only in the decisions, but also in the framing of the narratives of the particular cases and controversies that occasioned those decisions.

Finally, I want to highlight the thoroughgoing narrativity of the common law, an idea toward which Ramsey is also groping, although he does not use the term. I have argued elsewhere that the common-law tradition can provide a particularly rich conversation partner for any theologian who takes Alasdair MacIntyre’s tradition theory seriously.⁶³ Teaching first-year law students to think like lawyers means helping them to appropriate four features of tradition-constituted inquiry, which include (1) the interdependent relationship of rules and facts in common-law cases, (2) the importance of understanding the foundational narratives of the subject matter, (3) the need to move beyond both skepticism about legal reasoning and the quest for an unattainable certainty about the law, and (4) the role of authority in the development of the law.⁶⁴

The characteristic method of teaching law students is the “case method.” Students learn the law by reading “casebooks” that present key doctrines in the context of the key cases that pressed the court to articulate or revise those doctrines. These cases are stories. They function in the system of legal

60. *Id.* at 213.

61. “The first distinctive feature of Protestant doctrines of the law of nature—though not only of Protestantism—is the separation of the natural law from the context of the authority of ecclesiastical positive law so that the inherent meaning of natural law might come to fulfillment in the progressive discovery of new and relevant truth through unlimited discussion.” *Id.* at 229.

62. *Id.* at 213.

63. M. Cathleen Kaveny, *Between Example and Doctrine: Contract Law and Common Morality*, 33 J. RELIGIOUS ETHICS 669, 684–85 (2005).

64. *Id.* at 676.

education in much the same way that Bible stories function in religious education, or fairy tales function in the more general process of socializing a child. Through these stories, law students learn not just what the rules are, but who the characteristic characters are, and what the characteristic plot lines are, in the moral universe instantiated by the common-law subject in question.⁶⁵ By reading cases, law students learn to know the characteristic narratives well enough to “absorb the world into the text,” to borrow the description of a pre- and post-critical way of making use of the biblical narrative proposed by postliberal theologians such as Hans Frei and George Lindbeck.⁶⁶ They can, in other words, begin trying to fit new scenarios into the normative worldview intricately woven by the legal cases.

The realm of the common law, of course, is vast. Where in particular might Hauerwas begin his engagement? I would like to end this section by suggesting that the common law of contracts would be a particularly auspicious place for Hauerwas to begin engaging the American legal tradition, for at least two broad sets of reasons, which I hope to explore more fully in the future.

First, there is considerable historical and conceptual overlap in the development of the theological and legal ideas of covenant and contract. As I noted above, Karl Barth is a covenant theologian; he draws upon the repeated imagery of God’s agreements with humanity in Scripture to provide his theological framework. He was not the first one to take this approach. Although Christian theologians had always paid due regard to the concept, it assumed a more central role in the thought of John Calvin (d. 1564) and grew to provide the organizing motif of some groups of his followers. Originating in Germany, covenant theology (sometimes called federal theology; the Latin word *foedus* is often translated as “pact”) received fulsome development at the hands of the English and American Puritans in the sixteenth and seventeenth centuries. In developing their covenant theologies in sermons and religious tracts, the Puritans (who belonged to the emerging merchant class) tended to draw upon law knowledge of the nature of binding legal agreements in order to make their point. They tended, in fact, to use the terms “contract” and

65. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 201 (1981) (“[M]an is in his actions and practice, as well in his fictions, essentially a story-telling animal. He is not essentially, but becomes through his history, a teller of stories that aspire to truth. But the key question for men is not about their own authorship; I can only answer the question ‘What am I to do?’ if I can answer the prior question ‘Of what story or stories do I find myself a part?’ We enter human society, that is, with one or more imputed characters—roles into which we have been drafted—and we have to learn what they are in order to be able to understand how others respond to us and how our responses to them are apt to be construed. It is through hearing stories about wicked stepmothers, lost children, good but misguided kings, wolves that suckle twin boys, youngest sons who receive no inheritance but must make their own way in the world and eldest sons who waste their inheritance on riotous living and go into exile to live with the swine, that children learn or mislearn both what a child is and what a parent is, what the cast of characters may be in the drama into which they have been born and what the ways of the world are.”).

66. HANS FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE* (1974); GEORGE A. LINDBECK, *THE NATURE OF DOCTRINE* (1984).

“covenant” interchangeably—as did many non-technical legal discussions.⁶⁷ Second, turning to the contemporary era, it seems to me that the norms embedded in and illustrated by the cases of contract law would bear fruitful consideration by Christian ethicists, particularly those of a narrative bent. Narrative theology, for example, would not limit its moral evaluation of promise-making and promise-keeping to the moment of commitment, but would instead view that obligation in a broad temporal frame that relates past, present, and future. So does contract law, especially through the concept of reliance. Promissory estoppel, for example, centrally enforces unbargained-for promises upon which the promisee has relied to his or her detriment, either by making further commitments (for example, going into debt upon the promise of a forthcoming payment) or by forgoing other opportunities (for example, relying on the promise of one job by declining another offer).

Reflecting upon the legal concept of reliance might also allow Christian ethicists more firmly to situate individual actions in a communal context for purposes of evaluating their moral import, particularly with respect to the potential for vulnerability they create. For example, promise-making is essentially a social act, as the institution of marriage suggests. Each spouse relies upon the other’s promises in the joint expression of their positive freedom, creating a family together. Embarking upon that project, however, renders them far more vulnerable than they were before making or accepting the reciprocal promises of marriage. Women and men who are responsible for small children are not as free, flexible, and able to protect themselves financially as they were before those children came along. Reliance upon their mutual promises makes the two partners vulnerable; one purpose of treating those promises as legally binding is to protect them against the potential wounds.

V

CONCLUSION

I have argued that it is possible to articulate a theological basis for a Hauerwasian engagement with the law. That basis consists of three elements: (1) a Barthian understanding of the relationship of creation and covenant; (2) a general *ad hoc* correlationist methodology; and (3) a conviction that the moral norms of creation (natural law) appear through a glass darkly, inextricably entwined with cultural norms and particular facts and circumstances. Moreover, I think the common law can provide a particularly rich conversation partner not only for Hauerwas, but also for any theologian who takes Alasdair MacIntyre’s tradition theory seriously. In particular, I think the common-law subject of contracts—of the law surrounding enforceable promises—would be a good conversational starting point, for reasons both historical and normative.

67. DAVID ZARET, *THE HEAVENLY CONTRACT: IDEOLOGY AND ORGANIZATION IN PRE-REVOLUTIONARY PURITANISM* 168 (1985).

Historically, the tradition of covenant theology, in which Karl Barth participates, drew heavily upon images from widely known legal discourse pertaining to promise-keeping and debt in working out its understanding of the relationship of God and humanity.⁶⁸ Normatively, Christians are centrally a people who have learned what it is to rely upon a promise—the divine promise that we are, and will always be, God’s people. Relying on God’s promise, Christians try to become reliable ourselves. A conversation about what communal and individual habits and practices are necessary to encourage us to be persons who can rely upon one another’s promises is something about which contract law and covenant theology have a great deal to say.

So, in my view, does Stanley Hauerwas.

68. *See id.* (entire work).