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General Reponses to the Conferece, Symposium, Comment

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GENERAL RESPONSES TO THE CONFERENCE

COMMENT

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> "That's me in the corner. That's me in the spotlight, losing my religion . . . ."[1]

RUSSELL Pearce rendered good service in conceiving and producing these deliberations. They have been a marvel of politics, fund raising, management, and substantive interchange. He is due thanks and congratulations for setting aside his individual agenda in order to achieve this success of our common enterprise.

He asked that I serve as a commentator, and I am pleased to comply as an expression of appreciation for his fruitful labor. He assigned four commentators, me included, to no particular working group. Instead, he asked that we wander, like Arameans, among them. In effect this has caused us to be marginalized, episodic, and disruptive of the legal order. So did Professor Pearce—shrewd director—have us act out symbolically the role of the believer in the practice and teaching of law.

In the rich exchanges I overheard in my rounds, I discerned four approaches to the relation of religion and law taking shape. This is a construction of what I heard and not a stenographer's report. Nor is it a statement of Weberian or Niebuhrian types.

1. Worlds Apart

The first approach is premised on a fundamental division between religious belief and a lawyer's practice (including teaching). This difference is expressed as a gap between faith and practice, the private and the public, and the religious and the secular.

Its strategy lies not in attempting to bridge the gap but in equipping the believer to work in the alien, less valued, secular practice of law. To move from the spiritually rich world of religion to the bleak world of law is a form of space travel. The believer has something to take with her. She goes armed with faith, virtue, and morality. The believer must refresh and strengthen her beliefs during the time she inhabits the world of religion and renew her grasp of the morality that will guide her in her life outside of worship. When she arrives in law, she then consumes her spiritual stores in the work of applying the moral rules and principles to the situations she encounters.

The focus of attention in this approach is the individual lawyer. Her uprightness and goodness are the point. The question is how best to

1. R.E.M., *Losing My Religion*, *on* Out of Time (Warner Bros. Records 1991).

fortify her virtue and then preserve it. One answer is to provide more service to the believer during her withdrawal into the privacy of religion. Another is to press for greater recognition of religion in the public world. The aim of the latter is to secure a larger area—a landing site or beachhead—within which believers need not continuously face frontline assault by hostile forces during their term in service.

2. No Great Difference I

According to the second view, there is no great divide between a lawyer's life as a believer and her life in the practice of law because the law and its practice are basically good. If there is some separation between the two, this is no more than a disciplinary concern. The law is God's work of justice in the world, and to practice it is to extend one's practice of religion.

The strategy of the lawyer-believer is to strive for internal improvement of the law. While the work of the lawyer-believer does not make the law perfectly pure, it at least makes it purer. She is to participate robustly in the generation or amendment of rules and practices that constitute law's ongoing reformation. She particularly enhances the practice of her religion in doing so. The focus is not upon the believer, but rather upon the system and how it can be made better.

3. No Great Difference II

Like the second approach, this one also assumes a fundamental compatibility between religion and law but for a very different reason. Law is not basically good. It is basically necessary. And it is necessary partly in consequence of the pathology of religion. Religion has a capacity for types of conflict and oppression intolerable in a pluralistic, advanced, capitalist-democratic society. Law is a preferred means of government and dispute settlement. The believer may engage in law because law is neutral. The strategic hope is that her participation in the legal system will improve both her and the law. She will grow more sophisticated and tolerant. Law will become more inclusively neutral. The focus is thus upon both the believer and the law and upon cabining the capacity of each for cultural irritation.

4. None of the Above

The fourth approach views religion and law as equally fallen institutions. Their interrelations are ordinary. They are not qualitatively different from the interrelations of, say, religion and politics or law and business. The believer is free to participate, or not to participate, in the one as in the other. In fact, the two may often be indistinguishable, as they are when they merge in the civic religion. A person is a believer in the sense that she has been seized by the biblical stories and may find that civic religion—the American blend of law, religion,

self-improvement, politics, economics, and nationalism—can sometimes be idolatry. In that event her participation in law and in religion will become complex and marked by either tentativeness, tension, or both.

A believer does not carry with her certain beliefs, rules of morality or anything like that to be applied in either law or religion. God precedes her in these institutions as He does in every corner of the fallen world. He is there before she arrives. Her role is to discern His active presence and to align herself with it. The uncertainties encourage humility in the performance.

The focus is not upon either the believer or the system but upon the presence of God and what He is doing. Because God typically exerts pressure on the heap to put those at the bottom of it on the top and those excluded from it in the middle, believers may find themselves in distresses of the legal order—and of the religious and the religious-legal orders as well. Believers may appear to be strangers.

* * *

Well, that is what I think I thought I heard all of you say. But my statement of it is terribly abstract and therefore not an accurate reflection of the way you spoke. What you did was to tell stories. One of them was Frank Pommersheim's account of his practice of law in Indian country. Now if you are unfamiliar with the magnitude of wreckage that law and religion and the two together can produce, you should examine the extended example of the history and present status of relationships between the United States and the Indian tribes. Not the least instructive, humbling element of it is the fact that the damage arises from religion and law at their best and from the sincerest of commitments to God and civilization.

Frank told us movingly about entering Indian country to do as a lawyer what its inhabitants were willing to have him do. When he finished his story, one of us in the audience asked about his religion. He said that he is a practicing Catholic but that he had not attended mass during his time on the reservation.

He did not say so, but it seemed to me that he had risked both himself and his beliefs. He had been sharing with a people the dispossession of their land by law and the dispossession of their beliefs by Christendom. Or so I thought.[2]

2. In response to a draft of this comment, Frank offered a caveat: "Any number of Native people identify as and by any definition are authentic Christians. This may or may not be ironic, but it is certainly a reality I do not deny." He also offered a disclaimer: "I attach no particular significance to my actions. They were offered as narrative without any thought as to meaning. I meant to claim no high ground. There is quite enough of that in the world already."

I heard no stories about William Stringfellow and was genuinely surprised that I did not.[3] But I did catch resonances of his voice in Frank's comments. Frank's sojourn in Indian country was not unlike Bill's in East Harlem. The conjunction of the two called to mind Bill's remark: "I continue to be haunted by the ironic impression that I may have to renounce being a lawyer, the better to be an advocate."[4]

And I wondered—I could neither resolve it nor put it out of mind—whether Bill hadn't also been haunted by the impression that he might sometimes have to renounce his religion for the same reason. I mean his religion and not the Word that unfailingly upheld him.

Like Frank and Bill—and, if I understood correctly the comments offered to us by the adherents of Islam, Buddhism, Hinduism, and Native American religions, like those commentators as well—I remain mystified at the energy invested in wrestling over whether religion is relevant to the practice of law. Religion and law belong equally to the fallen world in which we believers live penultimately. The urgency to me is how to live in, but not of, this world and all its institutions.

Is it not our vocation, like Frank's and Bill's, to wait expectantly in the world? Is it not that our doing so requires mutual critique and encouragement from time to time? Is it not that one form of this judgment and mercy is borne to us by each other with our stories? And is it not that such an interchange has been a welcome value of our gathering here at Fordham Law School?

3. I was told that he had emerged in the conversation of one working group that I missed.

4. Andrew McThenia, *An Uneasy Relationship with the Law*, *in* Radical Christian and Exemplary Lawyer 167 (Andrew McThenia and William Stringfellow, eds. 1995).