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# The Consciousness of Religion and the Consciousness of Law, With Some Implications for Dialogue

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**SYMPOSIUM: LAW AND RELIGION  
PART ONE OF TWO**

**KEYNOTE**

**THE CONSCIOUSNESS OF RELIGION AND THE  
CONSCIOUSNESS OF LAW, WITH SOME  
IMPLICATIONS FOR DIALOGUE**

*Howard Lesnick\**

“Just then a lawyer stood up to test Jesus.”<sup>1</sup>

So begins Luke’s account<sup>2</sup> of a most extraordinary intra-religious dialogue, full of meaning for our understanding of religion, of law, of the relation between them, and of dialogue itself.

I.

“Teacher,” the lawyer began, “what must I do to inherit eternal life?”<sup>3</sup>

Jesus answered with a question of his own: “What is written in the law? What do you read there?” The lawyer’s response, because it is so familiar to Christians as the “love commandments”—“You shall love the Lord your God with all your heart, and with all your soul, and

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This essay had its origin as a panel presentation at the annual Symposium on Law, Religion and Ethics, Hamline University Law School. In an expanded form, it was the Keynote Address at a Symposium on Law and Religion sponsored by the University of Pennsylvania Journal of Constitutional Law. I am grateful to the Journal’s Symposium Editor, Michael Liskow, for his encouragement, and to Milner Ball, Marie Failing, Ed Gaffney, Joan Goodman, Emily Hartigan, Alice Lesnick, Jefferson Powell, Robert Rodes, Carolyn Schodt, Thomas Shaffer, Amy Uelmen, and James Boyd White for their valued comments. In its present form, the essay interweaves the evocative style of a meditation on a classic Scriptural teaching and the more familiar (in these pages) analytic development of relevant themes. My hope is that the result is more illuminating than jarring.

<sup>1</sup> Luke 10:25.

<sup>2</sup> Luke 10:25–37.

<sup>3</sup> A half-millennium earlier, with different words, in a different tone, and in a very different culture, Socrates spoke fervently to the centrality of just such a question in these words: “The subject we are discussing is one which cannot fail to engage the earnest attention even of a man of small intelligence; it is nothing less than how a man should live.” PLATO, GORGIAS \*500C.

with all your strength, and with all your mind; and your neighbor as yourself"<sup>4</sup>—might at first appear less arresting than it is, for it is easy to forget that he is quoting a central passage from *Deuteronomy*<sup>5</sup> and a line from the Holiness Code of *Leviticus*,<sup>6</sup> and that as an account of "what is written in the law" his response is most selective. Would we not expect of "an expert in the law of Moses"<sup>7</sup> that he respond more prescriptively? For example, do no work on the sabbath;<sup>8</sup> do not call on the name of God in vain;<sup>9</sup> make an offering in the temple on the three festivals;<sup>10</sup> do not boil a kid in its mother's milk;<sup>11</sup> refrain from sexual relations for seven days following the onset of your wife's menstrual periods.<sup>12</sup> When Moses put to the people the question, "Now then, Israel, what does the Lord your God ask of you?,"<sup>13</sup> he began his response saying you must "only" fear, love, and serve God, but he nonetheless immediately added, and "keep the commandments of the Lord your God and his decrees that I am commanding you today."<sup>14</sup> Matthew Berke, writing what he titled *A Jewish Appreciation of Catholic Social Teaching*, describes the developed traditions of both Judaism and Catholicism as seeing morality as involving "not just an ultimate ideal or aim but a system of specific rules and prohibitions that . . . taken as a whole over the long run, not only lead to, but themselves constitute, a good life."<sup>15</sup> The lawyer appears to have responded more as he believed Jesus would have,<sup>16</sup> than as he likely believed himself.

When Jesus assured him, "You have given the right answer; do this, and you will live." The lawyer, "wanting to justify himself," replied, "And who is my neighbor?" At that point Jesus recounted the Parable of the Good Samaritan, who came upon a man stripped and badly beaten by a band of robbers on the road from Jerusalem to Jericho. Two of his fellow countrymen had not stopped, perhaps for

<sup>4</sup> Luke 10:27.

<sup>5</sup> Deuteronomy 6:5.

<sup>6</sup> Leviticus 19:18.

<sup>7</sup> The term that many versions translate as "lawyer" is thus elucidated in THE BIBLE 117 n.25 (New Testament pagination) (New Oxford Annotated Edition 3d ed. 2001).

<sup>8</sup> Exodus 20:10.

<sup>9</sup> Exodus 20:7.

<sup>10</sup> Deuteronomy 16:16.

<sup>11</sup> Exodus 23:19.

<sup>12</sup> Leviticus 15:19.

<sup>13</sup> Deuteronomy 12:12.

<sup>14</sup> *Id.*

<sup>15</sup> Matthew Berke, *A Jewish Appreciation of Catholic Social Teaching*, in CATHOLICISM, LIBERALISM & COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY 235, 239 (Kenneth L. Grasso et al. eds., 1995)

<sup>16</sup> See Mark 12:28-31; Matthew 22:36-40.

good reason,<sup>17</sup> to give aid, but the Samaritan bandaged his wounds, cared for his animals, took him to an inn, and paid for his room and board. Jesus asked, "Which of these three, do you think, was a neighbor to the man?" "The one who showed him mercy," answered the lawyer, to which Jesus responded, "Go and do likewise."

Recognizing the sensitivity of the matter for some Christians, and for many Jews, I would like to go back over this conversation for what we can learn from attending to what its participants did *not* say at each of their turns. For I believe that choices were made at each step of the way, choices that I find eloquent and instructive.

## II.

I propose to do that, however, in counterpoint with some thoughts about choices in the ways we think about religion, and about law, and about the parallels between the two domains.

What Robert Cover famously said of Judaism—"[t]he basic word of Judaism is obligation"<sup>18</sup>—holds, I believe, across a spectrum of religious traditions, and applies in the domain of secular law as well. If the cosmic or the social order obligates, and does not merely threaten overweening force,<sup>19</sup> the contested question is, how?

I have suggested elsewhere that there is an ancient and enduring tension between two paradigmatic explanations of how religion and law each obligate, and an ancient and enduring connection between each explanation regarding religion and its counterpart in law.<sup>20</sup> I will look first at religion.

The "default" position—now and earlier the most widely held, treated often as simply axiomatic or definitional—understands God as transcendent and sovereign, the "Supreme Being,"<sup>21</sup> "the King of

<sup>17</sup> The Priest and the Levite were traveling from Jerusalem, perhaps after having purified themselves at the Temple, and touching the victim, "left half dead," *Luke* 10:30, would have subjected them to the hazard of "defilement." See *Leviticus* 21:11 ("The priest . . . shall not go near where there is a dead body."); see also J. David Bleich, *Kohanim and Flights Leaving Israel*, 36 *TRADITION* 64 (2002) (discussing how *kohanim*—the priestly class of Jews descendant from the Biblical Aaron—are forbidden to come in contact with a dying person or corpse).

<sup>18</sup> Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 *J.L. & RELIGION* 65, 66 (1987).

<sup>19</sup> For a classic articulation of the distinction between having an obligation, rooted in morality, and "feeling obliged," rooted only in prudence in the face of the power to harm, see H.L.A. HART, *THE CONCEPT OF LAW* 82–85 (Oxford 1994).

<sup>20</sup> See HOWARD LESNICK, *LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT* 132–57 (Fordham 1998) [hereinafter LESNICK, *LISTENING FOR GOD*]; Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 *FORDHAM L. REV.* 1469, 1473–78 (1998).

<sup>21</sup> Congress defined "religious belief" in the selective-service law as, "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." See *United States v. Seeger*, 380 U.S. 163, 172 (1965).

the kings of kings,"<sup>22</sup> who spoke the world into existence<sup>23</sup> and constituted morality by "His Word."<sup>24</sup> The words of the Hebrew Bible are saturated with this consciousness. It typically includes an understanding of God as always able to and at times choosing to intervene purposefully in human history, and as bestowing rewards and punishments, in this life or the next, on those who do or fail to do "His Will."

Typically, but not always. What to me is most "core" about the dominant paradigm is its focus on the *otherness* and *inexorability* of "divine commands," rather than on either their methods of enforcement or their origin in an exercise of divine volition. The matter now appears to me less as a dichotomy than as a continuing qualification of the "default" position, part by part, until (much as in an Escher painting) a qualitatively different conception comes to be articulated.<sup>25</sup>

One such qualification challenges the emphasis on reward and punishment. So traditional a believer as C. S. Lewis termed such a "preoccupation" a "corrupt[ion]" of religion.<sup>26</sup> Although he indeed spoke of commands, he described them as:

inexorable, but they were backed by no "sanctions." God was to be obeyed simply because he was God. Long since . . . He had taught me

<sup>22</sup> See JOSEPH H. HERTZ, *THE AUTHORIZED DAILY PRAYER BOOK* 209 n.5 (rev. ed. 1960). The ruler of Persia was accorded the title, "[K]ing of [K]ings."

<sup>23</sup> "Then God said, 'Let there be light;' and there was light." *Genesis* 1:3.

<sup>24</sup> The Revelation of the "Ten Utterances" at Sinai, *Exodus* 20:1-17, is the most obvious example. Having such an ability is, in this consciousness, what it means to be "God." See Art Leff's celebrated description of a God-grounded moral order: "God, for philosophical purposes, is uniquely in the universe that being whose every pronouncement, including evaluative ones, is a 'performative utterance' . . . [, that is,] a statement that does not describe facts or conform to them but instead constitutes them, creates them, 'performs' them." Arthur Allen Leff, *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1231.

Neither Leff's language nor mine should be read as taking a position in the "old debate" that Michael Moore identifies in these terms: "whether the consummate goodness of God consists in the fact that whatever God commands is good (because she commands it), or whether that goodness consists in the fact that God, being omniscient, makes no mistakes about what is good in her commandings." Michael S. Moore, *Interpreting Interpretation*, in *LAW AND INTERPRETATION* 1, 8 (Andrei Marmor ed., 1995). In personal correspondence, Robert Rodes speaks in similar terms, referring to "an old tension between the view that God's will is prior to His intellect, and . . . the prevailing view [that] gives pre-eminence to God's intellect." Letter from Robert E. Rodes, Jr., Professor of Legal Ethics, Univ. of Notre Dame Law Sch., to author (Jan. 11, 2005) (on file with author). Perhaps the *oldest* version of this question is Plato's: "Is what is holy holy because the gods approve it, or do they approve it because it is holy?" Plato, *Euthyphro*, in *THE COLLECTED DIALOGUES OF PLATO* 169, 178 (Huntington Cairns & Edith Hamilton eds., 1978).

<sup>25</sup> See, e.g., M.C. Escher, *Liberation* (1955), in which a scene of a sky, picking up white birds flying in one direction against a black background, changes gradually into one of black birds flying in the other direction against a white background, and finally into vaguely geometric shapes.

<sup>26</sup> C. S. LEWIS, *SURPRISED BY JOY: THE SHAPE OF MY EARLY LIFE* 231 (1956).

how a thing can be revered not for what it can do to us but for what it is . . . . If you ask why we should obey God, in the last resort the answer is, "I am."<sup>27</sup>

A related partial departure challenges the analogy to a willed (at times read, willful) act of a temporal sovereign. It understands the "command" of God as "the eternal law, . . . part of the very being of God, rather than something merely willed by Him for arbitrary or contingent reasons."<sup>28</sup> On such a view, "ethical requirements bind the conscience because they are *true*."<sup>29</sup>

This formulation preserves the idea of divine law as supreme, in that sense ruling over humanity. Yet note the critical role of what I will call moral discernment as the basis for moral norms. Writing of Catholic teaching, Joseph Boyle observes:

[M]oral norms are not . . . arbitrary impositions by God. They are . . . the demands of our own rational natures. . . . [M]orality is . . . [the effort] by rational creatures . . . [to] guide their lives to what is genuinely good. Thus, the reason which provides the basis for moral norms is a person's own reason, not something alien or imposed.<sup>30</sup>

A consciousness that can speak of "the demands of our own rational natures" departs in significant ways from a command consciousness, which would have difficulty seeing a self-generated call as a demand.<sup>31</sup> The departure is limited, however, by the emphasis on reason as the basis of an internally generated source of moral discernment, for the strictures of reason are a set of norms common to the species, only in that sense "a person's own."

But two celebrated passages in the Hebrew Scriptures contain at least the seeds of a different view of the relation between God and humanity with respect to the moral law. Moses himself, while speaking explicitly of God's word in the language of command, reassured the People of Israel in terms that went significantly beyond it:

Surely, this commandment that I am commanding you today is not too hard, nor is it too far away. It is not in heaven, that you should say, "Who will go up to heaven for us, and get it for us so that we may hear it and observe it?" Neither is it beyond the sea, that you should say, "Who will cross to the other side of the sea for us, and get it for us so that we may hear it and observe it?" No, the word is very near to you; it is in your mouth and in your heart for you to observe.<sup>32</sup>

<sup>27</sup> *Id.*

<sup>28</sup> Richard Stith, *Images, Spirituality, and Law*, 10 J.L. & RELIGION 33, 43 (1993-94) (attributing this understanding to St. Thomas Aquinas).

<sup>29</sup> Berke, *supra* note 15, at 239.

<sup>30</sup> Joseph Boyle, *Duties to Others in Roman Catholic Thought*, in DUTIES TO OTHERS 73, 84 (Courtney S. Campbell & B. Andrew Lustig eds., 1994).

<sup>31</sup> See LESNICK, LISTENING FOR GOD, *supra* note 20, at 3-4.

<sup>32</sup> *Deuteronomy* 30:11-14.

By "the word," I understand, Torah. Susan Handleman describes rabbinic thought as naming the Torah as "the Wisdom that preexists the world."<sup>33</sup> Drawing on the rabbinic teaching that "God consulted the Torah and created the world," she finds in the Jewish tradition a basis for regarding the Torah as "a blueprint for the architecture of creation; . . . not simply . . . a set of prescriptive laws, but the primordial design of the world."<sup>34</sup> But if the word is in our hearts, the template that exists in the world, by which the world and its moral order came to be created, is mirrored within each person. It may have been given to us from outside, but in the sense of being implanted *within* us, of being an attribute of our creation.<sup>35</sup>

A prophecy of Jeremiah expresses the thought that "God's will" is part of our own being in even more far-reaching words:

But this is the covenant that I will make with the house of Israel after those days, says the Lord: I will put my law within them, and I will write it on their hearts; and I will be their God, and they shall be my people. No longer need they teach one another, or say to each other, "Know the Lord," for they shall all know me . . . .<sup>36</sup>

These Scriptural words can perhaps be read as viewing the "internal" aspect of the search for the will of God as limited to the use of a person's (God-given) powers of reason. However, they also contain expressions of a consciousness that crosses the line between simply a significant variation on the traditional approach and a fundamental departure from it. The translator of the Soncino edition of *Jeremiah* interprets the prophecy that God will put the law on the hearts of the people in these words: "I will no longer be something external to them, but so deeply ingrained in their consciousness as to be part of

<sup>33</sup> Susan Handleman, *Emunah: The Craft of Faith*, CROSS CURRENTS, Fall 1992, at 292, 303.

<sup>34</sup> *Id.* The resonance of the Catholic sources quoted above, in the text accompanying footnotes 29 and 30, with this image is palpable.

The term "the Word" (now capitalized) appears most famously in the opening lines of the Gospel of John—"In the beginning was the Word, and the Word was with God, and the Word was God" (*John* 1:1)—and it is striking that Christian theologian John Cobb says of it what Handleman says of Torah. See John B. Cobb, Jr., *Toward a Christocentric Catholic Theology*, in *TOWARD A UNIVERSAL THEOLOGY OF RELIGION* 86, 88 (Leonard Swidler ed., 1987) (proposing that, "despite the predominance of 'Word' in the tradition, we speak today of 'Wisdom' . . . The Wisdom . . . that is present everywhere and at all times").

<sup>35</sup> One of the most beautiful expressions of this insight of which I am aware has a source hardly thought of as religious, yet imperfectly categorized as "secular":

A strange mystery it is that nature, omnipotent but blind, in the revolutions of her . . . hurrying through the abysses of space, has brought forth at last a child, subject still to her power, but gifted with sight, with knowledge of good and evil, with the capacity of judging all the works of his unthinking mother.

Bertrand Russell, *A Free Man's Worship*, in *WHY I AM NOT A CHRISTIAN* 104, 107 (Paul Edwards ed., 1957).

<sup>36</sup> *Jeremiah* 31:33-34.

them.”<sup>37</sup> Though Torah be thought so transcendent as to pre-exist creation itself, our understanding of it is transformed by thinking of it as Wisdom, written in our hearts. “Obedience” then becomes an active, creative practice; in “submitting” to the will of God, we first search for the voice to which we will submit. Discernment of it requires our fullest creative participation—a process that will often require but not be limited to analytic rationality—and to obey is not so much to yield our will to a superior force as to align our actions with that within us which is most holy, most our birthright as both creature and co-creator.

In place of an exclusive emphasis on notions of hierarchy and submission (even to “reason”), these expressions embody a conception of the divine/human interaction driven by themes of active personal searching for sincere discernment of God’s will, and of reciprocal love. Emily Hartigan, my sometime teaching partner and longtime intellectual and spiritual mentor, has written of a feminist spirituality that experiences the law of God as “a gentle draw, more than a compelling force, an invitation more than a command . . . [, an] ‘ought’ that beckons more deeply than it threatens.”<sup>38</sup> Robert Bolt understood the matter so when he had his Sir Thomas More respond to his daughter’s heartfelt appeal, “Haven’t you done as much as God can reasonably want?:” “[F]inally . . . it isn’t a matter of reason; finally it’s a matter of love.”<sup>39</sup>

### III.

Let me return to Luke’s dialogue. Countering the lawyer’s initial question (“What must I do . . . ?”) with one asking, “What is written in the law?,” Jesus’s inquiry seemed to invite a response that would fit comfortably within the lawyer’s presumably traditional conception of the likely source of an answer. The lawyer’s answer, I have suggested, appears, however, to have been less what *he* believed than what he thought Jesus was preaching—to be found in Scripture, to be sure, but not singled out there nor thought to be at all sufficient. Perhaps the lawyer, “wanting to test Jesus,” sought to commit him to a response, so that he could challenge it, rather than setting himself up to be the defender of his own more candid answer.

When Jesus appeared to “fall for it,” and simply said, “do this and you shall live,” the lawyer pounced: “Who is my neighbor?”

<sup>37</sup> *Jeremiah* 31:32 & n.32, at 211 (A. Cohen ed., H. Freedman trans., Soncino Press 3d ed. 1961).

<sup>38</sup> Emily Fowler Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L. L. REV. 67, 89 (1991).

<sup>39</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS* 141 (1990).



Now the issue seemed truly joined. The premise of this very lawyerly response was the idea, simple common sense in our world, that the law constrains us in our default-position pursuit of self-interest, such that, when we hear a rule that we must follow, our only obligation is to respect its boundaries.<sup>40</sup> A law with an undefined crucial term has told me little; the task of "definition" is one of exegesis of the text.<sup>41</sup>

Jesus's interest, however, was not in exegesis. He sought to challenge the lawyer's premise, that outside the scope of obligation I am free to respond (to "love") or not, as I choose. Suppose Jesus had simply said that. To put it as you or I might have done, it might read like this: "You know, you are proceeding from a flawed ethical premise, that law apart we owe one another nothing. Yes, we are 'obligated' to love one another, but the obligation is not a constraint on our will, to be accepted only if within the scope of the mandate. Rather, it is to recognize and take the opportunity that our being gives us to love the other. We can expand the range of this power to embrace all with whom we come in contact, transcending boundaries of ethnicity and religion and overflowing the day-to-day 'important' priorities that divert us (as they did the priest and the Levite<sup>42</sup>) from responding to another's need. The opportunity to define the term, 'neighbor', by our conduct, which by the spirit of your question enables us to see in it a legitimation of indifference to those not closest to us, invites us also to embrace wholeheartedly the norm expressed by the law, expanding its reach and expanding thereby our congruence with the contours of our creation."

After such a response, they might have had an interesting philosophical-religious discussion, as we might today if we were to debate such questions as the "duty to rescue" or the act/omission dichotomy in the law, the existence of an ethical "duty to reach beyond duty,"<sup>43</sup>

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<sup>40</sup> See Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 14 (Michael W. McConnell et al. eds., 2001).

<sup>41</sup> Over the next few centuries, the rabbis developed, and still follow today, a complex jurisprudence aimed at seeking to know God's will through the penetration of the meaning of undefined terms in Scripture. Any Jew wanting to know today, "Who is my neighbor?", as that phrase appears in Torah, may not simply choose the narrowest plausible meaning and, complying with it, do as he pleases. Nor is he free simply to consult his own moral sense. See *infra* note 57. At the least, he has some conscientious homework to do. See, e.g., ABRAHAM COHEN, *EVERYMAN'S TALMUD* 212-16 (1949) (discussing differing interpretations of Torah passages, specifically the meanings given "neighbor," "enemy," and "fellow man").

<sup>42</sup> See *supra* note 17 and accompanying text.

<sup>43</sup> See Heidi Hurd, *Duties Beyond the Call of Duty*, 6 *JAHRBUCH FÜR RECHT UND ETHIK* 3, 3-39 (1998) (offering an imaginative analysis, from a secular perspective, of the question whether there is a moral obligation to reach beyond moral obligation); Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, in *MODERN JEWISH ETHICS* 62, 81 (Marvin Fox ed., 1975) (concluding that we are commanded to "aspire").

or some similar conundrum. Jesus might have “won” such an argument, in the sense that most of those listening might have been persuaded by his statement. Perhaps. It is far less likely that he would have won over his debate partner, who (you recall) did not inquire out of genuine puzzlement but to “test” Jesus, to “justify” himself.

What Jesus did was to reach *under* the argument, and under the lawyer’s motivation, to a quality that the lawyer had not exhibited, and that most of us would have doubted that he had, to tap a capacity for empathy that Jesus perceived was capable of guiding his moral judgment. Like Nathan before him, he told a story.<sup>44</sup> And the lawyer did not keep his grip on his analytic powers and object to the relevance of the Parable, as any good lawyer might have, as glibly shifting the question from, “To whom am I obligated to act as a neighbor?,” to, “What does it mean to act as a neighbor?” For the moment at least, he was unable to hold onto his premise, that I am free to choose not to be a neighbor to anyone who is not already “my neighbor;” unable also simply to allow the “sterner” part of his character to lead him to shrug off the question as therefore of no concern to him. He quietly answered Jesus’s question: “The one who showed him mercy.” As the listeners to the dialogue may have been, he was left in the power of his own moral sense, the existence and latent power of which Jesus presumed and, by his story, brought to the surface.

Jesus did what, sixteen centuries later, George Fox, the founder of the Religious Society of Friends, charged his followers to do in their own lives: “[W]alk cheerfully over the world, answering that of God in every one.”<sup>45</sup> Jesus not only *saw* “that of God,” an authentic resonance with the “gentle draw” of the moral law,<sup>46</sup> in one who had not exhibited any such thing, who perhaps would have denied any such “softness,” but he spoke to that aspect of the lawyer in a manner calculated to bring it to his awareness, not as something imposed on him but as something recognized as part of him. At least for the moment, he was changed.

The point is not that Jesus’s approach was more likely to be effective in altering the lawyer’s own consciousness. It proceeds from a fundamentally different response to the moral frailty of human beings, the influence of which is not to be held at bay only through in-

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<sup>44</sup> In the Book of Samuel, Nathan leads David to condemn David’s own act of arranging to send Uriah, the husband of Bathsheba, into battle in circumstances where Uriah would be killed. 2 *Samuel* 12:1–15.

<sup>45</sup> This famous admonition appears in a letter that Fox wrote in 1656 while in prison. Letter from George Fox (1656), *quoted in* QUAKER FAITH & PRACTICE: THE BOOK OF CHRISTIAN DISCIPLINE OF THE YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS (QUAKERS) IN BRITAIN, ch. 19.32 (Warwick Printing Co. 1995).

<sup>46</sup> Text accompanying note 38.

centives or reason, but can be directly addressed by evoking the agent's own (perhaps latent) desire for the good. The more one sees in the search for discernment a creative and generative process, the more one is willing to trust that there is something within us which not only seeks to know God's will, but also can contend with that within which too readily turns us away from that search.

There is a telling understanding of a passage from the Sinai story, occurring at the very height of the dramatic appearance of God "on the morning of the third day," in the midst of "thunder and lightning, as well as a thick cloud on the mountain, and a blast of a trumpet so loud that all the people who were in the camp trembled."<sup>47</sup> In most translations, it reads, "As the blast of the trumpet grew louder and louder, Moses would speak and God would answer him in thunder."<sup>48</sup> Yet, one study Bible notes that this report of "thunder," so familiar an expression of the way in which God "speaks," may be a misleading translation, for it is "different in form" from the "thunder" of the earlier passage, "more probably (human) voice."<sup>49</sup> My teacher, Rabbi Marcia Prager, unencumbered by four centuries of English translations and the theology they embody, has no reticence about rendering the Hebrew as "God answered him with sound," or perhaps even "with voice," and reports an "extraordinary" Talmudic teaching.<sup>50</sup> To their question, "With voice? With sound? With what voice, what sound?" she writes that the rabbis understood Moses to hear God speak, "*b'kolo shel Moshe*, with Moshe's own voice! He heard God's voice as his own voice."<sup>51</sup>

The voice within the lawyer, which Jesus evoked, and by which he was able to take in Jesus's teaching and forget his brittle adversarial stance, was the gift of God, of his creation as a person. It *was* God; it was within him all along, but inaccessible to him and his listeners (all but one). Recall the miracle of the Burning Bush:<sup>52</sup> The miracle was not that "the bush was blazing, yet it was not consumed"; the bush (God's call) is *always* blazing, it is *never* consumed. The miracle was that Moses, though engaged in his daily work "keeping the flock of his father-in-law," said, "I must turn aside and look at this great sight, and see why the bush is not burned up." *Only then*, Scripture recounts, "when the Lord saw that he had turned aside to see, God

<sup>47</sup> *Exodus* 19:16.

<sup>48</sup> *Exodus* 19:19.

<sup>49</sup> THE HARPER COLLINS STUDY BIBLE: NEW REVISED STANDARD VERSION, *Exodus* 19:19 & n. 19, at 115 (Wayne A. Meeks et al. eds., 1993).

<sup>50</sup> MARCIA PRAGER, *THE PATH OF BLESSING: EXPERIENCING THE ENERGY AND ABUNDANCE OF THE DIVINE* 156 (1998).

<sup>51</sup> *Id.*

<sup>52</sup> *Exodus* 3:2-4.

called to him out of the bush." Through Jesus's response to the lawyer's challenge, he "turned aside to see."<sup>53</sup>

The combination of a deep faith in the latent capacity of every person to "turn aside and see why the bush is not burned up," and Jesus's emphasis in the Gospels on the sufficiency of the "love commandments" to ground a moral life, gives rise to the ever-present danger of a susceptibility to antinomianism. Traditional religion has responded to this temptation in two related ways: first, as earlier noted, love does not replace the many rituals, spiritual disciplines, and behavioral prescriptions of the moral law.<sup>54</sup> Because there is much to draw us away from that which is within us, we are enjoined to write it in our hearts as an ongoing, not simply a past, act, to remain aligned with the terms of our being. "Keep these words that I am commanding you today in your heart. Recite them to your children, and talk about them when you are at home, and when you are away, when you lie down and when you rise."<sup>55</sup> Within any religious tradition, its liturgy and rituals can serve to provide a structured and structuring means of serving this function.

Second, both Judaism and Catholicism long ago collectivized the human capacity for discernment, and found Scriptural warrant for entrusting it to an elite group. Berke quotes the Papal Encyclical, *Veritatis Splendor*: "[T]he Church's Magisterium also teaches the faithful specific particular precepts and requires that they consider them in conscience as morally binding."<sup>56</sup> Again, as I understand it, Jewish teaching is essentially in accord.<sup>57</sup>

<sup>53</sup> I owe this understanding of the story of the Burning Bush also to Marcia Prager, and to my wife, Carolyn Shodt, but recently found a stunning articulation of it by Elizabeth Barrett Browning:

Earth's crammed with Heaven,  
And every common bush afire with God!  
But only he who sees, takes off his shoes . . . .

Elizabeth Barrett Browning, *Aurora Leigh*, as quoted in Tony Bayfield, *Partnership in Covenant*, in *HE KISSED THEM AND THEY WEPT: TOWARDS A THEOLOGY OF JEWISH-CATHOLIC PARTNERSHIP* 25, 29 (Tony Bayfield et al. eds., SCM Press, 2001).

<sup>54</sup> See *supra* notes 4–16 and accompanying text; see also Berke, *supra* note 15, at 239 (stating that Catholic teaching "never assumes that human affairs can be regulated simply by referring all of life's decisions to the ultimate principle of love; there are always specific requirements of right and wrong . . . [It] recognizes that people cannot live in an ethical wilderness, between God and the Devil, without such rules").

<sup>55</sup> *Deuteronomy* 6:5–7.

<sup>56</sup> See Berke, *supra* note 15, at 239 (quoting POPE JOHN PAUL II, *THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR*, ¶ 110, at 133 (1993)).

<sup>57</sup> A well-known Talmudic account involving the Mosaic reassurance, "It is not in heaven," *supra*, text accompanying note 32, dramatically asserts that human discernment of the voice of God is collective, and is entrusted to the sages of Israel as a group, not to any individual. I first learned the story from a student and have recounted it previously. See ELIZABETH DVORKIN, JACK HIMMELSTEIN, & HOWARD LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 91–92 (1981) (describing the Talmudic story as assert-

The tension between the polar hazards of antinomianism and authoritarian legalism remains with us. Across the religious spectrum, examples abound.<sup>58</sup>

#### IV.

A century-and-a-half ago, Nathaniel Hawthorne described the Massachusetts Bay Colony of two centuries earlier as “a people amongst whom religion and law were nearly identical.”<sup>59</sup> No one would say so today, and few would wish it so. Yet, looking not at the content of the law, but about the way we think about our obligation toward it, I believe that there remains today a striking parallel between religious and secular law. One of Justice Holmes’ most-quoted epigrams describes the nature of (secular) law in these terms: “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .”<sup>60</sup> The enduring debate between the positivism of such thoughts and the natural law tradition<sup>61</sup> should not make us lose sight

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ing “not only the freedom of humankind ‘to interpret and decide,’ but an obligation as well to exercise this freedom, and not to fall back on the supposed authority of Heavenly Voices”). For a more recent presentation, and an analysis of many interpretative permutations, see David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in a Talmudic Tale*, 79 *CHI-KENT L. REV.* 1253 (2004). Suzanne Last Stone presents the broader context of the rabbinic struggle over the centuries with the question of the source and nature of interpretative authority. Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 *HARV. L. REV.* 813, 851 & n.203 (1993) (asserting, while complicating the assertion, that “[o]fficial authority to interpret the law is vested in the sages of each generation”).

<sup>58</sup> See, e.g., ELAINE PAGELS, *BEYOND BELIEF: THE SECRET GOSPEL OF THOMAS* 148 (Vintage Books 2004) (analyzing the formation of the Christian canon); Robert W. Tuttle, *All You Need is Love: Paul Ramsey’s Basic Christian Ethics and the Dilemma of Protestant Antilegalism*, 18 *J.L. & RELIGION* 427 (2002–03); Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 *TRADITION* 64, 69–74 (1994) (describing and analyzing the post-WWII turn in contemporary Orthodox Judaism towards a greater emphasis on text in interpreting the *halakha*, at the expense of practice within specific communities). Reconstructionist Judaism, which is founded on the principle that “the past has a vote but not a veto,” has struggled to find a significant role for individual conscientious discernment, while not simply legitimating self-justifying rationalizations for departures from the teaching of the tradition. See Rebecca Alpert & Jacob Staub, *EXPLORING JUDAISM: A RECONSTRUCTIONIST APPROACH* ch. 4 (1988) (presenting a Reconstructionist approach to observance of the dietary laws and the scope of permissible grounds for abortion).

<sup>59</sup> NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 41 (Sculley Bradley et al. eds., W.W. Norton & Co. 2d ed. 1978) (1868).

<sup>60</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>61</sup> The natural law tradition asserts that “human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods.” Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 *MICH. L. REV.* 1, 8 (1985). It rejects the view that law is no more than the command of one with recognized political power, simply posited by the sovereign (hence “positivism”). A classic statement of the positivist position is by Justice Holmes: “[A] legal duty so called is nothing but a prediction that if a man

of a salient commonality: both a “brooding omnipresence” and a “sovereign or quasi-sovereign” are often characterized by an entire otherness. They arise from outside us and constrain our choices. This view, it has been observed, is reflected in both religion and law:

In the Western theological tradition, God is lawgiver, as well as enforcer, of a legal and/or moral code. Western political tradition mimics this concept of deity. . . . The Bible assumes that God and God’s demands existed prior to creation . . . . The government is based on a system of law that develops a significance independent of its creators and obligates its citizens. The legal system, although open to influence, functions as an institution apart from the citizens, just as a transcendent God is open to supplication and prayer, but is ultimately separate from the creatures who were created.<sup>62</sup>

The human actor is primarily understood as having been *told* his or her obligations, whether by text, tradition, or reason. Hearing the authoritative voice may be a simple matter, it may require sustained and penetrating attention: the actor is in either case *discovering* what is required.

This is not the place even to catalogue the many manifestations of this consciousness in secular law. It dominates most approaches to such subjects as statutory interpretation<sup>63</sup> and judicial control of administrative discretion.<sup>64</sup> It is also exhibited in the ubiquitous

does or omits certain things he will be made to suffer in this way or that way . . . .” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). Within the natural law camp, there is disagreement over its relation to belief in God.

<sup>62</sup> FREDELLE ZAIMAN SPIEGEL, *WOMEN’S WAGES, WOMEN’S WORTH: POLITICS, RELIGION, AND EQUITY* 133 (1994).

<sup>63</sup> Normative theories typically accept the essential premise of legislative supremacy: a statute is a “command” of the legislature, which courts and agencies are obligated to carry out regardless of their view of the justice of such a result. Despite the contested character of theories of statutory interpretation, that is, of the way in which the content of that command is discerned, the major competitors—commonly termed intentionalism, textualism, and purposivism—have in common a quality especially salient for present purposes: they judge an interpretation according to its accuracy in following the Legislature’s directive, whether manifested in its perceived intention (intentionalism), the meaning of its chosen words (textualism), or its relevant attributed policy objectives (purposivism).

Contrast the “hermeneutic” model, which asserts that “statutory meaning is constructed, not discovered, by the interpreter,” WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 62 (Harvard University Press 1994), and that “the text lacks meaning *until* it is interpreted.” William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 346 (1990). This view would legitimate, as with varying degrees of emphasis the others would not, the “creative supplementing of the law” through the process of making the statute “concrete in each specific case.” WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 802 (West 3d ed. 2001).

<sup>64</sup> At first blush, the landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), appears to establish a counter-example, insulating from judicial oversight agency discretion to decide questions of law to which Congress has not “directly spoken.” *Id.* at 842. However, the ground of the decision seems to be a desire to preclude courts from giving meaning to ambiguous terms in a statute—filling “any gap left, implicitly or

grounding of legislation in instrumental rationality; influencing the conduct of those addressed by the law is typically conceived of as the application of incentives, positive or negative, that operate through their effect on individual calculation of advantage.<sup>65</sup>

In a consciousness that is seriously relational, the process of following moral norms becomes as much a matter of *assuming responsibility* as of practicing obedience. H. Richard Niebuhr's classic study of *The Responsible Self* expresses the thought in these words:

Israel is the people that is to see and understand the action of God in everything that happens and to make a fitting reply. So it is in the New Testament also. The God to whom Jesus points is not the commander who gives laws but the doer of small and of mighty deeds, the creator of sparrows and clother of lilies, the ultimate giver of blindness and of sight, the ruler whose rule is hidden in the manifold activities of plural agencies but is yet in a way visible to those who know how to interpret the signs of the times.<sup>66</sup>

Responsibility has in common with obedience the quality of a required response: an admonition may not simply be shrugged off. But the responsible response is far more textured than the simply obedient; judgment, insight, creativity, a wise discretion—in short, wisdom—play as much of a role as conformity to rule.

The function of the law in this consciousness is to a significant degree to facilitate as well as to induce or coerce—to facilitate, not only in the sense of creating an incentive grounded in self-interest, but also to remove impediments to an internally generated recognition of responsibility. This concept is not some lessened sense of obligation, a soft means of avoidance. Indeed, keeping the law written in our

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explicitly, by Congress," *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)), by deciding which reading best comports with the statute's ascribed purposes. Agencies are permitted to choose among permissible meanings because they are politically accountable; "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866. See Justice Scalia's justification of the decision as preferring, and believing Congress to prefer, that "the ambiguities it creates, intentionally or unintentionally, will be resolved . . . not by the courts but by a particular agency, whose *policy biases* will ordinarily be known." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (emphasis added). The exercise of wise judgment, guided but only partially channeled by legislative responses, is regarded as too close to the domain of "politics" to be accepted as part of "law."

<sup>65</sup> A focus on incentives, at the same time as it minimizes a creative human role in law-application, maximizes human choice of response to law in a manner that threatens to cabin its moral dimension. Rather than reason serving (as it does in the natural law tradition) as a means of discovering one's obligation, in a positivist consciousness reason can become "rational profit-maximizing," aiding the actor in choosing freely whether to obey the law or to risk a sanction, with no preemptive force given to a moral imperative discernable in it. For a comprehensive and careful description and critique of the growing espousal of this view, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998).

<sup>66</sup> H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* 67 (1963).

hearts can be more demanding than a rote obedience, can mean more than following the rules wholeheartedly, for it presumes fidelity to a moral norm that may be only partially expressed.<sup>67</sup> It entails acting as a co-creator of the law by which we are governed, giving it meaning in myriad applications by bringing to bear the qualities of moral imagination with which we are equipped.<sup>68</sup> A question like, "Who is my neighbor?" no longer seems so plainly dispositive.<sup>69</sup>

I believe that a major prop of the widespread reluctance to view the idea of assuming responsibility as sufficiently "law-abiding" is the difficulty it presents in judging whether an agent has met the norm in question. Responsibility is normally *imposed* on people, not *assumed* by them, in religion as well as in law. Marcus Borg has vividly described the "conventional wisdom" of traditional religion in terms that resonate graphically with this characteristic of law. He speaks of "the Christian life" in this paradigm as a "[l]ife . . . of requirement," "a world of judgment," and "anxious striving."<sup>70</sup>

To move the role of passing judgment off center stage is not to remove it entirely, but to refuse to allow the desire to facilitate judging questions of compliance to play so primary a shaping role in describing what is rightful conduct. The ready assumption that the law exists to coerce people into acting as they should, or to punish those who do not, needs to be leavened with the recognition that the moral law "is" in our hearts. It is not a "Pollyanna-like" mindset to insist on keeping in the forefront of our minds that most people have within

<sup>67</sup> Miriam Starhawk, a practitioner and expositor of Goddess religion, writes of the obligation to act justly, "not as a written code or set of rules imposed from without. Instead, justice is an inner sense that each act brings about consequences that must be faced responsibly." Miriam Simes Starhawk, *Ethics and Justice in Goddess Religion*, in *THE POLITICS OF WOMEN'S SPIRITUALITY: ESSAYS ON THE RISE OF SPIRITUAL POWER WITHIN THE FEMINIST MOVEMENT* 415, 418 (Charlene Spretnak ed., Anchor Books 1982).

<sup>68</sup> For a helpful discussion of the ethic of responsibility, see ALBERT R. JONSEN, *RESPONSIBILITY IN MODERN RELIGIOUS ETHICS* 173–228 (1968).

<sup>69</sup> In a study of surpassing subtlety and insight, Emily Hartigan has found in a group of state court decisions applying their constitutions to issues of local government and property an understanding of the fundamental law as jurisprudentially preceding and undergirding its textual expression. Emily Fowler Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions*, 6 *J.L. & RELIGION* 225 (1988). She writes that "order, law, public formation, cannot merely be imposed," *id.* at 261 (quoting MURRAY BODO, *JUNIPER: FRIEND OF FRANCIS, FOOL OF GOD* (St. Anthony Messenger Press 1983)), and sets forth an "interpretive cast" of constitutional justification that "has put into words more of the inchoate level of law," *id.* at 258, which she describes as:

drawing into words and voicing into tradition, wisdom from the underlying (or overarching) fund of human pre-knowledge. This is the idea of constitutionality "from time immemorial," of fundamental law that was known in the human heart before Magna Carta . . . which we are ever struggling to bring into being.

*Id.* at 258.

<sup>70</sup> MARCUS J. BORG, *MEETING JESUS AGAIN FOR THE FIRST TIME: THE HISTORICAL JESUS & THE HEART OF CONTEMPORARY FAITH* 75–80 (1994).



them the desire to act rightfully, residing alongside often-powerful contrary influences, which arise from within their personalities and from outside as well. We see the function and the possibilities of legal regulation more broadly when we act on that dual recognition.

When we do, we turn toward a legal response that acknowledges a public responsibility to ease some of the very real barriers to acting on the inward desire to do what is right. Weakness of will and just plain wrong-headedness and immorality can be constrained by the power of the law where it need be, while yet recognizing the distorted character of such a response as a total one.<sup>71</sup> The *first* response of the law should be to act to remove or lessen the force of impediments existing in people's private and social lives that limit their capacity and willingness to act consistently with it.

The spirit that is simply not interested in helping "sinners" to become better people, which characterizes so many political initiatives today, is based on an understanding of the world that views the law as "written on the hearts" only of the elect, however defined, and the rest be damned.<sup>72</sup> There is much in the religious tradition that manifests and legitimates such an outlook. There is, however, no less that reflects and supports a very different view, not least among them Luke's account of the lawyer "who stood up to test Jesus."<sup>73</sup>

## V.

Douglas Sturm has described dialogue as an "interaction" whereby a participant "enters into the life of the other" in a manner that at times entails "hard-headed confrontation and opposition."<sup>74</sup> I find in

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<sup>71</sup> An example is the contested question of how relatives of seriously ill people should be encouraged by law to provide necessary high-tech care at home for them, when care in hospitals and other facilities is not available. See Nel Noddings, *Moral Obligation or Moral Support for High-Tech Home Care?*, HASTINGS CENTER REP., Sept.-Oct. 1994, at S6 (critiquing approaches based on assertions of obligation); LESNICK, LISTENING FOR GOD, *supra* note 20, at 140-41 (critiquing Noddings' position as excessively polarized).

<sup>72</sup> In a penetrating study of the "transform[ation of] the conservative legal agenda," David Super has noted that a group of social conservatives whom he terms the "new moralizers" "have coupled rhetoric about individual responsibility with per se rules that deny individualized determinations":

Although this rigid approach . . . departs from the largely individualized concept of morality that the new moralizers have advanced, it is quite consistent with their binary concept of morality. If the world is divided between "good" and "bad" people, the search for redeeming characteristics in the latter is ultimately a fool's errand.

David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2074 (2004).

<sup>73</sup> See *supra* note 1.

<sup>74</sup> DOUGLAS STURM, *SOLIDARITY AND SUFFERING: TOWARD A POLITICS OF RATIONALITY* 183-84 (SUNY Press 1998).

Luke's story much to teach us about dialogue. I will comment briefly on a few themes; there may well be others.

First, although the "other" in the story was a co-religionist, the case one of intrareligious rather than interreligious dialogue, it is no less relevant. To me, the differences that exist *within* a religion, however we identify its parameters, are often more salient than those existing *between* one religion and another. That is so because I tend not to understand the classic denominational matters of belief, ritual, or in some cases even life practices, primarily as propositional assertions regarding the nature of reality. I rather view as more central to the essence of religious belief such enduring questions as the necessity and sufficiency of obeying the array of behavioral norms of one's faith tradition for living a moral life.<sup>75</sup> As I understand him, as I imagine or reconstruct his outlook from the few words he spoke, the lawyer believed in, and set out in "testing" Jesus to demonstrate, the vacuousness of reliance on the "love commandments" to constitute compliance with the Divine Will. When people of different religions (or different branches of a religion) hold differing views on that question, it is easy to attribute their differences in that regard to their particular faith commitments. But a version of the question exists within every religion of which I am aware.

Second, while the idea of interreligious dialogue often conjures up exchanges among large, at times very large, groups of people, here we have almost the polar setting. It was not, to be sure, a private conversation, for Jesus was probably interested in teaching something to the disciples present, and the lawyer may have been seeking to score a point with them.<sup>76</sup> Jesus's primary "audience," however, was the man to whom he was speaking; he is presented as talking *to* him rather than *about* his ideas. For most of us, however, the presence of a group of the like-minded is an obstacle to our observing that requisite of genuine dialogue.

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<sup>75</sup> A view like mine is of course highly contestable. For examples of approaches that understand the differences between religions *primarily* in terms of their differing "truth claims" about the nature of reality, and which therefore find interreligious differences decisive, see PAUL J. GRIFFITHS, *AN APOLOGY FOR APOLOGETICS: A STUDY IN THE LOGIC OF INTERRELIGIOUS DIALOGUE* 1–18 (Orbis Books 1991); PAUL J. GRIFFITHS, *PROBLEMS OF RELIGIOUS DIVERSITY* (Blackwell 2001); JOHN F. MACARTHUR, *RECKLESS FAITH: WHEN THE CHURCH LOSES ITS WILL TO DISCERN* 38–44 (Crossway Books 1994); HAROLD A. NETLAND, *DISSONANT VOICES: RELIGIOUS PLURALISM AND THE QUESTION OF TRUTH* 112–150 (Apollos 1991).

<sup>76</sup> The text does not make clear the extent of the presence of others, but it suggests the presence of the seventy disciples. The Chapter in which the story appears begins with the account of the appointment, commission, and return of the disciples. *Luke* 10:1–24. The lawyer's intervention follows just then. *Luke* 10:25. After the story's conclusion, "as they went" and arrived at "a certain village," the text turns to the incident involving Martha and Mary. *Luke* 10:38–42.

The interaction, though spare, has a most instructive content. Jesus went beyond refraining from attacking the lawyer for his motives or arguing the inadequacy of his premises. He sought to affect the lawyer's thinking by prompting him to experience inwardly the limitations of his approach, such that he "fell into perplexity."<sup>77</sup> The tension within the lawyer—between the logical grounding and thrust of the lawyer's question, "Who is my neighbor?," and the emotional pull of his empathic response to the Parable—complicated the lawyer's grasp of the process of giving meaning to a term in a moral admonition. The quiet response, "The one who showed him mercy," was eloquent in its receptivity. At this shift in the lawyer's affect, the possibility of "hard-headed confrontation," foreshadowed by the story's opening line, evaporated, and Jesus could now complete his response to the lawyer's original question: "Go and do likewise."

The awakening of empathy is a source of moral knowledge. To be a genuine dialogue partner, I must struggle to leaven my cognitive reasons for rejecting or disapproving of the position of the "other" with a meaningful attempt at an empathic understanding of its grounding. I cannot, for example, simply condemn as triumphalists or vestigial colonialists evangelical Christians who do not merely witness to their faith, but whose missionary activities consist of peaceful attempts to convert non-believers, without fully taking in the fact that they believe that, in doing so, they are carrying out an explicit, authoritative and binding expression of the Will of God.<sup>78</sup> My reaction to triumphalism is by no means benign, however,<sup>79</sup> and a venture into dialogue would require me genuinely to move condemnation off center stage. Were I to accomplish such a shift, I would not necessarily change my view but would more readily acknowledge the partiality of my own outlook, and the "mystery" of a moral template that is richer than both my own and that of my dialogue partner or opponent.<sup>80</sup>

If I would seek to affect another's outlook through dialogue, I would do well to seek methods of doing so that rest on engaging his or her capacities for empathy rather than to argue the validity of the premises or reasoning on which that outlook is based. So, I believe that one who finds in his or her religion grounds for opposing equal treatment in law for homosexual people would more likely come to question that view as a result of getting to know such people, and their lives, than by hearing a rebuttal of the meaning or binding force

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<sup>77</sup> PLATO, *Meno* \*84c, in PLATO: COMPLETE WORKS 870, 884 (John M. Cooper ed., Hackett 1997); see also *id.* at \*84b ("[F]or now, as he does not know, he would be glad to find out . . .").

<sup>78</sup> This is the "Great Commission": "Go ye therefore, and teach all nations, baptizing them in the name of the Father and of the Son and of the Holy Ghost." *Matthew* 28:19.

<sup>79</sup> See LESNICK, LISTENING FOR GOD, *supra* note 20, at 59–60: "My effort in this book is to present a religious consciousness that succeeds in divesting itself of the triumphalist legacy."

<sup>80</sup> I owe this realization to my daughter, Alice Lesnick.

of the scriptural bases of their views.<sup>81</sup> Once such an engagement of empathy has occurred, one will perhaps be more open to a direct engagement with a reading of Scripture that draws in question the claim of divine condemnation of all homosexual sex.<sup>82</sup> To dispute interpretations of Scripture, or the teaching of a religious tradition that one has long followed, may succeed in setting up existential tensions in the hearer,<sup>83</sup> but the awakening of empathy for those injured by one's understanding of divine law enables the person holding such an un-

<sup>81</sup> See Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988) (attempting to evoke such empathy simply by telling a story). The opinion of the Massachusetts Supreme Judicial Court in the "gay marriage" decision, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), contains an example of such an approach. As a prelude to, and a context for, considering the constitutional questions presented, the opening paragraphs of the opinion for the Court present the facts of the plaintiffs' circumstances in a manner that silently but eloquently draws in question the accuracy of widely held hostile perceptions of the lives of gay couples. See *id.* at 949 (describing the plaintiffs' long-term, benign relationships with each other and their communities).

<sup>82</sup> See WALTER WINK, *Homosexuality and the Bible*, in *HOMOSEXUALITY AND CHRISTIAN FAITH: QUESTIONS OF CONSCIENCE FOR THE CHURCHES* 33, 33-49 (Walter Wink ed., Fortress 1999) (presenting an example of such an engagement).

<sup>83</sup> Catholic analytic philosopher Paul Griffiths maintains that his assent to "most of the teachings of [his] religion" is, by and large, an involuntary matter. As to each such teaching: [T]here is a long (and usually complicated) story to be told about why I find myself involuntarily moved to assent to these claims at a particular time. Usually, that story will involve reference to habits, skills, and knowledge I've gained in the past, but in all cases the upshot is the same: I find myself irresistibly moved to assent . . . I cannot deliberate and then decide whether to believe it or not. When I find myself assenting to some claim (believing it, taking it as true), then, my assent typically does not involve choice or deliberation. It is simply given to me.

GRIFFITHS, *PROBLEMS OF RELIGIOUS DIVERSITY*, *supra* note 75, at 26. Inferentially, Griffiths is speaking about the convictions of many other religious people as well as himself.

It is important to recognize that the truth of such an admission does not imply that one's beliefs are not true, see Alvin Plantinga, *Pluralism: A Defense of Religious Exclusivism*, in *THE RATIONALITY OF BELIEF AND THE PLURALITY OF FAITH* 191, 211-12 (Thomas D. Senior ed., Cornell 1995), although the admission might—and perhaps should—"call into question, to some degree or other, the sources" of such beliefs. *Id.* at 214-15.

Opposition to equality claims of gay and lesbian people often does not avowedly rest on religious "sources." For well-known attempts by two leading moral philosophers, both Roman Catholics, to ground their condemnation of homosexual sex on secular premises, see John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475 (1977). However, their arguments condemn homosexual sex on principles that would also render illicit masturbation, contraception, and intra-marital sodomy, and, though cast in secular terms, map precisely onto the teachings of the Roman Catholic Church with respect to those practices. See *CATECHISM OF THE CATHOLIC CHURCH*, ¶¶ 2352, 2357, 2370 (Doubleday 1995). For a careful, thorough, rigorous, and to me wholly dispositive demonstration of the incoherence of the position they put forth, see Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995). See also Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 385 n.47 (1997) (noting the "very striking breadth" of the ground of Finnis's attempt to "articulate a basis in natural reason, apart from biblical condemnation and Christian theology, why homosexual relationships might be treated by the law as immoral," and summarily characterizing as "indefensib[le]" what he describes as "this accomplished philosopher's best effort to justify [the condemnation] in secular terms").

derstanding to deal with those tensions *from within*, as did the lawyer in Luke's story. Whatever the outcome, it will be that person's own, not simply a response to a check in a chess game.<sup>81</sup>

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<sup>81</sup> Amy Uelmen has written a careful, sensitive, and penetrating call for genuine dialogue about an especially vexing source of intra-religious discord. See Amelia J. Uelmen, *The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life*, 43 CATH. LAW. 289 (2004). Fully embracing the Papal pronouncement that abortion constitutes a grave moral disorder, she maintains that "a spirituality of communion . . . [a]t the very least . . . is an invitation to genuinely listen to the concerns of Catholics in public life as 'those who are a part of me,' taking on their burdens, and understanding their struggles." *Id.* at 305; see also *id.* at 305-08 (discussing "the spirituality of communion and political commitment").