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Some Problems in Administration of Justice in a Secularized Society

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unaccustomed to being the object of divine blessing, especially when the benediction is chanted over them for their role in restoring religious values. For example, Cyrus the Persian, who liberated the Hebrews from their Babylonian captors in 535 B.C., was undoubtedly uncomfortable with the notion that he was the servant of the Lord of Israel, yet that is how Israel remembers him.[113]

Strange though this psalm may sound to our ears, it contains an important statement for our society — a society which needs to be renewed in its ability to allow people to recall their religious stories and to sing their religious songs, and which needs to be warned of the dangers of obliterating religious consciousness or of pronouncing this consciousness irrelevant to the public order and off limits in matters legal and political. In short, we need to learn to sing the ballads of exiles in a foreign land, weeping with those who weep, laughing with those who laugh, and occasionally dancing for joy, confident in our expectation that we are going home, that one day we and our world will be free at last to bask together in the glory of the children of God.[114]

Some Problems in the Administration of Justice in a Secularized Society

By Lois G. Forer*

In our complex society, the role of the lawyer has assumed unprecedented significance. People turn to the law for answers to all of the new questions involving social, moral, and ethical considerations, as well as for answers to many of the old problems which were not typically perceived as legal issues. Law students, faculty, lawyers, judges, the clergy, and even anthropologists—all of us need a much more sensitive and deeper understanding of a wide variety of problems. We must continually question the rightness of the law and the fairness and decency with which we treat all of the people who are affected, not only by the legal process in the administration of justice, but also by the far-reaching effects of court decisions.

113. *See, e.g., Isaiah* 41:1-7, 25-29, 45:1-6, 48:12-16.

114. *Rom.* 8:21.

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As lawyers and judges, it must be our duty and our vocation to try to make real the phrase in the Constitution, "no person shall be deprived of the equal protection of the laws."[1] We are always trying to expand the definition of "person" to include every human being: the women, the nonwhite, the children, the mentally ill, the prisoners, those holding unpopular political, economic, religious, or social beliefs, and all others who are in essence excluded from the protections of the Constitution, and the benefits of the legal system. We live in a secular, pluralistic society mandated by the Constitution. It is not wholly Judeo-Christian. There are a great many other faiths in this country. I, for example, see a great many Moslems in my courtroom. The fact that we are a secular society does not mean that we need adhere exclusively to the Dewey-Holmes pragmatic value free view of the law. In my opinion, the law, to be credible, must be premised on a more enduring basis than just a mere statement of what a majority of judges say at the moment.

I often feel that I am a black-robed priest performing the rights of a dying faith because there is so little faith in the law among the people I see in court. Today, judges are faced with the most bewildering array of problems of any group of people in recorded history. The questions posed to fallible men and women, who claim no supernatural wisdom or divine guidance, include such issues as the right to die, limitations on liability for nuclear explosions, the right of citizens to know what their public officials say and do, the obligation of individuals such as reporters to breach confidences, the responsibility of manufacturers to persons unknown to them, the duty to protect plant and animal life, the right of the public to control scientific experimentation, the right of the citizen to obtain psychiatric care, to be free from noise, pollution, and unsightliness, and the obligation of society to redress historic wrongs by granting contemporary advantages. Moreover, courts are still faced with the old problems of guilt, innocence, penalties, property rights, and the fashioning of remedies for the invasion of these rights. We, in the United States, have the greatest number of laws, lawyers, and judges, the greatest quantity of litigation, the highest rate of crime, and the largest number of criminals in custody.

The behavior of people in a free democratic nation cannot be meaningfully compared with that of people living under dictatorships, where violations of law are frequently punishable by death or imprisonment without trial. Nevertheless, crime statistics in the United States are disconcerting. The number of police officers, prisoners, and the quantity of resources allocated to law enforcement continues to escalate, and yet so does lawlessness. The classic American rationale for obedience to law is a mythic concept, the rule of law. This, I maintain, has been inadequate. It has not engendered a strong collective morality dedicated to lawful conduct. Pro-

1. U.S. CONST. amend. XIV, § 1.

fessor Berman raises the question of the privatism of religion. I raise the issue of a moral law.

Today there is little concensus as to what is right and wrong, what is justifiable, and what is reprehensible. We see widespread dissatisfaction with the law in the administration of justice. Certainly, disparities in sentencing, arbitrary prosecution of accused persons, rapid fluctuations in the law, as well as a sense of anomie, are in part responsible for this attitude. There is no sense of sin, if you will, even in a non-theological sense. Many people who have committed terrible crimes lack a sense of wrongdoing or contrition. Everyone comes into my courtroom, places his hand on the Bible and swears or affirms to tell the truth. But many of them lie. There is no concensus that lying is wrong. There are those, like Professor Monroe Freedman, who assert that lawyers have a duty to lie for their client.[2] Many people agree with Richard Helms, the former director of the CIA, who was convicted of lying to a United States Senate Committee. He was sternly rebuked by the judge. Helms delcared that he did not feel disgraced at all. He said the conviction was a badge of honor and he was acclaimed by other CIA employees.

On the question of stealing, compare the varying reactions to the widespread looting during the blackout in New York in July of 1977. Some people referred to looters as "scum and animals," others looked upon this orgy of theft as an inarticulate cry for economic justice.

There can be no doubt that there is serious social and economic and legal injustice in the United States today. I question whether these injustices justify law breaking. Despite some recent decisions, we cannot have one law for the rich and one for the poor. The equal protection clause, if not common sense and problems of administration, forbid this kind of discrimination. On the other hand, merely applying equal standards to unequal people does not yield equal justice. Today under the rubric of justice as fairness, it is proposed that the sentencing judge be reduced to a computer, that all defendants who have committed the same offense be given the same sentence regardless of motivation, the defendant's conditions, or the needs of the victim. This is an issue which requires much more careful consideration than the blind rush to create sentencing commissions or to enact mandatory sentencing laws.

Although some inequalities among people, such as physical and mental endowments will always remain, much inequality can be eliminated or reduced by better health care for everyone, better schooling, better housing, better jobs, and the reduction of tensions and hostilities. In addition, a concerted effort by all segments of the legal system is required to make the laws and the manner of their implementation fairer for all citizens. I

2. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469-70 (1966).

look to the law schools and the new generation of lawyers to address these issues.

There is too much emphasis on what lawyers can do. The problems which many people have are not legal problems, they are real problems. There is a material difference. I recall when I represented some three thousand indigent children. Although I could get them out of jail, I could not solve their problems of illiteracy; I could not give them homes; I could not get them medical care.

We in the legal profession did not create this society, but we reflect its values. I do not think we are responsible for the basic injustices in our society, but we are responsible for injustices which the law perpetuates or exacerbates.

For centuries both the power to judge, assess blame and impose punishment, and the power to heal were presumed to require divine or supernatural powers. In time, the practice of medicine became a secular art as did the judicial function. In societies that have a state religion, the dichotomy between religious or moral decisions and civil or govenmental decisions is not clearly defined. In secular America, however, individuals faced with difficult personal decisions frequently solicit the counsel and support of both organized religion and the state. For example, the parents of Siamese twins, before going to court for an order to permit surgical severance of the children which would certainly result in the death of one, obtained religious sanction and then they got a court order. Similarly, many people seek both a civil and church sanctioned divorce.

The ties between church and state are extremely close in many aspects of litigation. Members of the clergy serve as chaplains in the armed forces. In prisons, the clergy may have to counsel men concerning the civilly sanctioned taking of life. These two groups, judges and clergy, have different approaches to problem solving. Religious leaders consult the scripture or seek revelations through prayer. It is believed that they have an imprimatur of more than human wisdom. Judges possess no such attributes. We cannot claim special virtues or capacity of divine insight. Our powers are derived from the state pursuant to wholly secular documents. Judges must depend upon individual scholarship and temperament as a source of insight, rather than divine authority.

What forces do American judges implicitly rely upon when it is essential to compel Americans to abide by decisions which violate their sense of justice or morality? What do we do with the Berrigans, Daniel Elsberg, and people like them, who are morally right but legally wrong? In earlier societies there was, I believe, a concensus as to accepted social behavior and a widespread acceptance of specified punishment for transgression, such as banishment from the tribe. Such a concensus does not exist in American society today.

At the same time, I should like to propose for your consideration certain limited steps that I believe could be taken to restore confidence in the

litigational process.

Justice must not only be done, it must be visible. Except for police officers, judges are most visible constituents of the justice system.[3] We operate in the open. The press reports our doings. We are not anonymous bureaucrats.

A good part of the public failure to accept the law is that it fails to provide adequately for a large proportion of Americans. We must all look at the law to see whether it actually provides equal access for all of the people. Simply having a warm body with a law degree does not answer the problem of counsel for the indigent. Unfortunately, we get the justice we pay for. Justice is terribly expensive. I am deeply concerned that I can be sitting in a courtroom trying a case between two large corporations, both of which have millions of dollars and it will take three weeks and cost the taxpayers at least $1,400 a day just for the courtroom personnel and a jury, and in the next room, indigents, mostly non-white, are being rushed through with guilty pleas, represented by lawyers whom they do not know and rarely trust. At the same time, children are having their five minute children's hour, again with lawyers who do not know them or their problem. We cannot be satisfied with mere token compliance with *Gideon*[4] and *Gault*.[5] We must have adequate representation for everyone.

The legal profession must also scrutinize laws and rules which have been applied for centuries to see how they actually operate. One egregious example of unfairness is the fact that the rules of evidence as to proof of criminal assault apply to all cases, whether the victim is a three month old baby who cannot speak or a strong thirty year old man. The rules of evidence can and should be changed to reflect the needs of unequal parties.

Another shocking instance is the rule as to filing fees. The United States Supreme Court has held that one cannot avail himself of the benefits of bankruptcy laws without paying a filing fee.[6] Surely the poor need to be relieved of the burden of debt as much, if not more than, the rich. This is an unjust situation that could easily be remedied by statute.

The criminal law ignores the victims of crime and fails to provide redress for them. Statutes requiring restitution, reparation, and victim compensation can alleviate the plight of innocent victims of crime. These are only a few examples of manifest injustice sanctioned by the law.

Since Watergate, there has been much discussion of ethics, but neither the judiciary nor the bar has really considered the fundamental question of judicial ethics. To whom is a judge responsible and for what? The judiciary has shown a singular lack of concern over its own ethical standards. Judges have enormous powers over the property, reputation, liberty,

3. Forer, *Judicial Responsibility and Moral Values*, 29 HASTINGS L.J. 1641, 1645 (1978).
4. Gideon v. Wainwright, 372 U.S. 335 (1963).
5. In Re Gault, 387 U.S. 1 (1967).
6. United States v. Kras, 409 U.S. 434 (1973).

and now the lives of Americans. A judge may render decisions which violate the law, or which are venal, unfair, capricious, or brutal; however, there is little likelihood of removal from office. Even conviction of crime does not necessarily occasion removal from the bench. The reasons judges have been immune from these discussions is not because the judiciary has been functioning so satisfactorily that it and its members are above approach. One need only consider that many judges have been tried and convicted of common crimes.

There are several reasons for the failure of judges to address this problem. The judiciary is an independent branch of government. The legislature cannot impose standards of conduct or behavior on judges. Judges do not consider the problem of their own ethics primarily because they are overworked and can barely get through the cases. Judges have a sense of collegiality. We do not like to point the finger at our colleagues for some of the terrible things that they are doing. Most importantly, unlike the practicing bar, judges are not threatened with malpractice suits. Moreover, there is no clearly defined standard of judicial conduct.

Where does a judge who is reasonably competent and has a sense of moral commitment look for guidance? Most judges, I believe, are torn between the mandates of positive law and basic benefits of human rights. Judges face this question frequently. Is a judge, who has sworn to uphold the law, free to violate the law in pursuit of moral value? A negative answer reduces a judge to an amoral computer, blindly committing crimes against humanity in the name of the law. The contrary decision often leads to result-oriented decisions, popular at the moment, but which time reveals to be unwarranted and violative of basic human rights as well as positive law.

Consider briefly some famous cases, popular at the time, which we now look back on with horror. Remember the famous decision of Mr. Justice Holmes declaring that "[t]hree generations of imbeciles are enough."[7] Recall the decision requiring forceable relocation of Nisei from California;[8] requiring the compulsory flag statute by school children;[9] the decisions holding that indicia of intent is a decisive element in obscenity;[10] and, finally those holding that police misconduct is grounds for exclusion of reliable objective evidence.[11] In time, all of these decisions have been seen to be unwise and violative of basic concepts or rights.

Where does a judge go if he or she fails to follow the mandates of positive law? There are only rare occasions involving what I consider basic constitutional and human rights when I feel free to violate precedent and positive

7. Buck v. Bell, 274 U.S. 207 (1927).
8. Korematsu v. United States, 323 U.S. 214 (1944).
9. Minersville Sch. Dist., Bd. of Educators v. Gobitis, 310 U.S. 586 (1940).
10. Ginzburg v. United States, 383 U.S. 463 (1966).
11. Mapp v. Ohio, 367 U.S. 643 (1961).

law. For example, I will not give a death charge because, regardless of what the Supreme Court has said, I believe that neither the state nor I has a right to take the life of another person. I have refused to give a charge in a rape case, which under our positive law required me to instruct the jury that they were to take the testimony of the rape victim with caution, a standard different from that which is applied to every other witness, and every other victim of crime. There are not too many times when a judge can conscientiously declare a law unconstitutional.

One question which is rarely discussed is what duty does the judge owe to the community at large? Does a judge have a wider responsibility than simply to be the neutral fulcrum in the cases which appear before him? Professor Lon Fuller draws the distinction between the morality of duty and the morality of aspiration.[12] He questions whether the court should be ethically neutral. Placing these moralities in a concrete specific setting, I raise the same question. Does a judge have a right to warn non-litigants of dangers and wrongs which are revealed in the course of litigation and to inform people whose rights may have been violated of those facts? Does a judge have a duty to these other people? To answer "no" would limit the judge to the morality of duty merely deciding the case before him. The judge would be ethically neutral with respect to all matters regardless of danger and evil. The morality of aspiration would yield a "yes" answer to these questions. Would such actions overstep the bounds of judicial propriety? Would the threat of such action by a judge deter witnesses from testifying in court and chill the exercise by potential litigants of their legal rights? On the other hand, if the judge does not act, who will know about these evils? How will the individuals in danger protect themselves?

The question is not answered by Professor Fuller's dichotomy. I shall not cite examples of people injured by the lack of proper standards in hospitals, clients losing cases because of the incompetence of lawyers, and similar cases that occur every day. There are no post-civil verdict rights for civil litigants comparable to those for a criminal defendant who can get a conviction set aside because his lawyer was incompetent. Maybe we need similar remedies in civil cases.

Although the Code of Judicial Conduct, adopted in 1972, represents an effort to deal with problems brought to the forefront in recent years, it has not substantially revised the concept of judicial ethics. It has not addressed this wider duty to the public. The Code merely deals with the simple, obvious problems; for example it is wrong for a judge to take money. A short, but unsatisfactory and simplistic answer to the problem of judicial ethics, is the appointment of better judges. For years we have been frustrated in this quest. I suggest that instead of relying heavily on the mechanics of judicial selection, conditions might be imposed upon the judiciary which will deter those who might misuse the office and encourage those

12. L. FULLER, THE MORALITY OF LAW 5-9 (1964).

who have no ulterior motives or aspirations to become judges.

Judicial office, I believe, should be viewed not simply as a job or a position but as a vocation. A judge who is entrusted with powers over the liberty and property of people, whose decisions may make the difference between poverty and comfort or life and death, should view this authority as a solemn trust. Certain obvious conditions might include: (1) annual disclosure of extra-judicial income from non-judicial activities, as well as financial holdings; (2) permanent disqualification from non-judicial appointive or elective office; (3) a cut-off period between leaving the bench and joining a law firm or corporation which has been in litigation before the judge; and (4) a minimum age requirement for judicial office. This latter requirement may seem startling, but beginning with the Kennedy administration, a premium has been placed on the appointment of young officials as if youth, in and of itself, were a particular qualification. Hugh Sloan, one of the young men in the Watergate scandal, warned against placing too great a reliance on bright, eager, young people.

The bench is no place for eager zealots. It is not easy to adjust to the change from the advocacy of a lawyer to the pensive role of a judge. Most judges find this change difficult. No one who is unwilling to forego dynamic participation for the rest of his or her professional life should seek to accept a position on the bench. Under the age of fifty, such a choice is difficult to make and practically impossible to adhere to. Judges who are appointed at the age of forty or younger obviously have had a limited legal experience, one which is, in most cases, insufficient. Unless such judges resign, they will serve at least thirty years. This, I submit, is much too long. Law is, by nature a conservative force in society. If a judge is on the bench too many years, he or she is deciding the questions of the day on the basis of experience and education that came thirty to fifty years before. Thus, we get decisions that are two generations out of date.

In the last half century since the canons of judicial ethics were adopted, the population of the United States has more than doubled. Litigation has increased enormously and disproportionately. Our society has undergone extraordinary changes. The rights of women, children, the aged, minorities, the mentally handicapped, and prisoners have undergone tremendous develpment in the past fifty years. No aspect of law has remained static for this half century except judicial ethics. During this period, the judiciary has imposed new and more rigorous standards of fair dealing and responsibility on professionals, on industry (products liability, for example), and ordinary citizens. Should not these concepts apply to the judiciary?

Ethics has been defined as the principle of what ought to be. If law is to be credible, it must reflect what our society ought to be. It must be consistent with human rights and morality. The judiciary must therefore be concerned with what law ought to be and how judges ought to behave. This concern with ethics and morality need not imply sectarianism. It does require a sense of vocation, a calling to do justice based on humanism and

moral considerations. I believe that such a concept of judicial duty and the role of the law is entirely compatible with a pluralistic secular state.

The Reverend William McLennan.* I quote from the words of Jesus, as reported from Matthew: "Woe unto you, lawyers and Pharisees, hypocrites that you are. You pay tithes of mint and dill and cummin, but you have overlooked the weightier demands of the law, justice, mercy, and good faith. It is these you should have practiced without neglecting the others."[1] Thank you, Judge Forer, for providing us with a powerfully prophetic challenge to the current legal status quo, in the spirit of that first century Jew from Nazareth. I say that, even knowing that you might not be comfortable with the label of prophet, having been careful to identify yourself previously as a nonreligious person.[2] Yet, I think it is important that we recognize in a symposium on the secularization of the law that you have spoken as a prophet. By prophet, I mean one who challenges the current social order, and in particular the state and its instrumentalities, in the name of higher truth.

This is the heritage of the Biblical prophets who stood beside the king and to his face named the wrongs that he had committed. This is particularly difficult for a judge to do because, if any religious terminology is appropriate, a judge acts most of the time in the role of a priest. Judges administer the sacraments of the culture, the secular ideals and values of society, as they are embodied in the legal system.[3] In his book, *The Interaction of Law and Religion*,[4] Professor Harold Berman speaks of the ritual of the courtroom. Professor Rosen also commented upon it. Judges wear black robes almost identical to those worn by priests; they appear above the rest of us within a particular kind of formally designed meeting house. Congregates rise to the ancient chant of "Oyez, Oyez" as the judges enter, and they rise again when the judges recess. Judges administer oaths; they are repositories of litanies which they repeat over and over again to defendants, juries, and other participants in the service of justice. Judges speak from the authority of a tradition, from precedent.[5] Yet, prophets emerge when rituals have lost their foundation; when rituals no longer relate to the

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1. *Matthew* 23:23 (adapted from the NEW ENGLISH BIBLE (1970). Oxford University Press and Cambridge University Press 1970).

2. Forer, *Response to Professional Responsibility: Who is Responsible for What?*, 2 NICM J. 64 (1977).

3. Berman, *Introduction: The Prophetic, Pastoral and Priestly Vocation of the Lawyer*, 2 NICM J. 5, 8 (1977).

4. H. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974).

5. *Id.* at 32.

meaning of life, they challenge those rituals as idolatry, as considering ultimate those things which are proximate and transitory. That is the kind of challenge Judge Forer has articulated.

Judge Forer has said that she often feels like a black robed priest performing the rites of a dying faith because there is so little faith in the law among the people. There is no sense that the courts are promoting moral values or justice. It is Judge Forer's opinion that, for the law to be credible, it must be premised on a more enduring basis than a mere statement of what judges say the law is. We are all concerned with the problem of which Judge Forer spoke: the exclusion from our society and from the legal system of the poor and disabled, the prisoners, the victims of discrimination, and the oppressed. This was a basic prophetic message spoken by Isaiah and repeated by Jesus:

"The Spirit of the Lord God is upon me, because the Lord has annointed me to bring good tidings to the poor . . . to bind up the broken hearted, to proclaim liberty to the captives and the opening of the prison to those who are bound; to proclaim the year of the Lord's favor."[6] Jesus added to those words of Isaiah, "No prophet is recognized in his own land."[7] Ed Gaffney discussed the Prophet Amos who condemned the judges of his time in this way: "For I know your manifold transgressions and your mighty sins: they aflict the just, they take a bribe, and they turn aside the poor in the gate from their right."[8] Amos goes on, "but let judgment run down as waters and righteousness as a mighty stream."[9]

I want to expand on the prophetic and the priestly, by discussing the judge's or the lawyer's vocation.

Secularization of law has not totally triumphed when there are those who have a sense of vocation or calling in their profession. By vocation, I mean that which relates and integrates the trade or skills one plys with one's ultimate concern, or the ground of one's being. I suggest that there are two primary dimensions to the legal vocation: the prophetic and the pastoral. Harold Berman suggested in a 1977 article that there is a third dimension of the lawyer's vocation which should be recognized—the priestly.[10] Lawyers in general stand well within society's establishment. They are recognized leaders and they have a critical role both in proclaiming and administering the secular ideals and values of society.[11]

I think, however, that judges, much more than lawyers, can be seen to be fulfilling that priestly role. Lawyers by playing the role of advocate rather than of final mediator of authority, have more of a prophet poten-

6. *Isaiah 61:1-2, Luke* 4:18-19.
7. *Luke* 4:24.
8. *Amos* 5:12 (revised standard version).
9. *Amos* 5:24.
10. Berman, *supra,* note 3.
11. *Id.* at 8.

tial, and as they counsel their clients they have the potential to serve as pastor. I feel "priest" is particularly inappropriate as applied to modern lawyers, given the secularization of law and our presumed interest in recovering some religious foundations for the enterprise. Law has become largely a positivist utilitarian instrument for effectuating the policies of those who happen to be in power. I cannot resist quoting directly from that 1897 article by Oliver Wendell Holmes, *The Path of the Law,* where he stressed that "the distinction between law and morals . . . is of the first importance for the . . . right study and mastery of the law."[12] The predictions "of what the court will do in fact, and nothing more pretentious"[13] is what Holmes meant by the law. Similarly, Sir Henry Maire praised the "severence of law from morality and of religion from law" as belonging "very distinctly to the later stages of mental progress."[14]

Lawyers are not priests now in the sense of mediating religious truth within the present judicial system, nor do I think it a particularly fruitful way to view their calling or vocation until we have radically altered the current legal enterprise. Yet, lawyers can be prophetic in pointing out how far we have strayed and the direction in which we need to go. More concretely, in the prophetic dimension of legal vocation, lawyers may be expected and challenged to use their litigation, lobbying, and organizational skills to confront social injustice, and to protect the helpless and disadvantaged according to the Biblical injunctions I read earlier.

I think I have said enough about the prophetic and the priestly in legal tradition and vocation. Let me turn now to the pastoral. Here I am speaking more in terms of the lawyer's vocation than the judge's, although the judge does have a pastoral role to play as well, perhaps more in chambers and in some kinds of closed hearings than in open court. By the pastoral dimension I mean the lawyer's regarding his or her client as a whole person, as a potentially holy person, and addressing the presented legal problem in terms of the client's total life situation.

Historically, lawyers have been called counselor, and yet lawyers get very little training in counseling skills in law school, especially in comparison to other professional schools such as those for doctors, nurses, teachers, social workers, and ordained ministers. Clients often come to lawyers with human needs only incidentally related to the law, and even in those cases where the legal problem is very real and pressing, a client will often be left fundamentally unserved if the lawyer is not willing to recognize and deal with the client's total personality. The late Securities and Exchange Commission lawyer turned Episcopal clergyman, Bishop James Pike, addressed the issue in his book, *Beyond the Law: The Religious and Ethical Meaning*

12. O. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
13. *Id.* at 461.
14. As quoted in Samuel Enoch Stumpf, *Theology and Jurisprudence*, 10 VAND. L. REV. 885 (1957).

of the Lawyer's Vocation.[15] Bishop Pike uses the example of a woman coming to a lawyer saying that she wants a divorce. If the lawyer simply starts up the legal machinery, plugs the client in, and an attorney is brought into the act for the husband, the process may very well string along to a finale that neither party wanted. It might be, Pike says, that the wife was simply looking for a big club to take home to create respect and power for her within the relationship. There may have been real substance to the marriage that the wife was trying to save, while at the same time she was blinded by frustration, pride, and fear. A pastorally sensitive lawyer will go beyond legal technicalities to deal with the whole human being.[16] So, there are two dimensions, I submit, to legal vocation, and to law practice as a religious calling—the prophetic and the pastoral.

I want to conclude by praising Judge Forer's attempt to assure that the so-called ethical codes which apply to lawyers and judges are congruent with more universal ethics, with philosophical and theological ethics, and a general sense of moral rectitude in society. In this area it seems to me that the legal profession is about a decade behind the medical profession. Doctors used to have trouble distinguishing between trade ethics or professional protectionism on the one hand and the real substance of ethics on the other.

Doctors used to claim that specialized rules applied in the medical context and that they had little to learn from the kind of ethical analysis provided by philosophers and theologians, not to mention the general public. Now, in areas like organ transplants, reproductive decision-making, genetic engineering, and experimentation on human subjects, doctors have learned that no profession is an island unto itself. If morality means anything, it must be that which one could will to be a universal, following Kant's definition of the moral imperative. The sooner that we learn that the courtroom, albeit a particular context with unique mechanisms of its own, is but another cultural form which can and must be scrutinized in terms of general, moral principles, the better for judges, lawyers, and the rest of society.

Thomas L. Shaffer* What do we mean when we say "the administration of justice"? Is that phrase a slogan, or is it an idea which tells us

15. J. PIKE, BEYOND THE LAW: THE RELIGIOUS AND ETHICAL MEANING OF THE LAWYER'S VOCATION (1963).

16. *Id.*

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something about our view of America, our profession, our clients, and ourselves? Is it possible to talk about "the administration of justice" as an idea?

To talk about the administration of justice may be a way to talk about justice itself. It may be a way to reduce justice to manageable terms; if so, we have to ask what price we pay for simplicity. One risk in equating "justice" and "the administration of justice" is that we may not be accounting for what the administration of justice is about. Another risk is that talking only about the administration of justice leaves out of account much of what people mean, and what they mean to do, when they talk about justice itself.

For every contract which is taken to the government for enforcement, a million more are performed without incident. Moreover, some of the contracts which are performed without the benefit of governmental attention would be unenforceable if they were taken to the government (those which do not conform to the Statute of Frauds, for example). For every disposition of property which becomes the subject of governmental administration, a thousand more are given effect without governmental administration. These examples are part of the daily occurrence of justice as it is experienced by practicing lawyers. Examples beyond the ken of the profession are even more common. Airline passengers, for example, appear to have a "right" to tip their cramped tourist seats back as far as they can be made to go — and thus, presumably, into the jugular veins of the passengers riding behind them — but they rarely take advantage of this "right."

Perhaps when we say "administration of justice" we mean to refer to the government, and especially that part of the government that wears judicial robes. The government dons its judicial robes to keep the peace or to vindicate the freedom of choice of citizens who repair to the government with vindication in mind. We talk about government in its judicial robes in this way — that is, as "the administration of justice" — when we seek to make government more efficient, so that the disputes it adjudicates can be resolved quickly, at low cost, quietly, and without disruption in the community, or failing that, at least without disruption in the courthouse.

When we citizens call on the government to "administer" justice we are resorting to the tools of fear. We ask the government to frighten somebody into behaving himself. The tools of government, and especially the tools of government in its judicial robes, are the tools of fear. That seems an ugly way to talk about the law, but I think it is useful to be ugly, at first. One reason is that it helps us see that we are inclined to ignore the ugly by talking about "the administration of justice" as if it were not fearful. We talk about government under law, for example, or about the history of American democracy, and we appeal to the sort of patriotism which was invoked by our leaders when they established Law Day as an antidote to the poison of communist totalitarianism.

When "the administration of justice" is talked about with patriotic connotations, it is helpful to remember (if only as a listener) that our government maintains itself by fear as much as communist totalitarianism does; and it is helpful to notice that "the administration of justice" in a Law Day talk does not mean what the phrase means in a discussion of the mechanics of court administration. Reporting that appellate dockets are short—which is what the chief justice in my state does every year when he talks to the house of delegates of the state bar association—indicates a view of "the administration of justice" which is not the same as the view taken in Law Day talks. Such a report may or may not indicate a limited view of what justice itself is, but most of us would agree that the docket report is less about justice than the Law Day talk is. It would keep concepts clear to agree that we should not talk with the same phrase about clear dockets and the ideals of the American experiment, any more than we should talk with the same phrase about democratic government and the status of litter.

I am suggesting that there may be a delusion in our profession's thinking about "the administration of justice." Perhaps the delusion is a matter of too quickly equating "the administration of justice" with justice itself. The danger lies in the assumption that government (which administers things) is a source of justice, and therefore a source of goodness. But if government is a source of goodness, then goodness can be obtained through fear.

The S.S. colonel in *The Holocaust* thought that goodness could be obtained through fear.[1] He did not set out, as an idealistic young Nazi, to do evil. He did not choose murder, torture, genocide, and terror. Instead, he arrived at the conclusion that those things were necessary incidents of his culture's search for goodness. He came to that sad conclusion because he thought that goodness could be obtained through fear. His problem was not a conscious choice of evil; his problem was a delusion. He did not tell himself the truth. His bad idea was bad because it was not truthful; it was evil because it was untruthful. The delusion that government is a source of goodness makes that much difference.

There are alternative ways to think about justice. There are ways to think about justice as something other than "administration," in order to see if "the administration of justice" has anything to do with justice itself, and in order to understand how we talk about "the administration of justice" in the first place. An issue which would combine these objectives would be this issue: Can justice be administered? That issue is really two issues—(1) Is "the administration of justice" a sound idea? (And by "sound" I mean to ask if it is a truthful use of the word "justice.") (2) Is the idea of justice itself an adequate idea for virtue in communities? In talking about these issues, we might learn to be modest about the justice which can be administered and about the administration which can be just.

1. The reference is to the made-for-television movie *The Holocaust*.

One alternative idea of justice is what is described in the second article of the Apostles' Creed:[2] Justice is how we describe loving relationships, and the model for loving relationships is the love of God for his people. This is a Jewish and Christian idea. To Christians the idea is embodied in the man Jesus.

Justice thought of as a loving relationship comes close to the embodiment of all virtue; it comes to be coextensive with love, and love, according to Jewish and Christian theology, summarizes the moral law.

The biblical idea of "the just man" is not an idea only about giving to others their due. To Jews the just man is one who lives a virtuous life, and who therefore stands *justified* before God. In the Christian (Pauline) idea, the just man is a person who has died and been resurrected with Jesus, the Christ, and who proposes to follow him. He is *justified* at the Cross.

Another idea of justice would be one that considers the harm done by imposing judgment. Oliver Wendell Holmes, Jr., said that the imposition of criminal punishment as educative and deterrent, and therefore appropriate for a democratic republic, was a morally deficient idea.[3] If that idea were truthful, he said, we should hang every thousandth thief. He implied that a better idea would be that force is imposed only where force is deserved.

This second alternative idea about justice is a common idea among lawyers and judges, and it causes us difficulty because we do not know when force is deserved and what force is appropriate. A divorce court judge appearing on television remarked that American judges have God-like powers. He said this as if the thought humbled him; Holmes would say that he is right to be humble.

The idea that justice is a matter of appropriate harm is a consequence

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2. Apostle's creed:

I [We] believe in God, the Father almighty,
creator of heaven and earth.
I [We] believe in Jesus Christ, his only Son, our Lord.
He was conceived by the power of the Holy Spirit
and was born of the Virgin Mary.
He suffered under Pontius Pilate,
was crucified, died, and was buried.
He descended to the dead.
On the third day he rose again.
He ascended into heaven,
and is seated at the right hand of the Father.
He will come again to judge the living and the dead.
I [We] believe in the Holy Spirit,
the holy catholic Church,
the communion of saints,
the forgiveness of sins,
the resurrection of the body,
and the life everlasting. Amen.

3. O. HOLMES, THE COMMON LAW (1881).

of the collective attempt by people in the twentieth century to control their existence. Through the lens of the Jewish and Christian tradition the attempt is futile and even blasphemous. The tradition of Israel and of Jesus claims that God is Lord of all and that he is among his people. He is at work in the world. It is pretentious to suppose that human beings can act without causing harm. We cannot appropriate God's power in the world; we can only witness to it. We can only be suffering servants before His lordship.

We cannot act morally without causing pain; the tradition of Israel and of the Cross is a tradition of pain. Justice involves pain and it is not adequate (not truthful) to suppose that the just man is the man who avoids the infliction of pain. This does not mean that Holmes' idea is one that should not be held at all, but only that it is not truthful to hold that idea of justice, and at the same time to ignore the delusions of power. There needs to be a warning made about an idea of justice which relies on happy endings; it is a warning sounded by the religious tradition which brought Puritan suspicion of power to these shores, and which tends to be lost when the religious tradition of the Puritans is forgotten.

Another alternative way of looking at justice would be to see it as a way for people to live together. This is like the first alternative idea—the idea that justice is the exercise of virtue—but it differs because it makes an attempt to explicate obligations. Law fits this third alternative idea if law is seen as a way to work out the interpersonal claims we make on one another. It recognizes the lordship of God but claims that God allows his people to exercise some of His lordship. Our working out our claims on one another is a participation in God's lordship. Law is, as my colleague Stanley Hauerwas puts it, the space God gives us to work things out. The power is not ours, which helps to mitigate the delusions of power; but power is not something God keeps to himself. This ideal is somewhere in almost all Jewish and Christian theologies of government, and in the older American jurisprudence.

Justice, in this view, is a matter of interpersonal debt. There are two ideas of justice as interpersonal debt, and the distinction between them may be important. It might be helpful, if overly simple, to call one of these Greek and the other Jewish. The Greek idea of justice as interpersonal debt calls upon one to exercise the particular virtue of rendering to other people what is due them. The Jewish idea of justice as interpersonal debt calls upon one to live a just life in the sight of God, who is judge. The Jewish idea is very broad; it calls upon one to be the person he or she was created to become. Its interpersonal implications cover most, if not all, of what it means to live a moral life. The Greek idea is narrower; it deals with rights and duties. The Jewish idea sees our indebtedness to one another as infinite, and as supporting, or illustrating, what Jesus talks about when he censures anger, urges his followers to turn the other cheek and walk the second mile, and when he says that the *meek* shall inherit the earth. The

Jewish idea is that justice requires more than what we, or the Greeks, think of as being just.

The Jewish idea occasionally appears in formal American law—in the "rescue doctrine" in tort, for example; but it more often appears where people gather together without the law—in companies, on airplanes, in families, and, sometimes, in churches. The question is not what one is entitled to demand from another, but how people are to live together.

The idea of justice which I am calling Jewish also implies a reluctance to invoke fear—to invoke what St. Paul calls the power and dominion.[4] One who is just in this sense might repair to the force of the state, but he would do this as reluctantly as, in Richard Neuhaus' phrase, a pacifist might go to war.[5] Resort to fear is resort taken when one cannot suffer any more, and it is then taken without revenge. An example here is the way St. Paul sought help from the Roman army when the Sanhedrin threatened to kill him.[6] This reluctance to resort to fear suggests the Jewish and Christian admonitions not to go to court for the solution of disputes. It supports secular and religious—even Marxist—efforts toward forums of mediation and settlement which refuse the coercive power of government. It calls on impulses to cooperation and friendship, and not on impulses to assert rights, demand duties, and threaten force.[7]

The Jewish idea of justice as interpersonal debt also includes the idea that justice is a process. But the process is not dispute resolution; it is the hope that we can give substance to justice as we work together. We seek to do justice as we talk about justice.

Justice seen in this interpersonal perspective is loving community—not

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4. *Ephesians* 1:21.

5. Neuhaus, *The Dangerous Assumptions*, 86 COMMONWEAL 408 (1967).

6. *Acts* 25-28.

7. I am, and intend to be, at odds with a reading of American history which sees us as grimly economic bands of immigrants. My claim is to religious traditions which had what I see as communal force among the Puritans, in the revivals of the 18th and 19th centuries, and in periodic bursts of effective Christian witness in American life. What I am at odds with is expressed in Professor James Q. Wilson's review of A. STRICK'S, INJUSTICE FOR ALL, in *Fortune*, July 31, 1978, pp. 131-32:

> The United States is an adversary culture. It was created by persons preoccupied with the assertion and maintenance of individual rights. Not only government, but our fellow man, was to be checked and limited so as to leave personal liberty intact. The task of the government was not to govern, but to supply those few things that citizens could not supply by themselves. Institutions, including government, had neither divine nor historical sanction, but only such license as might be provided by their utility. Throughout a century and more of mass immigration, the country grew by the addition to it of people who, distrustful of government and suspicious of power, came to this country in order to claim their rights and seek their advantage.

Not only do I find that view to be *nunc pro tunc* history (compare, for example, M. MARTY, RIGHTEOUS EMPIRE 1970) but I think it reduces the idea of justice to a trivial notion which is unworthy of either a book or a book review.

a crazy or utopian idea at all, but an idea which has been behind most of the spiritual history of America. This idea of justice as something *to do* sees people—citizens—in fealty to the lordship of God over all things, and therefore not pretentious or optimistic about their power. It is a conversation about the claims we make on one another and the infrequent use of fear as a way to realize on our claims. Justice, seen this way, is a gift people give to one another. It is not something we have from the government. Justice can be administered because the idea of justice cannot be separated from the process of administering justice. Those in administration must be modest about the claim that their work involves justice in a specialized way. There are no experts in justice. The lawyer, as a just person seeking to be faithful to his client, candid to the court, and fair to third persons, is doing justice no less than the court which pronounces judgment, or the litigants who seek either to avoid the necessity of judgment or to live with judgment in peace.

This idea makes it possible to talk about the administration of justice as a small part of something vast, grand, and truthful. "If the law goes against truth, then it's worse than useless," said Joyce Cary's character, Capt. James Latter. "It is an evil thing because it brings fair dealing and decent conduct into disgust. It brings in the worst corruption because the people give up all idea of fair dealing and think only of everyman looking out for himself. It turns everything into trickery and bluff."[8]

The Jewish idea of justice as interpersonal debt, which makes it possible to talk, but only modestly, about the administration of justice, and which makes justice an adequate basis for community, is a good idea because it is a truthful idea, and, given the Jewish and Christian roots from which the idea comes in our culture, it is a hopeful idea, too.

The idea that justice comes from the government, that it can be managed as the issuance of drivers' licenses can be managed, is untruthful. It is false because goodness is not the result of fear. It is a bad idea because it suggests that justice deals with what a person should claim, rather than with what a person should give. It is a bad idea because it implies that the justice of rights and duties is a model for relationships. It endorses the moral bankruptcy of a culture which conceives of the good of a person only in terms of procedures—of freedom of choice, for example—and is consequently a culture which is without the hope necessary to begin talking about a good life.

If the "administration of justice," as an idea, depends on the notion that goodness can be produced by fear, it would aid discourse to call it something else—"the administration of civic peace," perhaps, or "the administration of coexistence." If those who talk about "the administration of justice" in this untruthful way cannot be persuaded to adopt a new word,

8. CARY, NOT HONOUR MORE 41 (1955).

those of us who trust to an older and more American idea of what justice is, need to find a different word to express the hopeful idea we have about community in our country.

The Interaction of Law and Religion In The Middle Ages†

By Charles Donahue, Jr.*

To survey the interaction of law and religion over the thousand year period that separates 500 from 1500 A.D. would require much more time and knowledge than I have at my disposal. I am, therefore, going to confine myself to Western Europe and to orthodox Christianity. Both medieval heresies and medieval Judaism are relevant to this topic, but they introduce further complexities into an already complex topic, and their inclusion would stretch my paltry knowledge unduly. Further, I am not going to try to survey either the history of law or of orthodox Christianity during the period. Rather, I would like to offer a model for talking about the interaction of law and religion, to flesh out that model with a few illustrations from the thousand years of history with which I have been asked to deal, and close with some general remarks on the significance of the interaction of law and religion for the Middle Ages and, to some extent, for today.

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† In view of the speculative nature of this piece, it seemed best to leave it in the lecture form in which it was given and not attempt either to expand the argument or provide the kind of footnote support normally found in a scholarly article. I must, however, acknowledge some debts and offer the reader some suggestions as to where he may pursue at greater length the topics discussed in this paper. On the theoretical level, I have been much influenced by, and have reacted to, R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976). W. ULLMAN, LAW AND POLITICS IN THE MIDDLE AGES (1975) provides an introduction to his influential ideas on medieval political theory, further references, and the best introductory account in English of the learned law on the Continent. A short and brilliant account of religion in the Middle Ages is R. SOUTHERN, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES (Pelican History of the Church No. 2 (1970). On the church courts as an institution, *see* Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647 (1974) and bibliography cited therein. On the method of the canonists, see S. KUTTNER, HARMONY FROM DISSONACE (1960), a little book which repays numerous rereadings. For more specific points in the text I have relied on: B. SMALLEY, THE STUDY OF THE BIBLE IN THE MIDDLE AGES (1964); Helmholz, *Assumpsit and Fidei Laesio*, 91 LAW Q. REV. 406 (1965); Green, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, 47 SPECULUM 669 (1972); and Donahue, *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF S.E. THORNE (M. Arnold, T. Green, S. Scully, and S. White eds. forthcoming).