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What Can We Hope For from Law?

Ellen S. Pryor*

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I. INTRODUCTION

Many people feel called to law practice because they sense that law can be an avenue for helping others and improving society. But what should the lawyer of faith hope for, and expect from, law? The question might sound overly abstract or general. This Essay will explain why the question matters, not just as a matter of theory, but also to the real-world lawyering journeys taken by people of faith. This Essay develops three points: (1) there are different answers to this question; (2) the answers matter not just to theologians but to lawyers of faith because our answers can shape our expectations about law practice and how we see our purpose in practicing law; and (3) although our answers to this question do indeed matter, the answers will not be enough to explain and sustain our lawyering journeys. Thus, this last point will include a discussion of what else we will need as

* Homer R. Mitchell Endowed Professor of Law and Associate Provost, SMU. This essay is a version of the 2008 Louis Brandeis Lecture given at Pepperdine Law School. I thank Professor Robert Cochran for his comments and encouragement, and for arranging the panel of commentators. And I am grateful to the excellent scholars who commented on the talk: Professor Dallas Willard, Professor Douglas W. Kmiec, and Professor Edward Larson. It was a privilege to receive comments from these three Professors, especially because I have long admired their writings.

This article began with talks with my friend Reverend Frank Yates, now Pastor of St. Andrews Presbyterian Church in Albuquerque, New Mexico. I thank him for his invaluable and insightful guidance on this and other topics. I am also grateful for the input of Lee Taft and Will Pryor. Please send comments to epryor@smu.edu.

we try to cooperate in God's justice through our imperfect practice of imperfect human law.

What should a lawyer of faith hope for, and expect from, law? Early in my law practice, a particular case raised this question in a way that was a shock to my system. Thus, this introduction describes the path that led me to this case, and then the case itself.

Following law school, I clerked for the Honorable Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit. One of the cases that came before the court was a widow's claim for death benefits under the Black Lung Act.¹ Her husband had died of black lung disease after a lifetime of working in the coal mines of West Virginia. An administrative law judge had denied her claim on the basis of insufficient proof that her husband had worked enough time in the mines. The three-judge panel reversed the judge's denial and granted the widow her benefits.

The woman's lawyer specialized in black lung cases; his office was somewhere in West Virginia. I recall thinking that the woman's case—though strong—might not have made it to or won in the court of appeals if she had not had a good lawyer. This fundamentally altered my plans about the kind of law practice I wanted to find at the end of my clerkship. Although this sounds very simplistic now, I decided then that I wanted to be a lawyer who worked on claims that might not be “big” cases, but whose outcome was crucial for individual clients and for which the presence of a lawyer would make a difference.

So I changed my plans—which had been to work as an associate in a D.C. or Dallas firm—and began to search in my hometown of Dallas for a firm that engaged in direct people practice. I sent letters to family, criminal, personal injury, and the few employment/civil rights firms I could find. I joined a twelve-man firm engaged primarily in a plaintiff's personal injury practice. The firm's practice included tort claims and workers' compensation (which at that time in Texas could result in a *de novo* jury trial); in addition, the firm sometimes handled probate and family law matters. I worked in all these areas, and I was also able to handle *pro bono* social security claims, federal workers' compensation claims, and occasional civil service disability claims. All of the work was engrossing, but the case that became the most captivating and time-consuming was a disability-related civil rights case based primarily on section 504 of the Rehabilitation Act of 1973.

1. *See generally* 30 U.S.C. § 901 (2006).

II. *DONALD R. BALABAN V. COUNTY OF DALLAS*

Passed in 1973, section 504 of the Rehabilitation Act prohibited discrimination against “otherwise qualified handicapped individuals” in federal agencies or in programs or activities receiving federal assistance.² Later, in the Americans with Disabilities Act of 1990 (ADA), Congress would extend the disability-related antidiscrimination mandate beyond those entities covered by section 504 (federal agencies and recipients of federal assistance) to private employers, public services, and public accommodations and services operated by private entities.³ The ADA (and, since 1992, section 504⁴) use the term “individual with a disability” rather

2. 29 U.S.C. § 794 (1982). As Professor Bagenstos has noted in one of his many scholarly explorations of disability law: “The 1973 enactment of the Rehabilitation Act, and the Department of Health, Education, and Welfare’s promulgation in 1977 of regulations to implement the antidiscrimination requirements of Section 504 of that Act, constituted the first significant federal initiative to guarantee civil rights to people with disabilities.” Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 958 (2003). The Americans with Disabilities Act (ADA) expanded the scope of disability-related discrimination protection beyond federal agencies and programs/activities receiving federal funds to private employers, public services, and public accommodations and services operated by private entities. See 42 U.S.C. §§ 12101–12213 (2008). The ADA does not use the term “otherwise qualified handicapped individual”; rather, the operative phrase is “qualified individual with a disability.” See *id.* § 12112(a) (referring to employment); § 12131(2) (referring to public services); § 12102(2) (defining “disability”).

3. 42 U.S.C. §§ 12101–12213 (2008). As has been often noted, the ADA’s definition of a disability, and a qualified person with a disability, drew heavily on the Rehabilitation Act’s definition of a handicapped individual. “Congress drew the ADA’s definition of disability almost verbatim from the definition of ‘handicapped individual’ in the Rehabilitation Act” *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002). However, the ADA did not supplant section 504. The case law includes litigation alleging violations of section 504 only, the ADA only, and both. See, e.g., *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008) (regarding a claim based on section 504—Plaintiff was a candidate for the U.S. Foreign Service whose medical clearance was revoked when the State Department learned that she had stage-one breast cancer). As Professor Rothstein has explained:

Section 504 is very sparse in its statutory language. The details of what is required were spelled out initially in regulations and subsequently in case law development. The ADA statutory language draws on this body of administrative and judicial interpretation and incorporates much of it directly into the statutory language itself. There are, however, additional detailed regulations and substantial administrative agency guidelines on how the ADA should be interpreted. It is clear that the two statutes are intended to be interpreted consistently in most instances.

Laura F. Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 246 (2000) (footnotes omitted). For further discussion of the overlaps and differences between the two laws, see Katie Eyer, Note, *Rehabilitation Act Redux*, 23 YALE L. & POL’Y REV. 271 (2005).

4. The Rehabilitation Act was amended in 1992, and among the changes was the use of disability rather than handicapped person. Pub. L. No. 102-569, § 102(p)(32), 106 Stat. 4344 (1992).

than “handicapped individual,” a change both reflecting and reinforcing the terminology preferred by the disability-rights community by the time of the ADA’s passage.⁵

The firm filed the case in federal court in December 1982,⁶ a few months after I started at the firm. To describe the case, I will draw on the pleadings, findings, and orders in the case. The plaintiff, our client, was Donald R. Balaban, M.D., a urologist and surgeon who was diagnosed with multiple sclerosis⁷ in the mid-1970s. Sometime after his diagnosis, he closed down his private practice and, in May 1977, obtained a job at the Dallas County Health Department (DCHD) to serve as a part-time Assistant Director of the DCHD.⁸

By the time our firm began representing him in 1982, his condition had deteriorated significantly; he was essentially bedridden and unable to work. The extent of his disability during times relevant to his lawsuit was disputed to varying degrees. Before he was hired at DCHD, the Acting Director contacted the Texas Department of Health and expressed reservations about Dr. Balaban’s handicap.⁹ The Acting Director believed that Dr. Balaban was very knowledgeable but “markedly impaired.”¹⁰

According to the plaintiff’s allegations,¹¹ when he first started at DCHD, his role was essentially to serve as a consultative physician, requiring telephone contact and paperwork (including immunization records, rather than direct patient care). For his first two years, he received above average annual performance ratings from the Acting Director of DCHD. At

5. “In the years since the passage of the 1973 Rehabilitation Act, disability rights advocates’ own language had changed, and in the late 1980s the terminology changed. ‘Handicapped’ had been replaced by ‘disabled’ at advocates’ insistence.” See Mary Johnson, *Before Its Time: Public Perception of Disability Rights, the Americans with Disabilities Act, and the Future of Access and Accommodation*, 23 WASH. U. J.L. & POL’Y 121, 137 (2007) (footnote omitted).

6. Balaban v. County of Dallas, Texas, No. CA 3-82-2169-G (N.D. Tex. Dec. 30, 1982) (on file with author) [hereinafter Original Complaint].

7. This is a “chronic neurological disorder that affects the central nervous system.” Sarah Ringold, Cassio Lynn & Richard M. Glass, *Multiple Sclerosis*, 296 J.A.M.A. 2880 (Dec. 20, 2006), available at <http://jama.ama-assn.org/cgi/content/full/296/23/2880>. The disease inflames and damages the insulation around nerve fibers (known as myelin), thus resulting in impaired nerve signaling. *Id.* For a detailed overview of the disease, current treatments, and future research, see NATIONAL ACADEMY OF SCIENCE, BOARD ON NEUROSCIENCE AND BEHAVIORAL HEALTH, *MULTIPLE SCLEROSIS: CURRENT STATUS AND STRATEGIES FOR THE FUTURE* (Janet E. Joy & Richard B. Johnston, Jr. eds. 2001) [hereinafter NATIONAL ACADEMY OF SCIENCES].

8. Original Complaint, *supra* note 6, at 4.

9. Letter from Taylor D. August, Dir., Office for Civil Rights, Dep’t of Health, Educ., & Welfare, to Elliot Salenger, M.D., Dir., Dallas County Health Dep’t, at 2 (Oct. 24, 1977) (on file with author) [hereinafter First OCR Findings]. This letter was admitted into evidence for trial.

10. *Id.*

11. Pretrial Order at 2, Balaban v. County of Dallas, Texas, No. CA 3-82-2169-G (N.D. Tex. Apr. 4, 1985) (on file with author) [hereinafter Pretrial Order]. This paragraph is from the “Plaintiff’s Claims” portion of the Pretrial Order, not the stipulated facts portion.

the time, he had some difficulty with walking and manual dexterity, but otherwise was able to perform the job duties.

In the summer of 1979, a new Acting Director took over¹² and, within days, fired Dr. Balaban.¹³ Dr. Balaban filed a complaint with the Office of Civil Rights (OCR).¹⁴ The OCR investigated and concluded, in October 1979, that Dr. Balaban's termination had been discriminatory.¹⁵ The OCR concluded that many of the criticisms of Dr. Balaban's performance were "direct manifestations of Dr. Balaban's handicapping condition and in no way affected his ability to perform his job."¹⁶ In addition, the OCR found no effort "on the part of the department to make reasonable accommodation for Dr. Balaban's handicap."¹⁷ The OCR ordered that he be reinstated and that the DCHD provide "Dr. Balaban with an office that is accessible to restroom facilities to comply with Section 504 of the Rehabilitation Act."¹⁸

When the findings of the OCR were sent to DCHD, a new Director—Dr. Salenger—had been hired.¹⁹ Dr. Salenger sent a letter to OCR stating that Dr. Balaban had been reinstated and would be provided with an office accessible to restroom facilities.²⁰ Yet problems between DCHD (including Dr. Salenger) and Dr. Balaban persisted for the next six months.²¹ He was fired again in June 1980.²² Dr. Balaban filed another complaint with OCR, and also an appeal of the firing to the Texas Merit System Council.²³

According to the findings of the OCR²⁴ and the Texas Merit System Council,²⁵ the following are some of the developments that occurred

12. First OCR Findings, *supra* note 9, at 4.

13. *Id.*

14. *Id.* at 1.

15. *Id.*

16. *Id.* at 3. The OCR findings included a list of the criticisms that Dr. Balaban's co-employees and supervisors voiced. *Id.* at 2-3. Some related to his falling in the halls (he was using a walker at the time), the times when he could not control his bladder in time to make it to the available restroom, and refusing offers of assistance when he fell. *Id.*

17. *Id.*

18. *Id.* at 4.

19. Pretrial Order, *supra* note 11, at 3.

20. Letter from Elliot Salenger, M.D., Dir., Dallas County Health Dep't to Taylor D. August, Dir., Office for Civil Rights, Dep't of Health, Educ., & Welfare (Nov. 15, 1979) (on file with author). This letter was admitted into evidence for trial. After some back-and-forth visits and correspondence between DCHD and OCR, the OCR notified DCHD that it was now closing the investigation on the first complaint. *Id.*

21. Pretrial Order, *supra* note 11, at 3.

22. *Id.*

23. Original Complaint, *supra* note 6, at 7.

24. Letter from David A. Coronado, Reg'l Dir., Office for Civil Rights, Dep't of Health, Educ.,

between the time of Dr. Balaban's reinstatement (November 1979) and his second firing in June 1980.

Dr. Balaban was not reinstated to the actual position he had held at the time he was first fired.²⁶ Rather, in November 1979, he was placed at one of the jail facilities, and had clinical duties there. (This jail was known as the "Old County Jail.") The staff of the OCR toured the Old County Jail soon after Dr. Balaban's reassignment there and "found the facility inaccessible to mobility-impaired persons."²⁷

The new position was "distinctly different and unrelated" to the demands of his first position.²⁸ In addition, the new location posed "several working conditions more adverse than those of his former position,"²⁹ including a carrel-type desk "where he experienced mobility problems with his walker and wheelchair due to a heavy door and other architectural barriers."³⁰

When Dr. Balaban was at the Old County Jail facility, he was required to remain locked outside the nursing station any time when the nurses were away from the area.³¹ This reduced his ability to perform clinical duties and also made it hard for him to reach an accessible restroom facility.³² After the OCR discussed this practice with DCHD, the policy was changed, and Dr. Balaban was allowed access to the nursing station at all times.³³

In April 1980, Dr. Balaban was required to sign in and out each day, and no other employee was required to do so.³⁴ Disputes continued over

& Welfare, to Elliot Salenger, M.D., Dir., Dallas County Health Dep't (July 15, 1981) (on file with author) [hereinafter Second OCR Findings]. This letter was admitted into evidence for trial.

25. Council Decision, *Balaban v. Dallas County Health Dep't*, No. 1380 (Tex. Merit Sys. Council Aug. 8, 1980) (on file with author) [hereinafter Council Decision].

26. Second OCR Findings, *supra* note 24, at 2.

27. *Id.*

28. Council Decision, *supra* note 25, at 6.

29. *Id.* at 7.

30. *Id.* at 8. This decision was introduced into evidence at the trial. The Council Decision ordered that Dr. Balaban be reinstated "to a position, which is non-discriminatory with regard to physical handicap, in the class of Public Health Physician I . . ." *Id.* at 15. Interestingly, the Council made the following finding on one issue: "Appellant [Dr. Balaban] failed to sustain his burden of proof that his dismissal was in whole or in part because of his physical handicap." *Id.* at 14. Yet, in response to the next issue, the Council's next finding was: "We cannot say with certitude that Appellant's dismissal was in reprisal or retaliation" for the OCR complaints. *Id.* "However, all the uncontroverted evidence, from Dr. Salenger's misleading November 15, 1979 letter to HEW (Finding 1) through the unnecessarily cruel ejection of Appellant from his duty area upon dismissal (Finding 22), leads to an inescapable conclusion that Appellant was subjected to a continuing course of intimidation and harassment." *Id.*

31. *Id.* at 8.

32. *Id.*

33. Second OCR Findings, *supra* note 24, at 2.

34. *Id.* at 4.

whether Dr. Balaban ever slept on the job³⁵ or had received permission to leave work for scheduled weekly blood work.³⁶ Dr. Balaban received warnings from the Director about various times when, according to the Director, Dr. Balaban had violated time policies.³⁷ But, according to the OCR findings, “Dr. Balaban was subject to a different method of supervision from that of other employees[,] which contributed to what [DCHD] consider[ed] his failure to comply with established procedures.”³⁸

Four hours after he reported to work on June 5, 1980, Dr. Balaban was verbally informed that he was terminated, effective immediately.³⁹ He was instructed to vacate the jail premises, escorted from the jail by Sheriff’s deputies, and transported home in a prisoner transit vehicle.⁴⁰ He then received notice of the termination by letter dated June 4; the letter stated that he was terminated immediately given “frequency of abandonment of [his] position, lack of reporting [his] tardiness and early departures to [his] supervisors, sleeping on duty, and inappropriateness of [his] medical decisions.”⁴¹

The OCR concluded that “the Dallas County Health Department [had] subjected Dr. Balaban to a pattern of retaliation and harassment.”⁴² The OCR ordered several actions, including reasonable accommodations, an “appropriate chair and desk, a telephone, and any other basic office equipment necessary to the performance of his duties,” and clarification of his duties and supervisors.⁴³

The DCHD responded to the OCR with a letter strongly disagreeing with the findings and the necessity of the remedial steps. The DCHD believed that the OCR had not “fully investigated Dr. Balaban’s actions or activities with respect to his ability to provide medical care and his responsiveness to report on time, and his inappropriate excuses for leaving his position uncovered repeatedly within Dallas County health facilities.”⁴⁴

35. *Id.* at 5.

36. *Id.*

37. *See id.* at 3–7.

38. *Id.* at 6.

39. *Id.* at 8.

40. *Id.*

41. *Id.* at 7 (quoting a letter from DCHD to Dr. Balaban).

42. *Id.* at 8.

43. *Id.* at 8–9.

44. Letter from Dallas County Health Dept. to David A. Coronado, Reg’l Dir. of the Office of Civil Rights (July 22, 1981) (on file with author). This letter was introduced into evidence at the trial.

The letter also expressed the Director's serious concerns about Dr. Balaban's physical and mental disabilities.⁴⁵

In 1982, when our firm filed the suit, Dr. Balaban was no longer working for the County. His health had deteriorated to the extent that he was bedridden and blind. (This was before the significant number of drugs and therapies that can now modify the course of the disease.)⁴⁶

The Civil Division of the Dallas County District Attorney defended the case, along with a firm that represented the Director individually. The case was hotly contested throughout discovery, pre-trial motions, and trial. The case went to trial in federal court on April 4, 1985. Our team included two lawyers: myself and a young partner at the firm who was a very talented trial lawyer.

The judge's rulings on pretrial and trial motions were (in our opinion) correct. For instance, despite the defendants' Motion in Limine on the matter, the judge allowed into evidence both of the investigative reports of the Office of Civil Rights. He also allowed testimony from the investigators. We were permitted to introduce into evidence copies of the nurses' log of notes on Dr. Balaban.

Unsurprisingly, the parties differed greatly on the proper form of the jury charge. The County had submitted proposed jury instructions and questions that were highly particularized.⁴⁷ Yet the court opted for a simpler approach that, in our view, was legally appropriate and much better for our case.⁴⁸

45. *Id.*

46. NATIONAL ACADEMY OF SCIENCES, *supra* note 7, at 21 ("In recent years, progress in MS research has accelerated The 1990s saw the development of the first therapies that can modify the course of the disease. Admittedly, these therapies are not a cure, nor do they work equally well for all patients, but they are a major breakthrough.") According to this 2001 report on the disease and its future treatments, the treatments developed in recent years include: "the beta-interferons . . . [which are] anti-inflammatory agents that suppress cell migration into the central nervous system (CNS); and glatiramer acetate (Copaxone), a mixture of peptide fragments thought to act as a decoy for the immune system to spare myelin from further attack"; and "development of neuroimaging techniques that allow much more sensitive detection of pathological changes associated with the MS disease process than was possible in the past." *Id.* at 20. For a list of current and emerging treatments as of 2001, see *id.* at 387-400 app. E.

47. Under the County's proposed approach, the jury would receive a list of eleven actions (such as the 1979 firing, subjected to different leave requirements, etc.). Defendant's Proposed Instructions to the Jury and Special Interrogatories, *Balaban v. County of Dallas*, No. CA3-82-2169-G (N.D. Tex. Mar. 27, 1985) (on file with author). As to each, the jury would have to say "yes" or "no" as to whether: the action occurred (unless the defendants admitted it); Donald Balaban was an otherwise qualified handicapped person at the time of the particular action; the action constituted discrimination; and, at the time of the action, the County employed the plaintiff in a program or activity receiving federal assistance. *Id.* The same particularized approach would then apply to assessment of damages. See *id.*

48. Court's Charge to the Jury, *Balaban v. County of Dallas*, No. CA3-82-2169-G (N.D. Tex. Apr. 12, 1985) (on file with author) [hereinafter Court's Charge].

The first several questions related to our strongest claim: the section 504 claim. Basically, the court's charge included four relatively simple questions on liability under section 504.

Question Number One: "Was Balaban an 'otherwise qualified handicapped individual' with regard to the position he was hired for by the Dallas County Health Department in May, 1977?"⁴⁹ The question then referred to earlier pages in the charge for other instructions, including a discussion of "otherwise qualified" as meaning a handicapped individual who, "with reasonable accommodation, . . . can perform the essential functions of his job despite his handicap."⁵⁰

We were a little worried about how the jury would answer this question because it required the jurors to envision Dr. Balaban's condition when he first started to work for the county, rather than the bedridden and blind condition in which he appeared in his videotaped deposition.

Question Number Two: "Did Salenger subject Balaban to discrimination solely by reason of Balaban's handicap?"⁵¹ This was followed by an instruction stating that Balaban would need to prove that Salenger himself discriminated, or that he knew of, and approved or acquiesced in, such discrimination.⁵²

Question Number Three: "Did the County, through its official policy, subject Balaban to discrimination solely by reason of Balaban's handicap?"⁵³ This was followed by an instruction about the basis for finding an "official policy," which could include actual or constructive knowledge attributable to "an official to whom [the County had] delegated policy-making authority."⁵⁴

We were optimistic about the answers to Questions Two and Three. A "yes" answer to Question Two would be proper if the jury found that even one action—one of Dr. Salenger's many actions over time—constituted discrimination solely on the basis of handicap. And, if Question Two received a "yes" answer, then we were confident about a "yes" answer for Question Three, given that Dr. Salenger was the Director of the DCHD.⁵⁵

49. *Id.* at 15.

50. *Id.* at 13.

51. *Id.* at 15.

52. *Id.*

53. *Id.* at 16.

54. *Id.*

55. Question Number Four asked the jury whether the DCHD employed Balaban "in a program or activity receiving Federal financial assistance at the time of any discrimination [it] may have found." *Id.* at 18. We felt confident about this issue as well because the judge—correctly, we

After these basic liability questions,⁵⁶ the charge contained questions relating to several affirmative defenses—namely, good faith and statute of limitations. Then Questions Eleven and Twelve related to compensatory damages and punitive damages.

We had concerns about the compensatory damages issue, given the difficulty of finding proof to separate the inevitable physical decline caused by his illness from the added physical deterioration caused by the discrimination and resulting stress. And, understandably, it was hard to predict the range of damages that the jury might find for mental anguish or stress alone.

Although I cannot find the docket entries to show the length of time the jury deliberated, my memory is that the jury was back with a verdict in less than two hours.

On Question One—which we had worried might pose a problem given how severely impaired Dr. Balaban was during his video deposition—the jury answered that, “yes,” Donald Balaban was a qualified handicapped person when he was first hired by the County.

But on Questions Two and Three—the basic liability questions—the answers were both “no.” It followed, then, that the remaining questions either went unanswered or received a “no.”

III. WHAT CAN LAW DO?

Needless to say, the verdict was shocking and disappointing. I was terribly sad for my client, who obtained no public vindication, and who also lost out on compensation that could have funded additional care which might have improved the quality of his final years. In addition, the case broke something in my young lawyer’s heart.

At the heart of this deep disappointment was a question about the purpose of law. This particular anti-discrimination law had been drafted and implemented for a purpose that seemed incontrovertibly good. But in this case, in the end, the legal system had produced no benefit to the client. Indeed, invoking the law and litigating under it might even have worsened Donald Balaban’s situation. If a law such as this one—aimed on its very

believed—had instructed the jury on this in a way that we had easily established. According to the instructions, a “program or activity” receiving federal assistance could include, among others, a state or any political subdivision, or any instrumentality of the state or its political subdivisions. *See id.* at 13.

56. After the four liability questions, the Charge also included two questions relating to a second statutory claim based on 42 U.S.C. § 1983. *Id.* at 21–22. But an affirmative finding on this was premised on an affirmative finding of liability under section 504, with an additional finding that the defendants were acting under color of state law. *See id.*

face at justice—seemed to make no difference in a case, then what is the purpose of that law?

Stating this question now is somewhat embarrassing. Obviously, progress is not measured by a single case. The accomplishments and limitations of disability-related discrimination laws are topics examined in a rich, scholarly literature.⁵⁷ Thus, to state these questions here seems both simplistic (given the complexity of the law and its progress) and grandiose, with a hint of self-pity and self-absorption.

But that question was my real question at the time. It was a spiritual question relating to law and lawyering. What can a lawyer believe about, and hope from, law itself?

As noted, this Essay will develop three points: (1) that there are different answers to this question; (2) that the answers matter not just to theologians but to lawyers of faith because our answers can shape our expectations about law practice and how we see our purpose in practicing law; and (3) that, though the answer is important as a starting point, we will need more to sustain our lawyering journeys.

This next part of the Essay discusses the first two points together. It starts by explaining the natural law background that formed my approach to law practice as a young lawyer. In addition, it shows how this viewpoint affected my expectations and thoughts about God and human law—how it formed a kind of “faith within faith.” I will contrast this viewpoint and its effects with another viewpoint, which this Essay terms a “Lutheran” point of view.

After discussing the natural law, the Lutheran viewpoints, and how they can matter, the Essay turns to the last point. This last discussion will start by asking whether either of these approaches is more sustaining or explanatory over the long run, and it will discuss what else we need as we try to cooperate in God’s justice through our imperfect practice of imperfect human law.

The accounts of these two viewpoints—the natural law view and the Lutheran perspective—are necessarily limited. The descriptions here, at best, capture some central themes of these approaches. But both approaches are the subject of a vast and sophisticated theological dialogue that is centuries old and that continues to the present day. This Essay contends that

57. See, e.g., Samuel R. Bageustos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147 (2000).

these viewpoints can lead to different working accounts, different “faiths within the faith,” about what law can accomplish. Clearly though, neither viewpoint necessarily dictates a particular working understanding about what law can accomplish. Rather, the Essay tries to show that different working accounts can follow from different theological premises, and that these working understandings deserve attention and insight.

IV. DIFFERENT ANSWERS, AND WHY THEY MATTER

A. *The Natural Law Viewpoint*

One does not need to hold a natural law worldview to find the result in Donald Balaban’s case sad and unjust. Almost any lawyer who handled this case would have had these reactions. But, although I did not realize this at the time, the way I processed the verdict was through the natural law viewpoint that had been integral to my faith formation.

As a student in Catholic schools until high school graduation, I grew up learning the Baltimore Catechism,⁵⁸ and studied Thomas Aquinas in high school. Although at the time I did not perceive my faith formation as being influenced especially by natural law as distinct from some other model, the natural law perspective was my strong, guiding light.

Although many readers of this Essay are familiar with that model, and some have studied it deeply, let me recount its major points.⁵⁹ First, God’s

58. The Baltimore Catechism is a textbook of Catholic doctrine approved in 1885 by the Third Plenary Council of Baltimore. THE THIRD PLENARY COUNCIL OF BALTIMORE, A CATECHISM OF CHRISTIAN DOCTRINE Nos. 1–4 (Tan Books & Publishers 1974) (1885). According to the Note accompanying No. 3, it was “intended to furnish a complete course of religious instruction” for Catholic children. Much of the Catechism was in question-and-answer format.

59. The term “natural law” in this paper is limited to the Roman Catholic model. A large body of legal and philosophical writing in recent years has explored natural law as a theory of rights or jurisprudence that is not necessarily premised on faith in God. A clear explanation of the links between natural law and belief in God appears in Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 182 (2008):

The question then arises: can natural law—assuming that there truly are principles of natural law—provide the basis for a regime of human rights law without consensus on the existence and nature of God and the role of God in human affairs? In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights. These grounds remain in place whether or not one adverts to the question whether there is a divine source of the moral order whose tenets we discern in inquiry regarding natural law and natural rights. I happen to think that the answer to this question is yes But we do not need agreement on the answer, so long as we agree about the truths that give rise to the question—namely, that human beings, possessing the God-like (literally awesome) powers of reason and freedom, are bearers of a profound dignity that is protected by certain basic rights.

For other contemporary discussions of natural law jurisprudence, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2006). For discussion of the role of natural law originalism in constitutional analysis, see Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century—A Principle of Judicial*

law is the Eternal Law. It is perfect and unchanging; it is not subject to time and place but is eternal.⁶⁰ “[T]he whole community of the universe is governed by Divine Reason . . . [S]ince the Divine Reason’s conception of things is not subject to time but is eternal . . . this kind of law must be called eternal.”⁶¹

Second, humans have the ability, through the light of natural reason, to discern and understand, to some degree, the Eternal Law of God. As so discerned, this is called the natural law. Natural law does not take the place of the law revealed in Scripture; the latter is what Aquinas terms “Divine Law,” and it also is one way in which Eternal Law is revealed to humans.⁶²

The natural law is the law that humans can discern, through the light of natural reason, about the Eternal Law.

Wherefore [the rational creature] has a share of the Eternal Reason, whereby [the rational creature] has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law . . . [T]he light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.⁶³

Restraint, Not Invention, 40 SUFFOLK U. L. REV. 383 (2007).

60. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Question 91, First Article, *reprinted in* ST. THOMAS AQUINAS, *TREATISE ON LAW*, at 13 (Gateway ed., Eighth Printing 1970).

61. *Id.* at 12–13.

62. In the Fourth Article of Question 91, Aquinas discusses the Divine law. AQUINAS, *supra* note 60, at 22. He explains that there is a need for Divine law in addition to natural law. Natural law allows humans to participate in the Eternal Law only “proportionately to the capacity of human nature.” *Id.* Thus, God directly gives Divine law in scripture. “[T]o his supernatural end man needs to be directed in a yet higher way [than his natural capacity allows]. Hence the additional law [Divine law] given by God, whereby man shares more perfectly in the eternal law.” *Id.*

63. *See id.* at 15. As expressed in one major treatise on Catholicism, the Catholic tradition “insists that *human reason*, reflecting on human nature and human experience, can also arrive at a true moral wisdom and knowledge that holds not only for Christians but for all people.” RICHARD P. MCBRIEN, *CATHOLICISM* 959 (1994). Also, consider the following from the encyclical issued by Pope John XXIII at the start of the Second Vatican Council, *Pacem in Terris*.

But the world’s Creator has stamped man’s inmost being with an order revealed to man by his conscience; and his conscience insists on his preserving it. Men “show the work of the law written in their hearts. Their conscience bears witness to them.” And how could it be otherwise? All created being reflects the infinite wisdom of God. It reflects it all the more clearly, the higher it stands in the scale of perfection.

Encyclical from Pope John XXIII, *Pacem in Terris* 5–6 (Apr. 11, 1963), available at <http://www>.

Third, in addition to Eternal Law, Divine Law, and natural law, human law is necessary. Natural reflects general principles, and more particular determinations are necessary for the real world.⁶⁴ Human law is connected to natural law (and thus Eternal law): “[Human] laws, insofar as they partake of right reason, are derived from the [E]ternal law.”⁶⁵ This does not mean that human law is perfect; indeed, a human law might be unjust.

Fourth, one effect of human law can be to make people good. “[T]he proper effect of law is to make those to whom it is given, good.”⁶⁶ It can do so by reinforcing, preserving, and fostering virtue that already exists. And human law, by requiring certain acts, thus creates a habit of those acts.⁶⁷

Taken together, these points could yield, for the young lawyer formed in this view, an underlying theological narrative along the following lines:

The practice of law is a way to make the world better. Human laws might be flawed, but by participating in a human legal regime, I have a chance to make the world better in a way that fits with God’s purposes for a better world. This is because the human laws, at their best, are applications of the natural law, and the natural law is derived from Eternal law. By natural reason and effort, by participating in and improving human law, I help bring the world more into conformance with natural law and thus with Eternal law.⁶⁸

This model was not just something that I had studied and understood intellectually. It was a “faith within my faith.” It shaped my expectations and understanding about the connection between law, legal practice, God’s plan, and God’s justice.

vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html (last visited Feb. 3, 2009).

64. “[F]rom the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws.” AQUINAS, *supra* note 62, at 18.

65. *Id.* at 44.

66. *Id.* at 31.

67. *Id.* at 32. Aquinas recognizes that a person does not always obey the law because this is the right thing to do, but only given fear of punishment. But even this can create a habit. *Id.*

68. A superb discussion of the differences between Roman Catholic and Reformation views about humankind’s nature, as well as the significance of these differences for theories about ethics and law, can be found in numerous parts of the three volume work by the German theologian Helmut Thielicke. See 1–3 HELMUT THIELICKE, THEOLOGICAL ETHICS (William H. Lazarath ed., Wm. B. Eerdmans Publ’g Co. 1979) (1966). In Chapter 11 of Volume I, Thielicke outlines in detail the differences between Roman Catholics and Protestants over the original state of nature of humans, and what this implies for theories of ethics. See 1 *id.* at 195–221. The Chapter is titled: “The Evangelical–Roman Catholic Debate on Creation and the Original State.” *Id.*

Law can move the world along the trajectory towards justice. Civil rights laws, including the disability discrimination law, can create this movement in several ways. These laws prevent some acts of wrongdoing simply given the power of the prohibition alone.⁶⁹ And, when wrong occurs anyway, the law helps correct—via injunctions or via money damages for harm caused.⁷⁰ So, even if this antidiscrimination law never alters the hearts or minds of anyone with respect to disability, it will prevent some wrongdoings (by threat of sanction), and it will alleviate the effect of wrongs that do happen.

The effect of a good law goes beyond its corrective and restraining power. Within the natural law viewpoint, each newly discerned principle of God's order is a piece of new knowledge that, in turn, we can all see more clearly because it is now articulated. Sometimes it is articulated in books or in church doctrines. But sometimes it is articulated in human law. And, when an anti-discrimination principle is both discerned and articulated in law, its power to affect the world's trajectory is not just via the force of sanction. Rather, an articulation of a law that shares in the Eternal law has some power to move our hearts, to help us move towards it. Such a principle is like a candle: once it is articulated, as for instance in law, then the candle is lit and people are drawn toward it—not perfectly, not inevitably, yet to some extent.

Even granting this viewpoint, however, isn't it an overreaction to be knocked completely off stride by one episode of injustice? Certainly, no single case can invalidate the natural law model; the adverse verdict we received did not *theoretically* or *theologically* undermine the natural law model.

But the natural law model does not just sit on the shelf as theology or theory. Like any theology that truly becomes part of our faith education, the natural law model can shape the lens through which we see and interpret our world.

This is why a lawyer formed within a natural law framework could experience the Balaban verdict not just as a sad and unjust result, but also as a tremor within her theological world view. True, the natural law viewpoint is no guarantee against injustice or even systemic injustice.⁷¹ But it does

69. See *supra* note 2.

70. See, e.g., 29 U.S.C. § 794 (1982).

71. A point that needs to be clarified here is the relation between natural law and the problem of theodicy. As described in the text, a person formed within a natural law viewpoint might be more optimistic about the trajectory of justice in this world. This might suggest that the natural law model has a particular approach to the problem of evil—for instance, that natural law theology would

posit a real connection between human law and Eternal law, and it does posit that the articulation of this law can move people's hearts and minds towards the good. Thus, natural law is a theology of expectation about the effects of human law. For the young lawyer formed in this viewpoint, the clash between the legal system in practice and the natural law viewpoint was real.

So perhaps the clash signals that the natural law viewpoint is misguided. Indeed, maybe this faith within my faith is misleading. It tempts me to focus on changing the world or getting the result I think is the right one—winning this case or this disability benefit. It tempts me towards anger when what I view as justice does not prevail. And it leads me to false optimism about my own ability to discern what the just or right result is.⁷²

Without yet deciding whether the natural law viewpoint is misguided and misleading, it seems appropriate to ask whether there is another answer to the question of what we can believe about, and hope from, law.

B. The "Lutheran" Viewpoint

Although I did not realize it then, natural law is not the only viewpoint through which to see this question. Many Christians have quite different views about the relationship between God's divine order and what humankind can discern and accomplish in this world. Let me very briefly outline one of these, what I will call a "Lutheran" point of view, even though it is not specific to Luther and does not capture Luther's thought in all its nuance.⁷³

expect an inevitable "closing of the gap" between human law and Eternal law, and thus expect less evil over time. But this is not the position of natural law theology. The question of theodicy looms over all theologies, and natural law theory does not rule out one approach over others. However, a natural law perspective (and any other theological perspective) probably does affect how a person views various "answers" to the problem of theodicy. Theodicy challenges all theologies, asking about the presence of injustice, evil, and suffering in God's world. But questions are shaped in part by constructs within the questions. For instance, a follower of the Manichean school, one of the Christian heresies that Augustine found attractive in his early years, might be asked why evil exists in a world created by God. For the Manichean, the answer would be that evil is the creation of a different creator, who created all the evil and bad matter in the world, while God created only the good. For many Judeo-Christian thinkers, the question of evil has been asked against a backdrop in which God has three qualities: all-knowing, all-loving, and all-powerful. At times, thinkers address the problem of evil by modifying the premise of omnipotence. According to theologian Dorothee Soelle, writers and theologians as diverse as Elie Wiesel, Abraham Heschel, Rabbi Harold Kushner, and Dietrich Bonhoeffer "conceive[] of God as love, but not as omnipotent." DOROTHEE SOELLE, *THEOLOGY FOR SKEPTICS: REFLECTIONS ON GOD* 65 (Augsburg Fortress Publishers 1995) (1992).

72. Cf. 1 THIELICKE, *supra* note 68 at 252–53. Here, he refers to some of the implications of the critique he has elaborated in the previous two chapters, relating to Roman Catholic theology about the nature of humans. Under the Protestant view, as distinct from Roman Catholic theology, "there is no positive natural 'disposition,' and . . . the supposed 'positive' endowments [under Roman Catholic theology] give rise to pharisaic presumption and self-confidence which are a hindrance to grace . . ." *Id.* at 253.

73. Some of what follows draws on the Book of Concord. The Book of Concord is the

The Lutheran view is skeptical that humans, by the light of divine reason imprinted by God, can discover or understand God's Eternal Law by discerning the imprint of that law in this world.⁷⁴ As the Christian ethicist

compilation of the various statements of creed that have guided the Lutheran Church since the publication of the Book of Concord in 1580. See *CONCORDIA: THE LUTHERAN CONFESSIONS* (Paul T. McCain, 2d. ed. 2005). Each book or portion of the Book of Concord has its own history. Among the books included in it are two Catechisms authored by Martin Luther, the Small Catechism and the Large Catechism, both written in 1529. See *id.* at xxxi (giving an overview of documents in the Book of Concord). Also included is the Augsburg Confession, completed in 1530, which is "[o]ften viewed as the chief Lutheran Confession." *Id.* The first presentation of the Augsburg Confession was nine years after Martin Luther had been excommunicated and sentenced to death as a heretic. Yet within a few years, the Reformation had spread to such an extent that eventually the Emperor Charles V ordered an Imperial meeting to resolve the disagreements throughout the Empire. See *Editor's Introduction to the Augsburg Confession, in CONCORDIA, supra*, at 21–22. The Augsburg Confession was presented to the Emperor on June 25, 1530 as the expression of faith followed by Lutherans, and it has "never been withdrawn." *Id.* at 25. The Emperor disputed the Augsburg Confession by producing a "Confutation" of the Confession and demanding that the Lutherans concede. Yet the Lutherans replied with a document primarily drafted by Philip Melancthon, known as the Apology of the Augsburg Confession. The Apology contains a detailed response to the Roman Catholic disagreements with the Augsburg Confession. See *Editor's Introduction to the Apology of the Augsburg Confession, in CONCORDIA, supra*, at 69–70.

Still another major document in the Book of Concord is the Formula of Concord. This had several authors, and was completed in 1577. By this time, Lutherans had become divided over some of the teachings in the Augsburg Confessions. The purpose of the Formula of Concord was to restate some of the key teachings that had become the subject of disagreement. See *id.* at xxxii. The unabridged version of the Formula of Concord is known as the Solid Declaration, and the abridged version is known as the Epitome. See *id.*

74. For a detailed critique, from a Protestant perspective, of the Roman Catholic view of natural law, see 1 THIELICKE, *supra* note 68, at 420–33. This is not to say that Luther, Calvin, or other Protestant Reformers and theologians have rejected the existence of natural law. Rather, much of the disagreement relates to how "fallen" humankind is, an issue that in turn affects how one sees human reason as participating in or bearing the imprint of Divine Reason. Reinhold Niebuhr's classic, *The Nature and Destiny of Man*, concludes that a doctrine of "total depravity" is not really representative of most Protestant thought. REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN, VOLUME I: HUMAN NATURE* (1941). He notes that Protestant thought has sometimes made "extravagant statements of man's depravity," and then has "confused the effort to moderate such statements by the admission that some little power of justice remained to man." *Id.* at 268. See also MCBRIEN, *supra* note 63, at 181 (noting that "historical studies have shown that the positions of Luther, Calvin, and Melancthon were more nuanced than first appeared"). A good explanation of how John Calvin's thinking (which recognizes natural law) departs from the Catholic view on natural law appears in C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 *J.L. & RELIGION* 225, 235 (2007):

First, Thomas [Aquinas] stated that the relationship between the human and the divine was one of participation. Nothing in Calvin's writings suggested that he shared Thomas's belief in a metaphysical continuity or chain of being from God through man to all of creation. Second, Thomas specified human participation in the divine in terms of the faculty of reason. Participation in reason provided the epistemic counterpart to metaphysical participation in being and Calvin made no more use of the former than the latter.

Paul Ramsey has explained, Catholic theologians recognize the grave effects of sin, but “deny that sin seriously affects man’s grasp and exercise of the first principles of natural reason.”⁷⁵ By contrast, “Luther and Calvin opposed this limitation of the injurious effect of sin upon man’s nature.”⁷⁶ Rather, the Reformers’ view was that “sinfulness spiritually pervades the whole self with all its human capacities fully intact yet all alike under the sway of sin.”⁷⁷

Within the Lutheran viewpoint, a vast theological history is associated with the uses of law. The phrase “Law and Gospel” often denotes this complex history and theology. “Law” within this theological debate refers not so much to positive law, but to the moral law or the Ten Commandments.⁷⁸ Thus, the notion of law within this extensive literature is not primarily about the meaning, purposes, or ends of civil or criminal positive law in this world. Yet, in focusing on the purposes and limits of the moral law or the Ten Commandments, the Lutheran viewpoint has implications for the purposes and limits of positive civil or criminal law.

Under the Lutheran view, the law clearly has two uses—what Lutheran theology calls the first use of the law and the second use of the law. The first use of the law is to restrain evil. “[E]xternal discipline and decency are maintained by it”⁷⁹

The second use of the law is as a spiritual reminder to humans of how they fall short of God’s will and how they need God’s grace. This second use of law, then, is to be a spiritual taskmaster—to expose and remind us of our shortcomings and our utter dependence on external grace for any movement towards goodness.⁸⁰

75. PAUL RAMSEY, *BASIC CHRISTIAN ETHICS* 282 (1953).

76. *Id.* Cf. John Calvin, *Institutes of the Christian Religion*:

While experience testifies that the seeds of religion are sown by God in every heart, we scarcely find one man in a hundred who cherishes what he has received, and not one in whom they grow to maturity

That seed, which it is impossible to eradicate, a sense of the existence of a Deity, yet remains; but so corrupted as to produce only the worst of fruits.

JOHN CALVIN, *A COMPEND OF CALVIN’S INSTITUTES* 8–9 (Hugh Thomson Kerr, Jr. ed., 1939).

77. RAMSEY, *supra* note 75, at 283.

78. “[I]n this discussion, by *Law* we mean the Ten Commandments, wherever they are read in the Scriptures.” *Apology of the Augsburg Confession, Art. IV, in CONCORDIA, supra* note 73, at 73, 83.

79. *The Formula of Concord, Art. VI, in CONCORDIA, supra* note 73, at 503, 557–58. As explained in one recent discussion of the three uses of law, “[i]n Lutheran theology . . . [t]he *first use* of the Law is the threat to punish sin with temporal and eternal penalties. The first use is for unbelievers for whom threats of punishment can coerce only into outward obedience.” SCOTT R. MURRAY, *LAW, LIFE, AND THE LIVING GOD: THE THIRD USE OF THE LAW IN MODERN AMERICAN LUTHERANISM* 13 (2002) (emphasis in original).

80. “The *second use* of the Law is the distinctively theological use of the Law that lays bare human wickedness and makes clear the need for a Savior.” MURRAY, *supra* note 79, at 13–14. According to the Formula of Concord, the second use is that, “through the preaching of the

In the earliest formulations of the various documents that formed the *Book of Concord*, a possible third use of the law also appeared. The validity of this third use has remained a subject of debate from these early formulations to the present. The third use is a teaching function of the law, in which law can direct the believer and help him or her live in obedience and gladness. So the law is not just a “stick” to beat us (the second use) but also a “cane” that the believer can use to help walk the Christian life.⁸¹

Thus, the Lutheran perspective is considerably more skeptical than the Catholic natural law perspective about the effects of moral or justice-based mandates. As summarized in Helmut Thielicke’s major work on Theological Ethics:

Reformation theology takes a different path [than the Catholic approach]. Perceiving the total permeation of creation by sin, it recognizes neither an intact component of existence nor . . . an ideal order of nature and creation in which this component of existence might be objectified and over whose “foundation,” “interpretation,” and “application” the church should exercise “watchfulness.” Reform theology thus finds in the Law of God for the fallen world, not directives for a positive order, but primarily a negative protest against disorder.⁸²

The Lutheran view, then, reflects grave doubt about any connection between natural law and human law, and also doubts that ethical commands (e.g., the Ten Commandments) can influence behavior.⁸³ From this view, one could derive the following narrative about the possible function of law in this world: We are quite incorrect to think that discerning or improving

Law . . . the hearts of impenitent people may be terrified, and . . . they may be brought to a knowledge of their sins and to repentance.” *The Formula of Concord, Art. VI, in CONCORDIA, supra* note 73, at 503, 557.

81. See RAMSEY, *supra* note 75, at 282–83. According to the Formula of Concord, this third use is as follows: “[W]hen people have been born anew by God’s Spirit, converted to the Lord, and Moses’s veil has been lifted from them, they live and walk in the Law . . .” See *Formula of Concord, in CONCORDIA, supra* note 73, at 558. But the *Formula of Concord* also noted the dispute over this third use. “A disagreement has arisen between a few theologians about this third and final use of the Law.” *Id.* These theologians argue “the regenerate do not learn the new obedience (in what good works they ought to walk) from the Law.” *Id.* Rather, only the “prompting and impulse of the Holy Spirit” causes good works, “just as the sun by itself (without any [foreign] impulse) completes its ordinary course in the sky.” *Id.*

82. See 2 THIELICKE, *supra* note 68, at 548–49. The phrases in quotes are taken from an address by Pope Pius XII in 1954. See *id.* at 548.

83. See *id.*

human law can help society or humankind to move closer to God, God's will, or God's justice. The way to improve society, to bring God's kingdom here to earth, is through individual conversion and life in the churches and family. We are sorely mistaken if we hope that human law, or its improvement, will help bring God's justice. Indeed, we can be more than mistaken, we can be misled.⁸⁴

What if this approach had been my faith framework—my “faith within the faith”—during the Balaban trial? Would this have mattered, and if so, how?

I can address this question only with a thought experiment, because I was not formed in this viewpoint and also might not understand it completely. But it seems that the experience of law's failings would have clashed less with a Lutheran view than a natural law view. Formed in a Lutheran view, I would have been more skeptical about what the law could accomplish. I would have been less certain about the power of my own reason to discern the “right” result. I would have been more attentive to law's function as simply restraining us from doing the wrong thing, and thus would have more readily seen that the Balaban litigation might have restrained the County from similar behavior in the future.

Thus far, this Essay has developed two points. One is that there are different theological answers to the question of what we can believe about, and hope from, law.⁸⁵ A second is that these answers can matter in shaping how a lawyer of faith sees the role and possible effects of human law.⁸⁶ Granted, these points have been developed in connection with one case result, at one point of time in a young lawyer's life. But the aim thus far has not been to trace fully how these theological viewpoints could play out over

84. If this narrative were taken to an extreme, then it would lead to withdrawal from the effort to engage the world in social reform efforts. Thus, the narrative in text is not meant to imply the extreme consequence of the narrative. In a famous text, Carl F. H. Henry critiqued the strain of fundamentalism and evangelicalism that had led to systematic non-engagement with the world. He did not disagree that these movements were correct in their starting doubts about the nature of man. “Of all modern viewpoints, when measured against the black background of human nature disclosed by the generation of two world wars, Fundamentalism provided the most realistic appraisal of the condition of man.” CARL F. H. HENRY, *THE UNEASY CONSCIENCE OF MODERN FUNDAMENTALISM* 7 (2003). Yet these thinkers remained preoccupied with individual sin rather than “social evil.” *Id.* Thus,

the evangelical is convinced that the non-evangelical [social reformers] operate within the wrong ideological framework to make achievement a possibility He believes the liberal, the humanist, and the ethical idealist share a shallow sense of the depth of world need and an over-optimism concerning man's own supposed resources for far-reaching reversal even of admitted wrongs.

Id. at 15.

85. See *supra* Part IV.

86. See *supra* Part IV.

time. The next section of the Essay will include a longer view of how these viewpoints can matter over time.

V. THE LONGER JOURNEY: IS EITHER VIEWPOINT BETTER?

Because we see that different models can shape our experiences and expectations about law, we understandably might ask whether one is better. I have asked this question over time as both my legal experience and my theological knowledge have grown, however imperfectly.

In asking which one is better, we could be referring to a theological assessment about natural law, the Reformation view, or nuanced versions of each of these. Systematic theology literature contains extensive work in this area. But the question we are asking is more pastoral- and lawyering-related than systematic: for a lawyer of faith, is there any “faith within faith” about law that is more explanatory and sustaining as to the ends or purposes of law and lawyering?

Although I have thought about this question for some years, I now think it might be the wrong question. The question has two failings. But, by seeing these failings, we can also construct a better set of questions and insights into a lawyer’s “faith within faith” about the role and purposes of law.

One failing is that, even if we could answer the question, the answer might not have much effect, at least for many of us. We all carry with us various “faiths within the faith” of our Christian faith. These are not the creedal or foundational doctrinal points of our faith, but they are part of the deep identity through which we experience the world and God’s movement in the world and in our lives. The manner and “rooted-ness” of our faith formation shape these “faiths within faith” and their durability.

For many of us, and certainly for me, the framework of natural law or other theories is a deep thread in my faith fabric. So even if I concluded, intellectually and theologically, that a Lutheran viewpoint is more persuasive, it would be hard to unwind or extract that thread.⁸⁷ This is not an argument that certain theologies, once understood, can never be dislodged. Rather, the point is just that some “faiths within faith” for an

87. To illustrate, when I read Helmet Thielicke’s rich analysis of the natural law model and Reformation theology, and when I re-imagine handling the *Balaban* case while having a Reformation framework, the Reformation approach seems more theologically persuasive, and a better interpretive framework for the *Balaban* case. See 1 THIELICKE, *supra* note 68. But none of this really changes my deeper “faith within faith.”

individual merge with long-lived experience and are not altered by a theological or intellectual assessment.

The natural law viewpoint is my home; its sights and smells and fixtures are familiar to me, and they order and make sense of how I see the world. The Reformation narrative, by contrast, seems severe and lonely. It seems to paint a world that is more removed from who God is and what His justice might be. It is perhaps not a more pessimistic view, ultimately (given the role of grace), but it is more pessimistic about the natural world itself.

A second problem with the question is that, as the lawyer over time tries to connect the lawyering journey with God's justice, the lawyer will still have to find answers or sources of support in addition to what either model provides. The lawyer needs more "bread for the journey" than either model—however rich—gives on its own. So the better question after *Balaban* was not: "What is the right theology about what human law can do?" The question for any of us, under any larger theology about what law can do in this world, is: "How do I keep growing in the ability to cooperate with God's justice?"

This question calls for a process,⁸⁸ not an answer. Many of you here, and lawyers of faith everywhere, could give us insight into that process. Here are some of the insights that have been important and helpful to me.

First, no theology about the role and purposes of human law can give us enough guidance about the task, for each of us, of cooperating in God's justice. Indeed, if we try to find that guidance solely within the theological model, we might find ourselves not just lacking bread, but misguided and mistaken. The *Balaban* case is an example. My theology was not the problem; the problem was relying on this theology as an algorithm of how human law would work. Even after the verdict, my reaction was driven by this algorithm tendency, which in turn led either to despair ("so, it just doesn't matter what you do in law") or to constantly revisiting the question of what was wrong with the algorithm.

Second, we should be aware that any theology about the role of law can be misleading—either given its doctrine or, more likely (as in my case), how we have come to interpret it. Under my approach to law, I underestimated grace—its unpredictability, its lack of connection to visible "legal" improvements, and its mystery.⁸⁹ During the *Balaban* case, I focused on the

88. Much of the necessary process includes the good practices of any spiritual walk. The text tries to focus on the part of the process that might be especially related to lawyering.

89. This is a personal observation more than a theological point. The natural law narrative that was at the base of my formation surely included an important role for grace. But, in the narrative as I understood it, grace was more contiguous with nature. In giving this very brief description of my own understanding, I do not intend to minimize the great complexity of the debates among both Catholic and Protestant theologians about the relationship of natural law, human nature, and grace. For extensive discussion of the Catholic versus Reformers' view, see I THIELICKE, *supra* note 68, at

rightness of our cause, the wrongness of the County's cause, and what I expected would be the beneficial results of the certain legal victory. But if you were to ask if there were moments of grace in the case—if Dr. Balaban ever experienced some relief from suffering, a sense of hope, a sense of camaraderie, or some other a moment of grace—I do not know. I never felt one. I felt only certainty and righteousness, and then bitter disappointment. Maybe my eyes weren't trained to see these moments. I was expecting to see one step forward in the working of God's justice. When I did not see that, I saw nothing but lots of work that had all been for naught, and maybe all for the worse.

A wonderful example of certainty and rigidity about the relation of law and God appears in Victor Hugo's great novel, *Les Misérables*.⁹⁰ The example is the famous character of Inspector Javert. Javert pursues the escaped thief, Jean Valjean, throughout the entire book. He continues to pursue Valjean even though, at one point, Valjean saves Javert's life. In the last part of the book, Javert finally captures Valjean, and then grants Valjean's request that the carriage take him by for one last stop to Valjean's home.⁹¹ As Jean Valjean goes inside the house, Javert leaves, basically letting Valjean go free and giving up the quest for Valjean that has consumed so many years.⁹²

In an entire chapter of the book titled "Javert Off the Track," we see Javert in an inner struggle between the code that has defined his life—capturing the wrongdoer—and the act of mercy he has just performed:

His supreme anguish was the loss of all certainty. He felt that he was uprooted. The code was now but a stump in his hand. . . . There was within him a revelation of feeling entirely distinct from the declarations of the law, his only standard hitherto. . . . An entire new world appeared to his soul; . . . the possibility of a tear in the eye of the law, a mysterious justice, according to God, going counter to justice according to men.⁹³

222–49. As the Catholic theologian Richard P. McBrien has stated, "The problem of the relationship between nature and grace is as fundamental a problem as we will ever come upon in all of Christian theology." MCBRIEN, *supra* note 63, at 181.

90. VICTOR HUGO, *LES MISÉRABLES* (Henry Coates n.d.) (1884).

91. *Id.* at 176.

92. *Id.* at 180.

93. *Id.* at 193.

Third, we need to develop a working personal faith answer about the problem of evil and suffering. The lawyer is not uniquely challenged by evil and suffering; these are humankind's inherited and most challenging theological problems. But a lawyering life, like that of a minister or doctor or social worker, will take us to the side of clients in need. And this will often require us to be a witness to and a translator of suffering, and then to witness and translate what will often be law's limitations in addressing that suffering.⁹⁴

Fourth, whatever our theology is about the connection of human law and God's law, we need to have a theology of hope. The natural law viewpoint might be more hopeful about human nature than the Lutheran view,⁹⁵ but we have seen how it can yield to despair when expectations do not match up. Again, the need for hope is not unique to lawyers, but in the life of lawyering we will need a rich and intentional theology of hope. We work within private and public law regimes that often yield partial justice, and in which we often must try to win our clients' side of the dispute or transaction. Thus, we must guard against the presumption that we are right—that we can find and have delivered justice—and we must guard against despair. As the theologian Jurgen Moltmann has explained, both presumption and despair are inconsistent with hope.⁹⁶ "Hope alone is to be called 'realistic,'" he says, because:

it alone takes seriously the possibilities with which all reality is fraught. It does not take things as they happen to stand or to lie, but as progressing, moving things with possibilities of change. . . . [H]opes and anticipations of the future are not a transfiguring glow superimposed upon a darkened existence, but are realistic ways of perceiving the scope of our real possibilities.⁹⁷

VI. CONCLUSION

After the *Balaban* case, I alternated between two theological responses. At times, I kept trying to "solve" the link between God's justice and human

94. One semester, when I was teaching a writing seminar on Faith, Morality, and Law, a student came to meet with me, as required, to discuss the topic she had chosen for her final paper. Because she had already accepted a job, post-graduation, with the district attorney's child abuse prosecution section, she told me that she wanted to write a paper about evil and suffering. She made it clear that her goal was not to write about it as systematic theology, but to equip herself to go forward in practice.

95. See RAMSEY, *supra* note 75, at 282–83; see also AQUINAS, *supra* note 60, at 14–16.

96. JURGEN MOLTSMANN, *THEOLOGY OF HOPE: ON THE GROUND AND THE IMPLICATIONS OF A CHRISTIAN ESCHATOLOGY* 25 (James W. Leitch, trans., First Fortress Press ed. 1993).

97. *Id.*

law. At other times, I gave into some measure of despair about what civil rights laws could ever accomplish—a “why bother” response.

Both of these responses were incorrect. I did not have the “wrong” theology about the relation of God’s justice and human law. But I did lack attentiveness to the presence of grace, and I also lacked a theology of hope. Now, many years later, I can graft onto the case some claims of grace and hope. For instance, it seems plausible that the litigation invigorated Donald Balaban intellectually and psychologically, and that he valued our support and camaraderie. Possibly, the case caused changes in the County. But if any of this happened, I missed it because I was more intent on marching towards my own view of justice than on finding or helping participate in any moments of grace; I was driven by certainty, rather than by hope.

In the twenty-plus years since the *Balaban* verdict, I’ve been able to work on many cases that, like the black lung case in the D.C. Circuit, seek a benefit or right that matters greatly to an individual client even if the amount is not large by some standards. These include social security disability benefit claims; federal postal worker accommodation requests and federal postal workers’ compensation; individualized education plans (IEP) in public schools; and coverage under Medicaid.

And a natural law viewpoint is still the starting point in how I see the relation between God’s justice and human law. These human laws aim, however imperfectly, to carry out principles originating in Eternal Law, discernable by the light of natural reason: the dignity and worth of every person whatever his or her level of physical or mental ability; the obligation of the community to guarantee a basic standard of living to those whose disabilities prevent them from achieving this; the right to be free from violence and to protect one’s children; and the right to education.⁹⁸ And these laws, despite their limits, move us and our society closer to God’s justice. Our lawyering lives are not just holding patterns, a tending of the fences.

Yet, I no longer expect to see, in a given case or a stream of cases, proof that the human law has vindicated a natural law principle such as dignity, fairness, or freedom from violence. A belief in the connection between human law, natural law, and the Eternal Law cannot turn on a win–loss record. Indeed, focusing attention only on this connection is a recipe for either presumption or despair. We should believe that lawyering will bring unpredictable moments of grace. We should know that lawyering gives us a

98. This is not to say that concern about these issues can derive only from a natural law viewpoint; rather, this is my framework.

ministry of presence, an opportunity to sit next to someone who has fallen into the dark well of suffering even if the ropes of law are not long or strong enough to get them out.⁹⁹ And we should have an intentional hope that rejects both certainty and despair about what law can do in this world.

99. See DOROTHEE SOELLE, *THEOLOGY FOR SKEPTICS: REFLECTIONS ON GOD* 65 (Augsburg Fortress 1995) (1992) (discussing the imagery of sitting in the well in theological discussions).