JEWS, CHRISTIANS, LAWYERS, AND MONEY*

Thomas L. Shaffer**

By any honest estimate, we who have done well in the lottery of life, who have profited from the mating dance of genes and the unlikely chance of our birth, are rare. The rest are poor, some wiped out by tidal waves, some sacrificed on the altars of nation and militarism, many maimed during birth itself. The physical evils attendant upon evolution's cunning and nature's power are matched by the horrific intentions of the human mind.

John F. Kavanaugh[1]

Years ago, when I was the resident guru in legal ethics at Washington and Lee University, in the little mountain town of Lexington, Virginia, a reporter from the daily newspaper in Roanoke asked me to identify the most serious ethical issue for American lawyers. My answer: "Money."

Part of that answer reflected the fact that American lawyers make about twice as much money as lawyers in other "developed" countries.[2] And American lawyers make, on the average, fifty percent more than average Americans do.[3] (Reference to averages and means here do not reflect how steep the incline is from the middle to the top in American lawyer incomes.)[4]

---

* This is an expanded text of the Waterman Lecture given at the Vermont Law School, Apr. 13, 2000. For a description of the Waterman Lecture series at Vermont Law School, see Stephen Dycus, *Introduction to the Sterry R. Waterman Lectures*, 25 VT. L. REV. 449 (2001).

** Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic, South Bend, Indiana; member of the Indiana Bar.

1. *Humanity's Cross*, AMERICA, Apr. 22, 2000, at 23.

2. "While the highest-paid English solicitor earns £700,000 a year, the top earners in America earn £2.2m and can expect more generous bonuses. A survey of law firms in London showed that British graduates were being offered starting salaries of £66,000 by the Americans—double what English law firms pay their newly qualified lawyers." Robert Verkaik, *Top British Lawyers Earn £1.5M Less Than Americans*, INDEPENDENT (London), Nov. 11, 1999, at 14. The upper range of partner salaries in Swiss firms (the highest in Europe) are $490,000; in Germany (the next highest), $465,000, and Greece (the lowest of seventeen reported), $125,000. Robert Budden, *Who gets paid what in Europe*, INT'L FIN. L. REV., Apr. 1993, at 7-10. Hourly rates charged to clients in Asia were, at the top, $413 in Singapore—higher than Japan, and the highest in Asia. These compared unfavorably then (1993) with British hourly rates (at the top), which were about 50% higher.

3. Lawyers in the United States, in 1998, earned an average of $36.49 per hour and an average annual salary of $75,890. Bureau of Labor Statistics, Occupational Employment Statistics, *available at* http://www.bls.gov/oes/national/oes_prof (last visited Jan. 15, 2001). More generally, over the last twenty years "[e]ntry level workers without a college education have seen . . . a 28 percent drop in real wages." John F. Kavanaugh, *Place at the Banquet Table*, AMERICA, July 15, 2000, at 18.

4. A "partner/shareholder" in a firm of seventy-five or more lawyers, in 1998, received an average annual salary of $210,728. The averages for management-level in-house corporate lawyers ranged from $150,000 to $194,429 (and this apparently did not include corporate management "benefits" or stock options). Altman Weil Publications, Inc., 1998 Survey of Law Firm Economics, *available at*

High earnings are in themselves a moral problem because they corrupt. For example, Professor Lisa Lerman recently explored the fiscal condition of sixteen American lawyers who have been removed from practice for stealing from their clients.[5] Before they began violating our professional rules, these lawyers were paid remarkably well from their law practices. They were paid from $200,000, among the humblest, to $5 million a year at the top. This was legal income; they got it before they started stealing from their clients. Their average annual practice income, in the early 1990s, was about half a million dollars. It was, apparently, not enough.

Current news reports say that some of the firms from which these lawyers were expelled now pay first and second-year associates $160,000 a year.[6] Clients pay, for help from these novices in the profession, between $200 and $300 per hour. Fourth-year associates expected more than $200,000 from their practices in 1999;[7] I suppose clients pay $400 or $500 an hour for help from those slightly older young lawyers. Judge Michael Lattig, federal appellate judge (Fourth Circuit), had a bit of fun with these facts when he said he planned to apply for employment as a beginning associate in the District of Columbia law firm Hogan and Hartson. That firm's salary for beginning associates is higher than the salaries paid federal judges.

That look at American lawyers and their earnings is half the story. The other half is about accumulation of wealth. In America, throughout its history, the rich always get richer, and the poor always get poorer. The "median worth" of a household in America went up 15% between 1990 and 2000. Households at the bottom of America's selective prosperity went *down* by 12%.[8] African-American net household worth is now about one-sixth of

---

http://www.public.wsj.com/careers/resources/documents/19990316-attorney-tab.htm (last visited Jan. 15, 2001); *see also* Margaret Cronin Fish, *Most Lawyers Benefit from Boom*, NAT'L L.J., June 14, 1999.

5. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 314-21 (1999). For an historical and ethical analysis of the way American lawyers have kept a barrier between their money and their clients' money, see also John M.A. DiPippa, *Lawyers, Clients, and Money*, 18 U. ARK. LITTLE ROCK L. REV. 95 (1995).

6. David Leonhardt, *Law Firms' Pay Soars to Stem Dot-Com Defections*, N.Y. TIMES, Feb. 2, 2000, at A1. Many of these young lawyers are, from the beginning, paid so well that they express no interest in the process of becoming partners. *New Associates Well-Paid, Not Focused on Making Partner*, ADDENDUM (Indiana State Bar Association), Feb.-Mar. 2000, at 3. Federal agencies are losing lawyers to firms because of the salaries being paid by firms, which range from $110,000 to $140,000 per year for young lawyers, as compared with $43,000 in government employment. Some lawyers who leave government employment for firms, Mr. Grimaldi reported, more than quadruple their salaries. James V. Grimaldi, *Trouble With the Law*, WASH. POST NAT'L WKLY. ED., May 29, 2000, at 29.

7. Leonhardt, *supra* note 6, at A1.

8. *Net Worth of Older Households Up, Younger Down: Study*, S. BEND TRIB., Feb. 9, 2000, at A5 (Associated Press) (reporting a study called "Panel Study of Income Dynamics" done at the University of Michigan Institute for Social Research (as to the increase figure)); *see also* William R. Macklin, *Rise of Billionaires Raises Concerns*, S. BEND TRIB., Apr. 30, 2000, *available at* http://www.southbendtribune.com/stories/2000/04/30/nation.20000430-sbt-MICH-A10-Rise_of_billionaires.sto

white net household worth. In 1999, "[f]or every dollar of wealth accumulated by white families, black families had . . . nine cents."[9] This disparity parallels "welfare to work programs" and steady increases in productivity. A "Capital Politics" editorial cartoon in the *Washington Post* expressed the point with art: "I used to be on welfare and *poor*," a cleaning lady says to the man in the suit. "Now I work full time and I'm *still poor*," she says. "But," the man in the suit says, "it must make you feel good to know you've *earned* it!"[10]

(Knight Ridder Newspapers) (quoting a report issued in 2000 by United for a Fair Economy, a Boston research group (as to the lower figure)). If the comparison is given an international perspective, the situation (that is, the "gap") is even starker. "In 1985 the average income per person in the richest country [the United States] was 76 times that of the poorest; in 1997 it was 228 times greater." Victor Ferkiss, *Globalization: Myth, Reality, Problems*, AMERICA, Feb. 19, 2000, at 10, 12-13. "[W]omen constitute a class of underpaid workers, doing 2/3 of the world's work for 5% of the income." *Global Women's Strike*, CATHOLIC WORKER, May, 2000, at 8. *See also Measuring Up for Aid*, ECONOMIST, Jan. 8, 2000, at 44 (suggesting that aid to developing nations rarely reaches those who need it). If the comparison (in the U.S.) is given racial and age perspectives: "In 1999, the median net worth in households headed by older black people was $13,000, compared with $181,000 for older white householders." Paul Recer, *Study Finds Americans Living Longer, Healthier*, S. BEND TRIB., Aug. 10, 2000, at A5 (Associated Press) (reporting a study done by the National Institute on Aging, "Older Americans 2000: Key Indicators of Well-Being").

9. *Net Worth of Older Households Up, Younger Down: Study*, *supra* note 8, at A5.

10. The cartoon (WASH. POST NAT'L WKLY. ED., July 10, 2000, at 4) reflects the efforts of the working poor, such as the janitors in Los Angeles, who went on strike for a one-dollar increase in pay, from seven to eight dollars an hour. David Broder, *Invisible Poor Left Out of Economic Boom*, S. BEND TRIB., Apr. 16, 2000, at B5.

> During the 90's, while the real income of the upper one-twentieth of America's families grew by 15 percent . . . real hourly wages, measured against inflation, fell by 4 percent . . . . Among workforce members without a college education, average real wages plunged from $11.21 an hour in 1973 to $8.22 in 1997. . . . In 1992 . . . about 17 percent said they were afraid of losing their jobs. By 1997, that figure had risen to 46 percent . . . . Forty-five million Americans today have no health insurance and approximately 30 million more are inadequately covered.

Jim Wright, *If Times Are So Good, Why Are Families Struggling?* S. BEND TRIB., Apr. 2, 2000, at B7 (Knight Ridder Newspapers). "The welfare reform bill of 1997 was similarly pocked with stupid and cruel provisions, like taking food stamps away from legal immigrants and kicking handicapped kids off Supplemental Security Income." Molly Ivins, *Laws Are Cruel, Some Are Mean, Some Are Just Plain Stupid*, S. BEND TRIB., Apr. 23, 2000, at C12; *see generally Out of Sight, Out of Mind*, ECONOMIST, May 20, 2000, at 27.

On the particularly serious situation of migrant workers, *see* David Kusnet, *Bitter Harvest*, N.Y. TIMES, Nov. 1, 1998, at 28 (book review) (reviewing DANIEL ROTHENBERG, WITH THESE HANDS (1998)); Bernardo Ruiz, *I.N.S. Used as Anti-Labor Tool*, S. BEND TRIB., Jan. 30, 2000, at B10; and Mary Williams Walsh, *National Economic Boom Hasn't Paid Off for Latinos*, S. BEND TRIB., Mar. 26, 2000, at B7 (reporting a Federal Reserve study that shows "the median Latino household net worth fell a whopping 24%" between 1995 and 1998).

Other particular groups among the low-income population, each of which demonstrates grimmer statistics than national or local medians, include those suffering from AIDS/HIV, and the homeless. *See* Isabelle Hill, *Diagnosis Poverty*, COMMON PLACE (Mennonite Central Committee), Jan. 2000, at 18; Ed Marciniak, *Recalculating Poverty: More Than Dollars and Sense*, COMMONWEAL, Jan. 28, 2000, at 10 (discussing the state of the homeless); Alan J. Heavens, *Mortgage Lender Fannie Mae Calls for Home*

The reporter from Roanoke asked me about *legal* ethics. One piece of relevance for lawyers is that the lawyers who work for American business are in a position to influence the corporate bureaucracies that nourish these disparities, but they don't do it. The evidence is that, in terms of political, social, and economic bias, lawyers who serve business become like their clients.[11] If business lawyers are able to raise moral standards in business—as

---

Buyers' Bill of Rights, S. BEND TRIB., Mar. 11, 2000, at C5 (Knight Ridder Newspapers) (discussing the plight of the poor); *Scarcer Housing for the Poor*, AMERICA, Dec. 11, 1999, at 3 (discussing two studies on housing and the poor done by the Federal Department of Housing and Urban Development); *Homeless and Hungry*, AMERICA, Jan. 29, 2000, at 3 (discussing the 1999 Status Report on Hunger and Homelessness); Martha Irvine, *Housing Costs: Study: Working Poor Pay Over Half of Income for Shelter*, S. BEND TRIB., Mar. 30, 2000, at A2 (Associated Press); *Housing Costs Hitting Working Poor Hard*, S. BEND TRIB., Mar. 31, 2000, at D6 (Associated Press); Jim Wayne, *Housing Policy Hurts Poor*, CATHOLIC WORKER, Mar.-Apr., 2000, at 1.

Children are a special case and a worse case. *See* George M. Anderson, *Growing Poorly*, AMERICA, Feb. 26, 2000, at 28. "[O]ne in five children, including 40 percent of all minority children, is poor. Poverty among American children is twice as high as it is for their peers in Europe." *The Working Poor*, COMMONWEAL, June 16, 2000, at 5. *See also* Sue Leeman, *U.S. Among Worst in Child Poverty*, ANN ARBOR NEWS, June 15, 2000, at A10 (Associated Press). Especially black American children: "[B]lack children are three times more likely than white children to be poor; children are the poorest Americans by far, and 11 million of them have no health insurance." William Ayers, *'Small Packages,' Big Hopes*, CHI. TRIB., May 21, 2000, at C1. Additionally,

> black youngsters are six times more likely to be sentenced to prison than white youngsters . . . [,] nine times as likely to be sentenced to a juvenile prison (for violent offenses) . . . [,] 48 times as likely . . . to be sent to [a] prison [for offenses involving illegal drugs] . . . [, and] a white youngster is incarcerated on average for 193 days; a black kid is locked up for 254 days; and a Hispanic youngster is imprisoned for 305 days.

Carl T. Rowan, *Justice System Wrecking Lives*, S. BEND TRIB., May 2, 2000, at A8 (explaining a Justice Department Report).

Across all of these groups, and others, the cost of medical care and the increasing denial of medical insurance to the poor remains a special case. *See* Wright, *supra*; *see also* Ivins, *supra*; Susan Jacoby, *The Allure of Money*, MOD. MATURITY, July-Aug., 2000, at 34, 39-41; David Brown, *Medical Safety Net Seen in Peril*, WASH. POST, Mar. 31, 2000, at A2. Tracy Kidder's moving profile of Paul Farmer, M.D., who treats the poor in Haiti, Peru, Moscow, and, now and then, the United States, reports Dr. Farmer's identification of patients who have been given inadequate doses of medication for tuberculosis (a situation that increases the danger to themselves and others): "This occurs in places of nearly universal poverty. . . and most often in places where wealth and poverty are mingled, where the poor receive some therapy but not enough—places like New York City." Tracy Kidder, *The Good Doctor*, NEW YORKER, July 10, 2000, at 40, 51. Perhaps the most discouraging fact is that fewer than half of Americans say they would pay less than five dollars a month to help the uninsured gain medical coverage. Richard Morin, *Misdiagnosing the Uninsured*, WASH. POST NAT'L WKLY. ED., May 22, 2000, at 34.

11. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). Lawyers in these firms have enough power to represent the interests of the wider society in advising and representing their clients, but they do not do so; on the contrary, their moral views become the views of those they represent. *Id.* at 526-27. James Fallows suggests, in a moving survey of several families living in poverty, that one reason for bias among business leaders (i.e., business clients of business lawyers) is that the poor are not seen and encountered by the wealthy. James Fallows, *The Invisible Poor*, N.Y. TIMES, Mar. 19, 2000, at 68 (Magazine). I think of one of Ross Macdonald's lawyers who "specialized in estate work, and moved in

I believe they are—they are not doing what they are able to do toward making their clients better people.

A writer in the *National Law Journal* spoke for the young business lawyers he observed, and for himself, as he noticed that, even in the early years, lawyers devote effort for those on one side of the economic gap while they develop a declining interest in those on the other side. He called the problem "conflict" and described it as a kind of schizophrenia on the way to cynicism: "Why don't they say 'I'm a liberal' and quit defending rogue corporations and homophobic school boards? Or, why don't they say 'I'm a conservative' and start making their checks out to the Republican Party instead of Greenpeace?" He, of course, blamed it on law school:

> A second-year associate in a New York firm blames his indecision on lawyers' "on-the-one-hand/on-the-other-hand" analytical framework. "In college," he explained, "I worked for an environmental group and talked wantonly of good guys and bad. Today I still support that group—but not with the same gusto. I'm always noticing the good guys aren't that good, and the bad guys aren't that bad. The law has trained me to see both sides, and I just don't get fired up about issues the way I used to. . . . I guess that's why I can work for one side, contribute to the other, and not demand the same ideological purity from myself that I did before law school." . . . . Law firm liberals will never enjoy life unless they replace excuses with introspection. . . . Law firm liberals must stop swallowing hard and betraying their instincts or they will remain as uninspired and unhappy as they are now.[12]

The weak way American lawyers serve blue-collar and low-income people is another part of what makes social injustice a moral problem for lawyers. The gap between the highest and the lowest in the American

---

circles where money was seen but not heard." ROSS MACDONALD, THE GALTON CASE 6 (1970).

12. Kevin L. Lyskowski, *Conflicted Liberals and the Lure of Money*, NAT'L L.J., May 23, 1994, at A19; *see also* Molly Ivins, *The Fun Part of the Campaign is Over*, S. BEND TRIB., Mar. 12, 2000, at B10 ("The F.B.I. says burglary and robbery cost U.S. taxpayers $3.8 billion annually. Securities fraud alone costs four times that."). One would not want to identify the highest academic administrators with either of these criminal groups, but it is increasingly clear that they must be added to those at the very top of the income and wealth categories in America. *See $2.58 Million Goes to U-M's Top Executives*, S. BEND TRIB., Jan. 24, 2000, at C6 (The University of Michigan's medical dean earns $315,844 per year, and its provost $251,114.). Their children also must be considered: Tony Pugh, *College Aid Going to Wealthier Students*, ARIZ. REPUBLIC, Feb. 19, 2000, at A1. *But see* James Martin, *The Business of Belief: Living a Spiritual Life in the Corporate World*, AMERICA, July 1, 2000, at 16, 19 (recommending as a discipline for life in such a world, gratitude, active membership "in a church community," charitable giving, and spending time "with the poor and underprivileged."). On the last point, see James Fallows, *supra* note 11, at 68.

economy turns significantly on the fact that people who are left out find it next to impossible to locate legal help that might get them in. Blue-collar Americans typically lack the funds to pay what American lawyers charge for their time.

Defenders of the profession refer to free legal help, but the fact is that free legal help for low-income working people is not nearly as available as the bar associations would lead you to believe. There is one legal aid lawyer for every 9,000 people whose low incomes would qualify them for legal aid service. Seven-tenths of 1% of lawyers in America are in legal aid practice. There is one lawyer for every 14,200 "poor or near-poor persons," who would likely, at some time, seek legal help if they could afford it.[13] If you divide the number of lawyers in America into the population, my estimate is that there is one lawyer for every 400 people. But 200 of those 400 people cannot pay what American lawyers charge. So, in fact, there is one lawyer for every 200 well-off people.[14] The other 200 will be without legal help when they need it—this in a society that glorifies its government as a government of laws, and uses the word "rights" to describe the social situation of its citizens.

We are not talking here just about evictions and wage garnishments. We are often talking about legal help that is as elementary as taking a child to the family doctor. Consider, for a prosaic, Wednesday-afternoon-law-office example, the arrangements young parents need to make for the care and support of their children in case they die before the children are adults. They don't "own" enough to be called "estate planning" clients—an unpaid for car, maybe a little equity in a house, and inadequate life insurance—and they need a lawyer to find ways for them to keep this small wealth focused on their families, and to designate guardians for their children. They need contingent trusts, and correspondence with insurance companies and administrators of retirement plans[15] (if their breadwinners should be fortunate enough to have retirement plans, which is unlikely). They need legal attention to such things as low-cost term life insurance.[16] A lawyer will charge this family hundreds of dollars to do this work. It is not the sort of job lawyers take "pro bono." These parents probably will not qualify for legal services for the poor. Even

---

13. Paul R. Tremblay, *Acting 'A Very Moral Type of God': Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2481-82 (1999).

14. Some of those left behind (without legal help in the market) are the concern of the "pro bono" movement among bar associations. *See, e.g.*, Francesco R. Barbera, *Yard Work: Harvard Law Revives Mandatory Pro Bono Debate*, 86 A.B.A. J. 26 (2000); *and infra* note 21.

15. *See* T. SHAFFER, C. MOONEY & A. BOETTCHER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS, ch. 10 (4th ed. 2001).

16. The poor pay more for term life insurance, and life insurance is not a unique case. *See* DAVID CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES 12-13, 30-31, 41, 90-93, 130-36 (1967).

if they do, they could not find a legal services office that would accept them as clients; case loads in legal services offices are too heavy to allow for such frills as planning for the welfare of children.

If that example seems *too* prosaic (who, after all, came to law school to learn how to draft wills?), think of the breadwinners in this family when they are out of work because of injury, in situations where the personal injury bar and the workers compensation bar and the social security bar find their cases promising but not sure-enough deals to justify contingent fee contracts. (The working poor are not attractive clients for tax lawyers either. A research organization recently noticed that the Internal Revenue Service has changed its traditional audit practice into hassling low-income taxpayers more frequently than so-called "high flyers." A prominent tax accountant was quoted as believing the reason for the change is that "it's easier to beat up on the little guy who can't pay somebody like me $250 an hour to represent him.")[17]

If neither example moves your heart, think of the other side of the comparison, think of what business pays partners in large law firms for the reams of paper those firms grind out and notarize and file somewhere or argue over, at enormous expense, paid for by corporate clients who pass their expenses along to consumers. Think of the salaries partners in large law firms pay the former law review editors who do the drafting. Think of what this kind of life is doing to the idealism of young lawyers who told the admission committees at their law schools that they wanted to be lawyers so they could help people.[18]

From an economic perspective closer to home, think of how the system—our system—works to move young people from college to law offices:

(i) Law schools charge high tuition—about $23,000 a year at my school, which is not one of the most expensive,
(ii) so they can pay high salaries to teachers who can cope with classes of 100 students at a time, law teachers being the highest paid teachers on university campuses because they have the highest rates of productivity;
(iii) the tuition obtained through student loans, by students who will leave law school with debts ranging beyond $100,000 each, as a result of which

17. Liz Pulliam Weston, *Audits Target Working Poor More than Rich*, S. BEND TRIB., Apr. 16, 2000, at A3 (Los Angeles Times) (reporting figures released by the Transactional Access Records Clearinghouse of Syracuse University).

18. Lyskowski, *supra* note 12, at A19.

(iv) graduates seek employment in practices that charge clients too much, so that
(v) they can get jobs that, without loan liability, would put them in trendy, gentrified townhouses with Beemers in the underground garage;
(vi) which, when the law school loans are paid off, is the sort of economic status they hoped to have when they came to law school[19]—because
(vii) lawyers make a lot of money and know how to spend it.

Young lawyers are among the highest paid workers in the country.[20] That is a look at earnings, not at the accumulation of wealth. Your neighbor Daniel Webster said, in a humbler time, that lawyers live well and die poor. If that is still true, lawyers are ostentatious consumers. And I suppose that is not morally a better thing than being a penny-pinching Scrooge.

* * *

I rejoice at the chance to get this tirade off my chest. These sentiments have not earned me an audience elsewhere. The newspaper in Roanoke did not run a story on what I saw as the number-one moral problem for American lawyers. My present argument was developed more academically some years later and given during a symposium at St. Louis University. The law review editors there published the other symposium papers but left mine out.

Recently, I worked on an Indiana Supreme Court committee that is part of an effort by that court to get Hoosier lawyers to take more "pro bono" cases. Our court had decided that it was better to use the interest from lawyers' trust accounts to finance a new judicial bureaucracy than to spend the money on legal services programs.[21] I hope the effort to interest Hoosier lawyers in serving the underclass for no fees succeeds, but, even if it does, it will not be significant for giving legal help to those whom Jesse Jackson

---

19. *See* Jeffrey Kastner, *A Vision of Suburban Bliss Edged With Irony*, N. Y. TIMES, Mar. 19, 2000, at AR36. Marian Burros, *Betting the Farm on a New Age Vision*, N.Y. TIMES, Apr. 12, 2000, at B1, characterizes such irony with a verbal picture of the combination of suburban D.C. life and hard-scrabble Virginia farming: "Rappahannock County [is] home to the very rich who have made their money elsewhere and to farmers who barely make a living. Like the cattle, sheep, and goats that keep the pasture trimmed, the chickens take care of fertilizing it." On the situation of graduating law students, *see generally* Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333 (1999).

20. Leonhardt, *supra* note 6, at A1. Jerry Kennedy, the late George V. Higgins's Boston street lawyer, arrived slowly: "I got up in my two-bedroom condo on Pinckney Street at the foot of Beacon Hill–'riv. vu, ind. pkng.,' for a paltry $335,000. . . . The only time my shirt went unstuffed was when I wasn't in it." GEORGE V. HIGGINS, SANDRA NICHOLS FOUND DEAD 156-57 (1996). Jerry had a T-Bird for "ind. pkng." *Id.* at 163.

21. *See* IND. RULES OF PROF'L CONDUCT R. 6.1-6.5 (1998) (public service section).

refers to as "locked out" by the law, "those," he said, "whose backs are against the wall."[22] The effort would probably, for example, not help a destitute young woman I have been working for. She got a "payday loan" at 250 % interest. It is in collection; the lender's lawyer is threatening to sue my client. She and her husband are insolvent. They rent a modest apartment and are paying on an old car. They have almost nothing, and owe much more than they have, but she supports herself and her family with a salary that, while small, is large enough to be garnished. I think I can stiff this payday loan outfit; any able lawyer could. But most of this loan shark's customers are not going to have a lawyer—not from legal services, or from the local "pro bono" pool. She has no money to pay a lawyer. If she did she would not be borrowing money from a payday loan outfit or coming to our clinic for legal help.

It is clear to me that the cases my sisters and brothers at the Indiana Bar are being asked to take for no fee are family law cases that should not be in front of judges in the first place. We Hoosier lawyers are not expected to take, for nothing, cases that will upset the government, or cause the corporate bureaucracy to alert its own lawyers, or seriously inconvenience the "Merchants of Misery" who prey on low-income consumers and borrowers.[23] Pro bono lawyers are not supposed to inconvenience them, or their bill collectors, or their lawyers, or the judges who garnish their earnings.

What seems to have happened in the American legal profession, in the long transition from the cab rank ideal that made lawyers available to clients who needed them to law firms of specialists who serve wealth, is the separation of the Bar into those who expect high incomes on one side and those who serve "causes" on the other.[24] The National Lawyers Guild has tended, since the Joseph McCarthy days, to recruit "cause" lawyers; that organization is identified with a radical left political tilt, but it also represents vestiges of lawyer habits that were, a century and a half ago, considered routine.[25] It is interesting to me (as well as a bit depressing) on the present

---

22. Jesse Jackson's Martin Luther King Day Talk (C-SPAN television broadcast, Jan. 17, 2000). Two other excerpts are notable from that moving talk: "[Dr. King] used his faith to challenge the law" and "[b]lacks had to run twelve yards in order to get a first down. Whites had to run only eight, because they inherited some yards." *Id.*

23. *See generally* MICHAEL HUDSON, MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY (1996). *See* MILNER S. BALL, CALLED BY STORIES 137 (2000) (suggesting that legal advice to the powerful is a matter of supporting the conditions in which the powerful can continue to prosper).

24. *See generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998).

25. Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 24, at 118.

agenda that Professor Scheingold, in his published survey of present-day "cause" lawyers in Seattle, inquired of his subjects what their religious affiliations were: He found that virtually all of them claimed membership in a Christian or Jewish congregation, but that none had studied law at a law school with significant religious affiliation.[26] This brings me to a moral argument.

* * *

My purpose so far is to suggest to you that money is the number-one most serious moral problem for American lawyers and their clients. My moral observation is biblical: God destroyed the biblical cities of Sodom and Gomorrah in a rain of brimstone and fire.[27] The Rabbis of the Mishnah wondered why. They did not decide, as many Christian preachers have decided, that God got upset because of the Sodomites' sexual irregularities. It wasn't sex. The reason for the destruction of Sodom was money. The Rabbis said the relevant text is in the Book of Leviticus: "Thy brother may live with thee."[28] The wealthy Sodomites were not generous to one another; they did not take care of the poor; they did not practice hospitality to immigrants. (They did welcome Abraham's nephew Lot, but that was because he was wealthy and they thought they could get something out of him.) Sodom was destroyed by God, in the view of the Jewish tradition, because "individual selfishness . . . had become an integral part of its communal culture."[29] The Rabbis teach that one who thinks his wealth is the product of his own effort denies that God is the Creator of prosperity.[30] One who ignores the obligation to the poor is an idolater who does not recognize the source of wealth.[31]

The Book of Leviticus also says, "You shall not put a stumbling block in the path of the blind."[32] The sages of Judaism decided that the rule does not apply to those who harass blind people as much as it applies to those who misuse the law, who are dishonest, but legal, who, "through perfectly legal transactions," mistreat vulnerable people[33]—my debtor clients, for example. The Rabbis say that those who use the law to protect their wealth are like those who buy from thieves, or those who sell commodities that are harmful.[34]

---

26. *Id.* at 122-23.

27. *Genesis* 18:20-33, 19:24-29.

28. *Leviticus* 25:36.

29. MEIR TAMARI, THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY 148 (1995).

30. *Id.* at 149.

31. *Id.* at 129-32, 134-37.

32. *Leviticus* 19:14.

33. TAMARI, supra note 29, at 39; *cf. Psalms* 94:20 (N.E.B.) ("Shall sanctimonious calumny call thee partner, or he that contrives a mischief under color of law?").

34. TAMARI, *supra* note 29, at xxii.

Such commercial practices—not rampant sex—were also the reason God destroyed almost all of Creation in the flood. That is rabbinical commercial law, Torah as if it were the Uniform Commercial Code. The Rabbis were not naive; they were, in fact, the canny business lawyers of their culture; they understood commerce. They warned against buying saplings from the watchmen of the orchards.[35] And they denied the protection of conscience to people who exploit (or ignore) the poor.[36]

The theme appears again among the earliest Christian teachers, who appealed to the example of Jesus of Nazareth. The primitive Christian church, as described in the Book of Acts, established a communist economy: "[A]ll who believed were together and had all things in common, and they sold their possessions and goods and distributed them to all, as any had need."[37] By the time St. Ambrose of Milan came along (fourth century C.E.), communism among Christians had disappeared; some Christians were poor; many were wealthy. St. Ambrose said to the wealthy (and that would be about a fifth of modern Americans, and most American lawyers): "God gives you prosperity, either to overcome or to condemn your greed, so that you may have no excuse. But you keep for yourself the yield that was meant, by your means, to do for many—or rather you steal it."[38] Martin Luther, centuries later, said of wealthy Christians, "If we look at mankind in all its conditions, it is nothing but a vast, wide stable full of thieves."[39] John Calvin said that if we Christians "receive peaceably" all that God gives to us, "of necessity we will always be thieves."[40]

The point of these earliest Christian teachings on the morals of wealth were, like their Jewish parallels, that the wealthy had what they had in order to serve those who had little. Basically, wealth belongs to God: "We give Thee but Thine own," as the old hymn puts it, putting words into the mouths of the wealthy. "Wonderful riches more than tongues can tell," the Children's Chorus says, putting words into the mouths of those who are not wealthy. "He is my Father so they're mine as well." St. John Chrysostom asked: "[H]ow can anyone who has wealth be good? It is simply not possible. He is good when he distributes his wealth. So, when he no longer has it, he is

---

35. *Id.* at 40.

36. *Id.* at 166.

37. *Acts* 2:44-45 (R.S.V.).

38. FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 78 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999).

39. STANLEY M. HAUERWAS & WILLIAM H. WILLIMON, THE TRUTH ABOUT GOD: THE TEN COMMANDMENTS IN CHRISTIAN LIFE 106 (1999) (quoting THE LARGE CATECHISM OF MARTIN LUTHER 40 (Robert Fischer trans., Fortress Press 1959)).

40. *Id.* at 113. A more modern theological expression uses Marxist analysis: The biblical God is a Creator God, "who breaks into human history to liberate the oppressed." JOSE PORFIRIO MIRANDA, MARX AND THE BIBLE 77 (1974).

good . . . ."[41] At best, anyone who is well-off holds what she has as a fiduciary for those who are not well-off. (With the introduction of that concept, perhaps a lawyer could leap ahead a millennium or so, to the American judicial words of Benjamin Nathan Cardozo, and say of the fiduciary: "[He] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[42]

That fiduciary epoch in the moral theology of wealth was derivative from the morals expressed in the Book of Acts, when nobody (apparently) had anything that was not shared by everybody. Wealth, in the earliest transition period (end of the first century C.E.) became, under Roman law (which said that an owner was free to do whatever he wanted with his property), came to be regarded by Christians as owned in partnership with those who did not own anything. When that ideal faded (third century C.E.), wealth came to be (for those outside monasteries) legally owned, and then wealth became a moral problem for the wealthy—a problem sometimes expressed in the morals of greed, sometimes in the faithlessness of seeking security and independence through property. There were still, well into the Middle Ages, voices like St. Ambrose's, which said property was the product of usurpation.

Finally, in an early version of the happiness of poverty, the problem begins to be expressed as a moral problem not for the rich, but for the poor—provoking Justo Gonzalez, a modern church historian who trains Presbyterian ministers, to sarcasm: God seems to have made the poor immoral in order to test the morals of the rich.[43] "That gentlemen are forced to perform manual labor or that letters of indebtedness are destroyed is a great crime and shows an undue preoccupation with material things. Yet that the same gentlemen oppress the poor and that the letters of indebtedness manifest their concern with material things apparently is less important."[44]

The distant literature of the religious tradition is full of such radical economics. It does not look at money in terms of either freedom or equality, which are the ways money is looked at in liberal American political and economic thought, particularly among law teachers. The religious tradition

---

41. FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 38, at 103.

42. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

43. JUSTO GONZALEZ, FAITH AND WEALTH: A HISTORY OF EARLY CHRISTIAN IDEAS ON THE ORIGIN, SIGNIFICANCE, AND USE OF MONEY 218 (1990).

44. *Id.* at 230; *cf.* George F. Will, *Gore Has Several Options in Filling Demo Ticket*, S. BEND TRIB., Aug. 3, 2000, at A9 (expressing a point of view on wealth that might renew Gonzalez's sarcasm: "The effect of today's prosperity may be to diminish materialism and enlarge the political importance of values and character." To somewhat the same effect, see also *Growth Is Good*, ECONOMIST, May 27, 2000, at 82.)

says to those who are doing well: Wealth is evidence that you are enjoying what is not rightfully yours. Not that you own more than your neighbor, but that you use the law to keep what is your neighbor's. The relevant, ancient biblical word is theft. The Mishnah teaches that the maxim "what is mine is mine and what is yours is yours" is the mark of Sodom.[45] A righteous person says, "What is yours is yours, and what's mine is yours."[46] These ancient meditations on ancient scripture say of the poor that they are poor because those who are doing well have stolen from them. The poor are favorites of God, not because of equality, but because they are victims of injustice. One consequence of this point of view is that wealth held by the wealthy is held in trust. The other consequence is that those who do not have wealth are oppressed; if they were not oppressed, they would not be poor.

This ancient ethical literature has undergone remarkable change, as it has found its way into the modern mainline Christian church and into American civil religion. By the century after Ambrose, the moral problem of the wealthy was being resolved by monasticism: Christians who wanted to live in a New Testament economy became monks and nuns. Other Christians developed a Christian ethic of prosperity, an ethic that said money was not the moral problem but that the attitude the believer had toward his wealth was the moral problem.[47] By the time medieval Scholasticism and the Protestant Reformation had fine-tuned the Christian ethic of prosperity, the church had placed its blessing on capitalism, which provides for the needy through the trickle-down economics of the market.[48] (The way capitalism feeds the birds, as Senator Lieberman said in August, is to give the oats to the horse.)

My friend Stanley Hauerwas, Methodist theologian, describes the ethical shift with characteristic Texas irony:

> We should not trust in our money but rather we ought to trust in God. So it really does not matter whether we have a lot of money because the issue involves the attitude we take toward the money we have and not the money as such. But if it's just an attitude

---

45. TAMARI, *supra* note 29, at 128.

46. *Id.* at 10.

47. GONZALEZ, *supra* note 43, at 132-48; *see also* CRAIG L. BLOMBERG, NEITHER POVERTY NOR RICHES: A BIBLICAL THEOLOGY OF MATERIAL POSSESSIONS 174-75 (1999).

48. Represented in the opinions of George Will and the unidentified writer in ECONOMIST, *supra* note 44. For an exacting analysis of the development in one tradition of late medieval and post-Reformation Christian moral thought, see JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY (1957). Within that context, he concluded, "[a]spects of the old theory had always been favorable to capitalism; the revised theory approved all the basic financial mechanisms of a capitalistic society." *Id.* at 408. Professor Jean Porter demonstrates that, early in the development Judge Noonan described, Scholastic natural-law theory (still) held that all wealth is held in common. *See* JEAN PORTER, NATURAL AND DIVINE LAW 247-59, 270-72 (1999).

> problem, I would much rather have an attitude problem about a Porsche than [about] my '83 Toyota Corolla with the dent in the fender.[49]

"We tell ourselves we have worked hard, and we no doubt have, and we deserve what we have got," he says. "But the very fact that we have been able to work hard, and thus assume that we deserve what we have gotten, is because we are white Americans. . . . [T]he luck of our birth is based on the fact that our wealth is the result of dishonest appropriation." Stanley invoked the land records in and around Chapel Hill, North Carolina, where he lives.[50] I am sure there is no such evidence in the land records of Vermont. Or, perhaps, even here, as T.S. Eliot said, "Whatever we inherit from the fortunate we have taken from the defeated."[51]

It is not so much that the modern Christian ethic of prosperity is evidently mistaken. To the extent it recognizes that we people, we creatures, are meant to enjoy God's good creation and all of its blessings, it is faithfully biblical. We believers have rejoiced on that theme since King David left the family farm. The moral problem is self-deception of the sort Hauerwas notices when he compares his neighbor's Porsche with his own dented '83 Corolla, or his own situation, or mine, compared with those in America who are locked out.[52] I think of my own attitudes: I see vivid evil behind ads that offered rides on the Concorde for $62,500; hotel rooms in Hawaii for $4,200 a night; a Rolls-Royce car for $360,000; and $11 million for a condo on Fifth Avenue.[53] I say to myself: Now that is what evil wealth looks like. It makes me feel like a simple, plain-living school teacher. Then I pick up a magazine from the Mennonites, which does not run ads for the Concorde: "[T]hirty-four million people in the United States live at or below the poverty level."[54] I think of those of my clients who have jobs and make around $15,000 per

---

49. STANLEY HAUERWAS, SANCTIFY THEM IN THE TRUTH: HOLINESS EXEMPLIFIED 250 (1998).

50. *Id.* Hauerwas aims his observations at popular American political theology. Calvin Coolidge voiced this theology, stating: "So long as wealth is made the means and not the end, we need not greatly fear it." Ida Chipman, *Cool' Cal Could Warm Up to July Fourth Festivities*, S. BEND TRIB., July 2, 2000, at B7. Jewish theology has its modern parallels. *See* EUGENE B. BOROWITZ & FRANCES WEINMAN SCHWARTZ, THE JEWISH MORAL VIRTUES 105-17 (1999).

51. T. S. ELIOT, *Little Gidding*, *in* THE COMPLETE POEMS AND PLAYS 143 (1971).

52. And therefore religion is self-deceived or even hypocritical in its claim to want to alleviate suffering. *See generally* Jeffrey L. Bullock, *A Conversation With Robert Wuthnow and John Milbank*, 57 THEOLOGY TODAY 239 (2000).

53. NEW YORKER, Feb. 21 and 28, 2000, at 114 (Concorde); Michelle Higgins, *Hotel Perks Hit New Highs, But do Guests Really Want Bathroom Butlers?*, WALL ST. J., Feb. 4, 2000, at W5 (hotel room in Hawaii); WASH. POST NAT'L WKLY. ED., July 17, 2000, at 19 (Rolls-Royce); N.Y. TIMES, May 21, 2000, at 96 (Magazine) (condo).

54. Donald J. Rider, *Just Generosity*, 4 THE DISCERNING READER: GOOD BOOKS FOR THE JOURNEY 4 (2000).

family per year. They do not go hungry on most days, but, the Mennonites say to me:

> Could *you* provide for a family of four on [that]? It would mean no vacations, no regular trips to the dentist, no movies, no house of your own, no new clothes. It could also very well mean poor education, inferior health care, unsafe living conditions, and a sense of hopelessness.[55]

A sense, I suppose, of being locked out.[56] Poverty compounds other misery, the Mennonites say to me, as they point out that 80% of those who have AIDS or HIV are living below the federal government's poverty line.[57]

I do not worry about affording a vacation, or going to the dentist or the movies. I do not worry about a comfortable house, or new clothes whenever my wife buys them for me, or about safe living conditions. So, who is self-deceived about wealth? Not just those in $11 million condos.[58] Maybe what I need is a more truthful religious solution to my own situation, not so much in terms of theory and command as in particular answers being lived out by particular people. Here are some stories:

Robert Wuthnow reports on a number of people whose lives and personal theologies are instructive. Here is a sample: Pam Jones, a Mennonite from Indiana, went with her father, a physician, to Puerto Rico. Her father gave up a lucrative medical practice. Before that, Ms. Jones, after a year doing relief work in France, gave up the promise of her significant talent with computers to work with her husband in setting up housing for refugees. She emphasizes not only useful work, but also simplicity in what she consumes. "The only thing that's really going to help the poor," she says, "is for rich people to start living at a lower level."[59]

John and Mary Phelps, Roman Catholics, stayed at home in Minnesota, but John gave up his business job. They joined others in their parish in boycotts, demonstrations for nuclear disarmament, and inner-city economic development. He said, "I get more and more fulfillment out of working for

---

55. *Id.*

56. Jesse Jackson MLK Day Speech, *supra* note 22.

57. Hill, *supra* note 10, at 18.

58. HAUERWAS & WILLIMON, *supra* note 39, at 112 ("[W]hat is more deceptive than the presumption that I really don't want all that I have; I'm just trying to prepare a good life for my children. Or that it is not really wealth itself that is the problem, but our *attitude* toward our wealth.") (emphasis in original).

59. ROBERT WUTHNOW, GOD AND MAMMON IN AMERICA 191-92 (1994).

a cause, working for groups that are ostracized, disenfranchised, oppressed, or just plain left behind by our society."[60]

Steve Young, a Mormon in Idaho, stayed in his prosperous business but began spending his evenings with the ill, the elderly, and the needy. "I don't like the aggressiveness and competition," he said of his business life.[61] "It's brutal and it[']s raw."[62] Rachel Eisen, a Jew who lives in Philadelphia, devotes her time to raising funds for the Jewish community. She says this work is for her children. "She doesn't consider herself particularly religious," Wuthnow says, "but she does believe in God, [and] in the basic tenets of Judaism." Mike Kominski, a truck driver and a Catholic become Pentecostal, spends the entire paycheck he gets the week before Christmas to buy food for the homeless.[63]

Jo McGowan, writing in February in *Commonweal*, a lay-edited Roman Catholic magazine, talked about her modest new house in Dehra Doon, India. She and her husband live humbly by American standards—on $9,000 a year–but they have a new house. They can hire people to help them in their house, and they have enough money to buy groceries in bulk—all badges of wealth their Indian neighbors cannot wear. She finds the difference is beginning to affect her attitude:

> Now that my house is more comfortable, I am less tolerant of being disturbed in it. Now that I have staff taking care of . . . both my home and my office, I am more impatient when they slip up. Now that I have more gadgets and toys, I am more frustrated when there is no electricity to run them.[64]

Her psychic adjustment to prosperity, so far, is like mine; she feels guilty about the difference. Maybe she reads Mennonite magazines. At that, she is better than most of us back here in America, because she at least notices the difference. Maybe that is due to the fact that she lives on a street where the

---

60. *Id.* at 192-93.

61. *Id.* at 223.

62. *Id.*

63. *Id.* at 223-25. Some of these stories turn less on undertaking what modern Christian social thought would call a new ministry and instead choosing to be a free-lance do-gooder, as my children once fondly described the activity of my wife Nancy. Lorraine V. Murray, *Feeding His Sheep*, AMERICA, July 15, 2000, at 16, describes such a life. She once held a well-paid university job. Now, she says, she does "a little of this, a little of that," helping old ladies, nuns, and friends. The price has been "voluntary simplicity" for her and her family: "We gave up our weekly restaurant splurges, started checking books out . . . instead of buying them and shopped for clothes in thrift stores. . . . I no longer sweep through the mall triumphantly brandishing my charge cards. Nor do I dress in the latest fashions or drive a sleek late-model car."

64. Jo McGowan, *Uncomfortable in Comfort: Being 'Rich' in Dehra Doon*, COMMONWEAL, Feb. 25, 2000, at 7.

difference is not hidden from her. We lawyers who live in the suburbs in the Midwest, or in the mountains of Vermont, don't notice the difference as much.

Wuthnow's stories remind us that there are people who reach beyond guilt. Some prosperous Americans adjust to their prosperity by providing directly for those who are hungry or lack shelter. Some leave well-paid jobs to work for the poor in churches or community agencies. Some campaign for political and legal relief. Some argue for radical change in the lives of the prosperous, and some of those choose simpler lives. And some of those who choose simpler lives give what they save to widows, orphans, and the strangers in their midst.

Craig Blomberg, an evangelical Christian, in a new book, ends by revealing what he and his wife do about their money: They give a lot of it to people who have nothing. They ponder whether 25% is enough. Should it be 30%? They have settled, for now, on 30%, noting, as they did so, that their annual income is $4,000 below the average household income of their affluent suburban community.[65] But Blomberg says they worry, as Jo McGowan does, about their nice house and the fact that they give nice toys to their children; they realize, he says, that there are American Christians who are more generous than they are.[66] He reflects, I think, a modern-American gloss on the traditional Christian ethics of prosperity, an ethic for those who are relatively clear of self-deception, relatively aware of America's persistent mistreatment of those who are locked out: Give, and worry. Wuthnow, after dozens of interviews, found that people who go to church are reluctant to discuss income, the things they buy, or their worries about having enough money. "The reason for this may be that formal teachings encourage people not to value money and not to worry about it, and yet people do value it and do worry about it," he says. "In the absence of any frank discussions of the topic, they simply feel guilty and anxious."[67]

The Jewish tradition seems to worry less about guilt, as it reflects a worldly wise familiarity with the reality that we people, especially we people who are well-off, love to deceive ourselves.[68] The Torah and the Rabbis say a lot about guidelines for the accumulation and distribution of wealth. Judaism, and some modern American Christians, are serious about biblical rules on tithing, for example.[69] The traditional Jewish rule is one-fifth of

---

65. BLOMBERG, *supra* note 47, at 247-53.

66. *Id.* at 249.

67. WUTHNOW, *supra* note 59, at 140.

68. *See generally* LAWRENCE BUSH & JEFFREY DEKRO, JEWS, MONEY, AND SOCIAL RESPONSIBILITY 22-25 (1993).

69. TAMARI, *supra* note 29, at 156-69, 243; BLOMBERG, *supra* note 47, at 136, 247-53.

one's income, a guideline that is coupled with the suggestion that a good Jew should give more than the guideline requires.[70]

A more specifically Jewish guideline is the moral teaching that warns Jews against accumulating wealth in the first place.[71] Judaism, being the sensible moral system that it is, came to terms early with human greed.

> In talmudic times, we are told, the Sages captured the evil inclination of man, the yetzer hara, the source of his greed, his lust, and desire. They rejoiced, believing that thereby they could now eradicate all evil actions. They discovered, however, that, in the whole country they could not find even one single fertilized egg. So, much to their sorrow, they released the evil inclination, understanding that this is what leads to human activity.[72]

But appended to this commonsense view of what makes people click are extensive rabbinical limits—against hoarding, against temptations to corruption, against charging interest on loaned money, against taking advantage of those they bargain with—and positive injunctions to generosity, to philanthropy, to spending time with family and in religious study, and to social responsibility.[73]

Behind both tithing and discipline in accumulation is the economic principle of the Torah that providing for the poor is not really a matter of charity; it is primarily a matter of justice, of respecting the ownership of the poor in what the "owner" might otherwise regard as belonging to her. A faithful Jew who takes care of the poor is only giving to the poor what was theirs from the beginning.[74] A faithful Jew who refuses to become more wealthy is avoiding the self-deception that is inherent in prosperity.

The enduring biblical symbol is in the passage from the Book of Leviticus from which I quoted earlier. It contains, for an agricultural economy, specific rules on what belongs, from the beginning, to the poor:

> [W]hen ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field, neither shalt thou gather the gleanings of thy harvest. And thou shalt not glean thy vineyard, neither shalt

---

70. TAMARI, *supra* note 29, at 158, 162-63.

71. *See* TAMARI, *supra* note 29, at 128-32, 173-74, 181, 236; *cf.* BUSH & DEKRO, *supra* note 68, at 17-58; BLOMBERG, *supra* note 47, at 71-82.

72. TAMARI, *supra* note 29, at 5.

73. *See generally* Arthur Waskow, *Toward an Eco-Kosher Life Path*, *in* BUSH & DEKRO, *supra* note 68, at 175-86.

74. *See* TAMARI, *supra* note 29, at 133-42.

> thou gather every grape of thy vineyard; thou shalt leave them for the poor and stranger.[75]

* * *

The centuries have turned this ancient radical economics into what I am calling the religious ethic of prosperity. It is what time and wear and tear and pastoral adjustment have done to ancient principles in the faith of Jews and Christians. It does manage to provide an analysis that is more coherent than I have made it sound:

Jews and Christians have generally recognized that prosperity is part of God's good creation. The dominant tradition, from Abraham to the recent pastoral letters on the economy by the American Roman Catholic Bishops,[76] has announced the plausible sentiment of being grateful to God for good fortune. Protections against self-deception can be tied to the sentiment, but gratitude comes first. (I have put the protections first here because they sound more radical. I plan to send a copy of this to the newspaper in Roanoke.) Gratitude comes first, but gratitude contemplates the prosperity for which gratitude is the response. A story in the Talmud tells of Rabbi Shimon bar Yochai, who got so angry at the profligate ostentation of the Romans that he hid himself in a cave for thirteen years. When he came out of the cave, he saw a Jewish farmer plowing instead of protesting against the delusions of wealth. He went into a rage so intense that the poor farmer was reduced to a heap of ash. Then Shimon heard a voice from Heaven, accusing him of turning the world into chaos; the Voice sent Shimon back to the cave for another year, to cool off. When Shimon came out a second time, his gaze, the Talmud says, was a healing gaze. Eli Wiesel says that Shimon's story shows the importance of "the ability, nay, the necessity, to transform curses into blessings, darkness into light" in God's good creation.[77]

The religious ethic of prosperity is celebrated in American civil religion in two familiar ways: The New England Puritans believed that the good are prosperous; America's foremost child of the Enlightenment, Thomas Jefferson, believed that the prosperous are good. The two points of view came together in generations of expansion that until recently worried Mr.

---

75. *Leviticus* 19:9-18 (King James).

76. *See* U.S. Catholic Bishops, *Economic Justice for All, in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE (David J. O'Brien & Thomas A. Shannon eds., 1992). *See also* William J. Byron, *Ten Building Blocks of Catholic Social Teaching*, AMERICA, Oct. 31, 1998, at 9. *See generally* Lucia Ann Silecchia, *On Doing Justice and Walking Humbly With God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163 (1997). *Cf.* Marie A. Failinger, *The Justice Who Wouldn't Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions*, 46 CLEV. ST. L. REV. 643 (1998).

77. TAMARI, *supra* note 29, at 5-6.

Greenspan. Either way, there is a civil-religious ethic of prosperity. It says that it is a good thing to get ahead in America. The religious tradition that is mixed into our civil religion has, for the most part, ignored the dangers of self-deception and is only very occasionally brought to book by its prophets—by the Hebrew Prophets who raged at the Temple priesthood for grinding down the poor; by the prophet Jesus, who said it required special exertions by God to get a rich person into the Kingdom of Heaven; by Jo McGowan and Craig Blomberg; and by modern preachers such as my friend Hauerwas. If nothing else, the prophets try to make us worry.

* * *

On the other hand, to the extent that I am addressing my fellow believers,[78] I might hope to bring to them deep, clear learning from the older religious tradition. Believers argue a lot over morals, as, I think, God expects them to do. I am offering an argument, on what I believe to be good authority. This deep, clear learning is able to point, as the dominant moral conventions in our country do not, to:

- returning to the poor what the rich have taken from them;
- recognizing that much of what we think we own in fact belongs to those who do not own so much;
- taking care that we own less—that we don't deceive ourselves about how much we need;
- distributing the difference to those who need it more; and
- observing, at the very least, the settled guidelines on accumulation and distribution that the religious tradition provides. At least that.

That is the deep, clear (if a bit ancient) tradition among Jews and Christians: the teaching, the corruption of the teaching, and the discomfort—not to say guilt—that teaching produces among prosperous believers.

There are two rather different ethical approaches to our ancient scripture and its ancient commentary. One is suggested in the sermon on money, given by Stanley Hauerwas at his Methodist church in North Carolina. The other is suggested by the Latin American liberation theologians.

The first of these alternative traditions suggests that the resolution of problems of wealth is a communal agenda. Stanley's advice was that Christians should talk more about their money—and even disclose to one another how much money they make—and seek discussion on what they

78. And, generally, according to the polls, I am—even when those I address are lawyers.

should do with it. He said we modern Americans more readily talk about our sex lives than about our money. He said:

> Let us therefore seek to be reconciled with ourselves and with our brothers and sisters, asking one another to help us understand what we are to do with the fact that we are wealthy, and yet still God's people . . . perhaps even friends with those who suffer because we are wealthy.[79]

The Jewish tradition preserves this communal quality of belief in the pondering of rabbis, ancient and modern. The Christian tradition preserves it hardly at all, although you can find little, instructive traces in the communities that trace their theology to the Radical Reformation—the Amish, Mennonites, Quakers, some people in the Church of the Brethren and the Seventh Day Adventist Church. These enclaves teach the virtues of simple living, and tend to watch one another and provide criticism and guidance to those who do not live simply enough. They tend to be concerned about one another's wealth, because, "[t]he world has enough for everybody's need," as Gandhi said, "but not enough for one person's greed."[80]

Craig Blomberg, the evangelical thinker whose family gives 30% of its income to the poor, ponders the fact that our modern American "system" exalts and rejoices in acquisition and consumption. He and his wife worry both about the corrosive effect of their society and about the politics of their country. This is not only a worry about being corrupted. It is, beyond that, a concern for having some sort of impact, or, to put that as Mother Teresa might have, about being not only a helper but also an advocate. "[T]here are limits to how much we can expect Christian values to take root in non-Christian structures," Blomberg says. He continued:

> We should be spending the largest amount of our efforts on remolding the church into a counter-cultural community. We may debate the best way to help the poor through economic and governmental policies, but the needy and marginalized in our world should have no doubts as to *our* compassion and concern.[81]

---

79. HAUERWAS, *supra* note 49, at 251-52.

80. RAMACHANDRA GUHA, ENVIRONMENTALISM: A GLOBAL HISTORY 22 (2000). *See* John Leubsdorf, *Gandhi's Legal Ethics*, 51 RUTGERS L. REV. 923, 936 (1999) ("He did . . . urge lawyers to desert the legal system and to establish a new one, and he practiced and incited violation of the law. It is not surprising that . . . his Inn of Court in London disbarred him.").

81. BLOMBERG, *supra* note 47, at 252 (emphasis in original); *see also* HAUERWAS, *supra* note 49, at 171 ("Money, particularly in a capitalist economy, becomes one of our most determinative spiritual realities. The task is to demythologize money's mythic power by making it a mode of service.").

The Rabbis' warnings against accumulation and ostentation, and the guidelines they promulgate for distribution to the less wealthy, rest in communal discernment. The God of Abraham, Isaac, and Jacob leaves moral reason to Israel,[82] and, in doing so, addresses them as a people, not as individuals. Jews harbor a passion for justice; they form their children in a communal politics of justice. It is no accident that American Jews are always more prominent than their numbers would suggest among radical lawyers and politicians who work for wealth distribution, racial justice, and civil liberties. (I do not intend this to be an ethnic stereotype. I intend, as a biblical person, to affirm that the Jews are God's Chosen People, a priestly people, a blessing to the nations.)

The other alternative tradition, that of the liberation theologians, sounds, when it is candid about its historical and economic analysis, like Karl Marx. Gustavo Gutierrez is the gentlest of these.[83] There are a number who are more confrontive. Liberation says that the wealth of the well-to-do is built "on the backs of the poor," as [then] Governor George W. Bush suggested in a primary-election speech early in his campaign. Liberation theology seeks social and economic revolution. Liberation theologians (most of them, like Father Gutierrez, pastors) differ from secular Marxists in that most of them are uncomfortable about violent revolution—although they point out that powerful Christians in the mainline church tend to be more concerned about the violence of the poor than about the violence with which the rich keep the poor at bay.[84]

Two of the most prominent of these theologians, Clodovis Boff and Leonardo Boff, warn against becoming gentle in attempts by the church to come to terms with capitalism: "Capitalism can be more or less immoral," they say. "[I]t can never be more or less *moral*. You do not eliminate the ferocity of the wolf by filing down its teeth. . . . It is just as impossible to create a moral market system as it is to build a Christian brothel."[85]

And, of course, the liberationists differ from secular Marxists on religion. They are not atheistic. They believe in God; they describe the God of Jews

---

82. *See* JAKOB J. PETUCHOWSKI, OUR MASTERS TAUGHT: RABBINIC STORIES AND SAYINGS 43-44 (1982).

83. The seminal work is GUSTAVO GUTIERREZ, A THEOLOGY OF LIBERATION (Orbis ed. 1973); he answered many of his critics in THE TRUTH SHALL MAKE YOU FREE: CONFRONTATIONS (1990).

84. GUTIERREZ (1973), *supra* note 83, at 45-52; *see also* GUTIERREZ (1990), *supra* note 83, at 76. His theology turns less on violence than on solidarity with the poor.

85. Peter Burns, *The Problem of Socialism in Liberation Theology*, 53 THEOLOGICAL STUD. 493, 496 (1992). The exemplar Christian actor Martin Sheen, when he was mayor of Malibu, California, declared that prosperous town a sanctuary for the homeless. "I was considered a radical who sold out the city. . . . It just scared the hell out of them." Len Doucetto, *Citizen Sheen*, MOD. MATURITY, Mar.-Apr., 2000, at 15 (quoting Martin Sheen).

and Christians as residing among the poor, having a bias in favor of the poor, and being present in the world in the hope the poor have for a better life.[86]

These two positions are genuine alternatives, I think. They illustrate the fact that ethics in Judaism and in Christian thought is rarely a matter of "thus saith the Lord." It is centrally and commonly a conversation, an argument sometimes, even—God help us—a violent confrontation sometimes. Both of the alternatives promise ways to overcome the self-deception in the religious ethic of prosperity. One alternative would resolve personal moral issues about wealth in communal discernment, and, in doing so, would depend on the biblical promise that God will lead the community in its moral discernment—if not to "thus saith the Lord" answers, at least to provisional solutions to provisional moral problems.

Liberation would resolve the self-deceptions of prosperity by re-arranging prosperity itself. This is not necessarily a matter of turning the wealthy into villains. Father Gutierrez has to deal, on the one hand, with the moral theology that bids him and his desperately poor parishioners in Lima to turn the other cheek, to love their wealthy neighbors (who I suspect do not live nearby); and, on the other hand, with a theology that says God is present among the poor, present in hope. He puts the two things together by saying that the rich are as much victims of prevailing injustices as the poor are; the rich, too, need to be liberated. Karl Marx called the tension I have been describing "class warfare." My friend and teacher Professor Robert E. Rodes, Jr., calls it a dialectic.[87] Gutierrez calls it a fact,[88] as he expresses compassion for those who delude themselves into believing that their excessive income and accumulation of wealth are from God and not from those they rip off. He wants to liberate the rich from their self-deception.

I have wondered how these alternatives would be expressed today in North America. Liberation would speak out, I think, because liberation speaks truth to power, as the Quakers say. The other alternative ethic, the communal alternative, would not be expressed at all until the community decided to speak "over the wall,"[89] and discerned what it was going to say. Liberation would, I think, insist that politics and religion should not be kept separate; that religion is politics; that religion is jurisprudence—and law as well. In that way, the liberationists would answer questions about wealth that American culture, and particularly the culture of American lawyers, evades.

---

86. Burns, *supra* note 85, at 501-02.

87. *See generally* ROBERT E. RODES, JR., PILGRIM LAW 31-54 (1998).

88. GUTIERREZ (1990), *supra* note 83, at 73-76.

89. Walter Brueggemann, *II Kings 18-19: The Legitimacy of a Sectarian Hermeneutic*, 7 HORIZONS IN BIBLICAL THEOLOGY 2 (1985) (the metaphor being that speech "over the wall" is speech from the faith community to the wider society).

It would, I think, decrease self-deception. It would not need to contemplate violent revolution; it would, though, contemplate an adequate conversation.[90] Even in law school.[91]

90. I intend here only to refer to these "sectarian" and "liberationist" projects in political theology. I am at work on a more thorough description, which I expect to see published in the *Notre Dame Law Review* within the next year. Some of the background for that project is here. Other pieces of background are in my *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859 (1993); *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1998); *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (2000); *Forgiveness Disrupts Legal Order*, 4 GRAVEN IMAGES 127 (1998); *The Radical Reformation and the Jurisprudence of Forgiveness*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Robert F. Cochran, Jr. et al. eds., forthcoming from Yale Univ. Press); and in the last chapter of my daughter Mary's and my AMERICAN LAWYERS AND THEIR COMMUNITIES (1992).

91. I am grateful for the assistance of Jane Farrell, Timothy Fort, Linda Harrington, Stanley Hauerwas, Dwight King, Robert E. Rodes, Jr., Brian C. Shaffer, Nancy J. Shaffer, and Kinvin L. Wroth.