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ON CHECKING THE ARTIFACTS OF CANAAN: A COMMENT ON LEVINSON'S "CONFRONTATION"

Thomas L. Shaffer*

And God said . . . I have set My bow in the cloud, and it shall be for a token of a covenant between Me and the earth. And it shall come to pass, when I bring clouds over the earth, and the bow is seen in the cloud, that I will remember My covenant, which is between Me and you and every living creature

—Genesis 9:12-15**

INTRODUCTION

My friend Levinson has been prominent of late among constitutional scholars who use religious metaphors to describe the curious American political experiment. In the image he uses, we lawyers are priests in the practice of a constitutional faith; the federal constitution is our scripture, our creed, and our oath. Levinson, though, is not a television evangelist or street preacher. He is, instead, a theologian. He is unique in the honesty and thoroughness he brings to the discussion—as evidenced here by his looking at the possibility that we priests of the American constitutional faith have another faith to take into account when one of us is summoned to serve the state.

I propose here to quibble, as a Roman Catholic apologist must, over a couple of minor matters, and then to suggest that it makes a difference whether the issue of conflicting faiths is focused on idolatry, or on a hierarchy of moral values, or on a point of view.

I. MINOR MATTERS

A. *Remote Political Theory*

The concrete, specific values of a singular person, and not a theory in a school of thought, is the context Levinson invites us to: in this case, what

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** The Pentateuch and Haftorahs 33 n.7 (J. Hertz ed. 1960):

Rabbinic interpretation of these verses deduced seven fundamental laws from them: viz. (1) the establishment of courts of justice; (2) the prohibition of blasphemy; (3) of idolatry; (4) of incest; (5) of bloodshed; (6) of robbery; (7) of eating flesh cut from a living animal. The Rabbis called these seven laws the 'Seven Commandments given to the descendants of Noah.' These constitute what we might call Natural Religion, as they are vital to the existence of human society. Whereas an Israelite was to carry out all the precepts of the Torah, obedience to these Seven Commandments alone was in ancient times required of non-Jews living among Israelites, or attaching themselves to the Jewish community.

Id.

a Roman Catholic candidate for American judicial office thinks about conflicts between her priesthood in the constitutional faith (as to which she is required to take an oath) and her Catholic faith (as to which she recites the Nicene Creed in church once a week, or the Apostles Creed every day if she says the rosary—or both; you always need, with Levinson, to get your texts straight). It is useful background to discuss medieval, Counter-Reformation, and European church/state dispositions; but it is unlikely that an American judge educated at Stanford or the University of Chicago is likely to know about them, or to know about the bigots who have used them to bash American Roman Catholics. It is even less likely that the long European God-and-Caesar story will influence an American Catholic's views on American government or on what she proposes to do in public office.

B. *Personification*

The tensions between the Protestant American state religion and the religion of Roman Catholic immigrants from Italy, Ireland, Poland, Germany, et al., at least through President Kennedy's appearance in Houston in 1960, were usually expressed in references to the Bishop of Rome. This was not the choice of those on the Catholic side of the tension. The anti-Catholics chose the Pope as a symbol, not because he was important to any real American issue, but because the Pope was the symbol anti-Catholics hated best: He was not only alien; he was also an Italian. The papacy is not an issue that will survive, though, because no Catholic in state office is likely to let the Pope tell him what to do. The difficulty, as in President Kennedy's case, was the perception of others that even clever Catholics fold away their minds and consciences when the aged Italian or Pole in the Vatican speaks. That was rarely the case in America's past, and is even more rarely the case now.

C. *Magisterium*

The "teaching authority of the church" in the relatively sophisticated Catholicism that an American state official is likely to entertain is the same sort of teaching authority for Catholics as it is for Jews and Protestants. Jews who seek out and consider *halachah* from the moral authority of the Rabbis of Talmud, Midrash, and Responsa are doing what Catholics do when they read the pastoral guidance of their bishops. Most church teaching for American Catholics comes not from Rome but from the National Conference of Catholic Bishops. What Catholics and Jews do with what they hear from their teaching authorities is what Protestants do after they consult their pastors for moral advice or receive the consensus statements of their founders, their theologians, and their modern conferences, conventions, and delegations. The words "magisterium" and "rabbi" both mean "teacher," a weaker authority word than "pastor," the Protestant equivalent. The respect Catholics have for the magisterium is the respect a person has for her teachers. It does not add to this respect, or confirm its authority, that

almost everyone, even a student of constitutional law, tends sometimes to underestimate and sometimes to exaggerate the moral authority of her teachers.

D. *Infallibility*

The magisterium is a teaching authority manifested at every level of the church (similar in this respect to the vertical and horizontal webs of teaching authority in Judaism). It includes the *consensus fidei* of the laity, an ancient, non-Hobbesian, Catholic notion that says the people may be right and the hierarchy wrong. The teaching authority is not infallible, neither in theory nor in practice, nor does it claim infallibility. It can be wrong and has often been wrong, even when it has been exercised by a whole building full of bishops. Pious Catholics in American corporate business, for example, have taken strenuous, vocal issue with their bishops' recent teaching on capitalism.

The First Vatican Council (1869-70) declared limited infallibility for the Pope, available in narrow and rare circumstances. The authority has been invoked twice, in both cases on points of Marian theology that would hardly interest the Senate Judiciary Committee. Many Catholics do not agree with the theory of limited papal infallibility; they think the teaching was wrong. Even more Catholics think it is a bad idea.

In any case, no piece of political theology or jurisprudence is based on the authority the First Vatican Council claimed to give to the pope. Popes are bishops; when they write encyclical letters they invoke the teaching authority of bishops. Catholics disagree with encyclical letters, in theory, principle, and practice, as is evident from the almost universal disregard—in preaching, teaching, and practice—of three recent popes' consistent teaching on artificial birth control.

E. *Charles Curran*

Discussion of the Curran case has been so complex and so strident that I have to take refuge in a metaphor myself. I suggest that the case came about because the bishops, and particularly the Archbishop of Washington, had a reverter clause in the financial arrangements for paying Father Curran's salary.¹

It is as if my grandfather gave his orange grove to the University of Texas, "to support a professorship of constitutional law, so long as the position is used to teach constitutional faith, as defined by S. Levinson, and then to the campaign fund of Senator Heflin." If the University used the income from the orange grove to support a constitutional law teacher who advocated giving anti-communist loyalty oaths to applicants for plumbing licenses,

1. The Catholic University of America is the bishops' University; its theology faculty is a pontifical faculty, established under a charter from the Vatican that makes arrangements such as these possible.

Professor Levinson would likely rule that the income was not being used to teach constitutional faith, and Senator Heflin would claim the funds. There would be arguments about the University of Texas entering into such an arrangement (Notre Dame would never have done it). There would be arguments about Professor Levinson's understanding of constitutional faith (tendentious and too liberal). But it would not be fair to say that my grandfather, the University, or Professor Levinson had intruded into the consciences of those who oppose constitutional faith. They are free to go out and give away their own orange groves.

II. IDOLATRY

The morality that says every human person is bound to avoid idolatry is probably as general among theists of the Hebraic tradition (Jews, Protestants, Mormons, the Orthodox, Anglicans, Anabaptists, Coptics, and Roman Catholics) as it is possible for a moral opinion to be. The Rabbis said this was a morality for every human person: No one should put non-God where God ought to be. Aquinas, Luther, and Calvin would have said it was "natural law."²

It is more confrontive to say that modern American "secularism" is a god, but that is a respectable point of view, even among those who do not identify it as secular humanism. Those who believe that secularists, or secular humanists, propose to worship a god may also believe that constitutional faith is a god. If so, the teaching of Yirmiyahu Yovel (faithful, I think, to Chapter Nine of the Book of Genesis) is the teaching to which Presbyterians, Baptists, Episcopalians, and Roman Catholics subscribe: "[S]ome particular entity within the world can . . . be sanctified by some person as the foundation of his or her life. This is not merely 'paganism' but outright idolatry."³ Justice Scalia appears to have allowed for this possibility by saying (as I interpret him) that when constitutional faith appears to require faith in a god that is not God, he will resign his office. As I interpret Justice Brennan's comment to his law clerk, he said just the opposite of that: "My religious beliefs," he said, "will have to give way." I think Professor Yovel would say: "What you are saying is that your religious beliefs will be moved from the God of Abraham, Isaac, and Jacob, and of the church, to the god of (the god which is) the American nation-state."

2. It is not, by the way, the case that the natural law is a peculiarly Catholic thing; it comes from Aristotle, who was not even a Christian. Thomas Aquinas, who followed Aristotle on the point, was a Christian, but he is as much the spiritual ancestor of Presbyterians and Methodists as he is a Roman Catholic ancestor. What is peculiarly Catholic about natural law is that confessors used to use it—and do so no longer—to justify the prohibition against birth control.

3. YOVEL, 1 SPINOZA AND OTHER HERETICS: THE MARRANO OF REASON 123 (1989), quoted in Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1066 n.64 (1990).

I doubt, though, that idolatry has been an issue for any of the three Justices Levinson discusses. I doubt that Justice Brennan is an idolater, even if his statement to his law clerk is a description of idolatry.⁴ The Judiciary-Committee statements of all three Justices avoid idolatry; I would like to think that each of the three Justices thought about the issue, in those terms, before he testified, but I don't know whether any of them did.

If idolatry were to become an issue, either for judges who are believers or for other believers who must live under the coercive power of idolatrous judges, the issue would be a very grave one. It would recall to the faithful the words of Moses to the children of Israel as they paused on the borders of Canaan: "You shall tear down their altars, smash their pillars, cut down their sacred posts, and consign their images to the fire. . . . [They are] abhorrent to the Lord your God."⁵ Since the issue is serious—much more serious than a difference in theological or moral opinion—it will be important to have some way for deciding whether a legal situation or proposition or a political debate or demand involves idolatry. That will be as important for senators and their constituents as it will be for judicial candidates. I am not ready to ask for a religious test for such candidates; I can even endure atheists up there; but I would oppose an idolater.

There is a rabbinical test that might be useful in this context:⁶ Jews have come into the possession of artifacts that were, or had been, or might have been, gods (little dolls, I suppose, rather like the one Queequeg prayed to in the inn on Nantucket, in "Moby Dick"). These were often valuable. (Moses had warned that Canaanite idols would be made of silver and gold.) The Rabbis decided that Jews who found or bought these things could keep them only: (1) when they were not gods; or, (2) when, although they had been gods, they were gods no longer. So, one of the questions a Jew had to answer was whether the little doll, which evidently or, maybe, presumptively, had been an idol, was an idol no longer. The rule was that it was still an idol, even though a non-idolater owned it, unless it had been renounced as an object of worship by the last person to worship it. Evidence of renunciation was admissible. One type of evidence was mutilation: If the idol had been mutilated by the last person to worship it, the Rabbis were willing to infer that it had been renounced.

The question Levinson proposes as if for use in the Senate Judiciary Committee could be a demand that the judicial candidate worship an Amer-

4. Idolatry, in any event, is in the heart; all we professors are justified in talking about is what judges say. I regret that my earlier, angry remark about Justice Brennan was not limited in this way. See Levinson, *supra* note 3, at 1066 n.64.

5. *Deuteronomy* 7:5-25.

6. Shaffer, *The Tension Between Law in America and the Religious Tradition*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 28 (R. Neuhaus ed. 1989), develops this theme more fully. The text here quotes several sentences from that essay. The rabbinical test is in the tractate *Abodah Zarah*, especially 41b, 42a, 53a-54b, in 4 *SONCINO TALMUD*, NEZEKIN 204, 268 (A. Cohen trans. 1935).

ican constitutional idol. The question is like the Canaanite artifact; it will need to be examined for evidence of mutilation. One likely bit of evidence would be modesty about American constitutional faith—something like the remark once made by Abraham Lincoln (whom Levinson calls a rabbi in the constitutional faith): Americans, he said, are God's almost chosen people. The question itself, as Levinson has designed it for discussion,⁷ would not, if I were the rabbi, otherwise provide evidence of mutilation. The proposer of the question would need to mutilate it before I would answer it. (Notice that his mutilation would clear up a question about him as well as a question about the question).

What is important in saying this as to the seven percent quota we Roman Catholics can claim is that the test of the Canaanite artifact is as important for Unitarians, back-sliding Methodists, Muslims, and members of the Hare Krishna sect, as it is for a Jew or a Roman Catholic; Levinson will find it is easier to adapt it⁸ for ecumenical use than to prove it is not a summons to idolatry.

III. PRIORITIES

It is an altogether different thing to look at the answers of the three Roman Catholic Justices in terms of their moral priorities. Not: Does constitutional faith propose a god? But: Does Levinson's description of the duties of a judge rank higher with you than what you learn and resolve to do as a consequence of your formation in a religious tradition? All three Justices said, as to this question, that constitutional faith comes first for them, although all three also added or implied that they did not foresee a conflict between the two sets of morals. Justice Brennan was specific: "I took that oath . . . unreservedly . . . there isn't any obligation of our faith superior to that. . . ." One should probably assume, absent evidence to the contrary, that such an answer shows that the Justice has thought about his faith and finds the judicial office consistent with it. (He may even find the judicial office to be a manifestation of religious faith—an apostolate—a point I will discuss below.) The principal scandal of Christian groups in America—of all denominations except the Anabaptists—has been something like the opposite of that point: Most Christians in America have revised their religious faith until it conforms to the constitutional faith.⁹

7. Levinson, *supra* note 3, at 1074.

8. From, for example, its Roman Catholic form to one suitable for a Southern Baptist (as I imagine it):

You belong to a religious community that claims of human beings that they are able to discern, through scripture studied under the guidance of the Holy Spirit, and presumably with the help of pastors, teachers, and others in your community, the requirements of morality and justice. That is, you Southern Baptists have set yourselves resolutely against the various doctrines that can loosely be brought together under the rubric 'moral skepticism,' which suggest . . .

9. Stanley Hauerwas stated:

The curiosity of the senators, and of the anti-Catholic groups who baited them, was conflict between these two sources of morals, however unlikely conflict was. It was a question asked only of Catholics; it was not asked of Jews, who were opposed not because of their faith, but just because they were Jews. It was not an issue where the religious source of morals was the American Protestant state religion.¹⁰ The orthodox answer to it, in the orthodoxy of constitutional faith, is that, in the unlikely event of conflict, the oath of office takes precedence over the religious moral tradition.¹¹

That is, for the well-being of the state and the health of the law, a bad answer. Robert Bolt's Thomas More suggested why it is a bad answer in his colloquy with Cardinal Woolsey, who told More that his conscience was creating problems for state policy. More's conscience got in the way of the King's divorce, a divorce which was necessary before the King could marry a wife who would give him a son, a son necessary for the very good reason that King Henry's failure to have a Tudor heir would throw the country into civil war. The stakes were high; the cardinal was not exaggerating and More knew he was not. Nonetheless, More said, "I believe, when statesmen forsake their private conscience for the sake of their public duties . . . they lead their country by a short route to chaos."¹² That is, it is in the best interests of the state to have officers who have integrity enough to follow their "private" consciences when they carry out their public duties. (More had not then reached the point where the two sets of duties were in conflict. When he reached that point, he resigned from office).

More's argument is really two arguments: (1) To be faithful to the King is a way to be faithful to God; the King would be ill-served by a judge who

Christians . . . fail to see that the . . . liberal tolerance they took up . . . undercut the seriousness of Christian convictions that were necessary to form limited states to begin with. . . . But this is not the legal system, per se; it's the legal system reinforced by an increasingly self-fulfilling liberal political system that says that religion is what you do with your private time.

Hauerwas, *Faith in the Republic: A Frances Lewis Law Center Conversation*, 45 WASH. & LEE L. REV. 467, 471 (1988).

10. For example, the American Bar Association Journal praised Justice Lewis Powell, as he retired from fulltime service on the federal Supreme Court, for his ability "to disassociate himself from his own background" and for his "non-ideological approach." McAllister, *The Southern Gentleman*, A.B.A.J., Apr. 1, 1988, at 48, 49-50. If such qualities had been emphasized at the beginning of Justice Powell's judicial tenure, rather than at the end of it, I suppose he would have been asked to renounce the effects on his character of being a mainline Protestant from Virginia, educated at Washington and Lee.

11. Justice Scalia hedged a bit when he said he might not be able in practice to discern such a precise moral hierarchy; if that happened, he said, he would excuse himself from the case at hand or, if necessary, even resign from the bench. It is not irrelevant to his view of the law that he is an Italian American. Italians have never been very good at separating religion from the rest of life. See my daughter Mary's and my two essays, Shaffer & Shaffer, *Lawyers as Assimilators and Preservers*, 58 MISS. L.J. 405 (1988), and Shaffer & Shaffer, *Character and Community: Rispetto as a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838 (1989).

12. R. BOLT, *A MAN FOR ALL SEASONS* (1962).

was not faithful to God; and (2) the King—the secular order, the order of constitutional faith—cannot provide the character a judge needs. I suspect my friend Levinson would argue with me (or with Bolt) on the second point, if not on the first, and that I, in the argument, would likely reach the point where I would say we have to stop and ask Levinson to check constitutional faith as if it were an artifact of Canaan. The insistence, which I would expect to hear from him, that the order of constitutional faith can provide the character necessary to being a good judge, would make me nervous about the issue of idolatry.

IV. A POINT OF VIEW

Both Levinson and I have taught scores of law students who came to, lived through, and left law school with firm, active religious commitments. I think of them, for purposes of analysis, if not of description, in Anabaptist terms, as if the religious congregations that formed these students were communities apart from the community they entered for studying law and the community they proposed to enter for the practice.

A remarkable thing happens to these students when they start talking about public law; they come to regard themselves as culturally disembodied. There is something about the way lawyers are trained, and I suspect it is the constitutional law teachers who do this, that makes even the most pious believer *look at her church as if she were not in it anymore*. She learns, for professional purposes, to stand on the courthouse steps and look at the community that formed her as if being a lawyer had removed her to a new community, even though that has not happened, even though she is still very much in the community she came from—teaches Sunday school, sings in the choir, tithes, and serves on the board. But she approaches the church as a legal phenomenon with questions one is taught to ask in the Levinsonian order of constitutional faith.

And that isn't all—she has been trained not to think of church/state issues as issues about the church; she talks about them as if every individual in America were his own church. Thus she asks: Is what a religious person proposes to do within the limits of tolerable eccentricity or not? That is the way law students are taught to look at a Mormon who has more than one wife (answer: no);¹³ at a native American who wants to use hallucinogens in worship (answer: no);¹⁴ at an observant Jew who wants to wear a little black

13. See *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (religious belief in polygamy not accepted as justification for committing overt criminal act of bigamy).

14. See *Employment Division v. Smith*, 110 S. Ct. 1595 (1990) (free exercise clause permits the state to prohibit sacramental use of peyote by members of the Native American Church, and thus to deny unemployment benefits to drug rehabilitation counselors discharged for such use).

beanie under his Air Force hat (answer: no);¹⁵ at a Quaker who will not kill for the state (answer: yes, if he is careful about procedures);¹⁶ and at four or five high-school kids who want to read the Bible, after school, in an empty public-school class room (answer: yes).¹⁷

Then along comes Levinson, and nominates this woman for judge, and bishops of the constitutional faith up the ante. It is one thing to stand on the courthouse steps and look at the church. It is another to trot out scripture, creed, and oath on the courthouse steps and perform a constitutional-faith service of worship. When that happens, as I imagine the case, the lawyer, the candidate for judge, if she is honest with herself, has to put herself back into the community the law has taught her to treat as alien and intrusive and not even a community. I imagine her deciding that she is going to have to get back into her religious congregation and look at the courthouse from the steps of the church, before she can go on and be a judge in America.

The lawyer's return to the community that formed her could be an inspiring experience and it could be seditious. Its inspiring outcome, as I imagine it, would have her realizing that she went from the church to be a lawyer in the first place. She will remember her professional history as if it began one day when she came back from the marketplace and sat down with her fellow believers (who might also be her family or people she went to school with, or her neighbors, or members of her ethnic community). She said, "I would like to do some useful work in the world. Being a lawyer seems like useful work. What do you think about my being a lawyer?"

And the formative religious community would then have had a talk about whether their sister should go out from the church to be a lawyer. I imagine that the answer was a tentative yes—tentative because no final answer can be given to such a question. She must come back to the church from time to time to talk about being a lawyer, because a lawyer's life is so many different things. And then, one day, as I imagine it, she comes back and says she has a chance to be a judge, and the community talks about that: In the early Christian church being a judge would have been out of the question. It was like being involved in the use of nuclear weapons is now, according to the teaching of the American Roman Catholic bishops—out of the question.

Adherence to the Hebraic religious tradition, in any of its forms, can arguably require such a "sectarian" point of view: The believer has gone into the community of constitutional faith to do useful work; but she has gone out from, and in her moral deliberation she returns to, the religious

15. See *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (regulation prohibiting visible religious apparel upheld because it promoted military's interest in uniformity).

16. See *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (petitioner exempted from military service because he believed killing was morally wrong).

17. See *Board of Educ. v. Mergens*, 58 U.S.L.W. 4720 (U.S. June 4, 1990) (formation of Christian Bible study club at high school does not violate establishment clause).

community that formed her. If the theologians of the constitutional faith would only relax a little bit, and think about where they came from and what that means to their own morals, they might see that this judicial candidate's adherence to her formative community is useful for the state. That was More's first argument. The judicial candidate's being religious is a resource the state cannot provide. That was More's second argument, and, I think, James Madison's as well.

V. CONCLUSION

If the guardians of American liberal democracy were serious in their talk of pluralism, they would see that this judicial candidate's adherence to her formative community is an asset for democratic deliberation. Substantive pluralism, serious about moral values, would be a society in which moral beliefs are described, aired, and discussed, even in legislatures and in the courts. No moral belief would be silenced because it was also religious. Its dialogue would be more interesting than what's now on the evening news, and it might be more productive. I doubt that the bishops of constitutional faith could put up with it. I don't know about the theologians.