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## On Lawyers and Good Samaritans: A Reflection

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Mark A. Chinen<sup>1</sup>

1.

One summer during law school, I worked as a summer associate for a firm in Hawaii that engaged in insurance defense work. One of the lawyers asked for help in preparing a motion in a case the firm was handling. According to the file, a high school boy took the family SUV for a drive. A classmate, a fifteen-year-old girl, went along for the ride. As the boy turned off the highway and drove along a sugar cane road that ran parallel to the main road, the SUV hit a bump and flipped over. The girl was thrown from the vehicle and landed headfirst on the highway. She did not survive. Her parents sued the boy's parents for negligent supervision. We represented the defendants.

Amid the accident reports and pleadings was a copy of a letter from the boy's mother to the girl's mother. As best as I can remember, the mother began, "I am writing to you against the advice of my lawyer, but I feel I must do something to give you a sense of how very sorry and how devastated we are by all that has happened." The boy's mother shared how her son had not been the same since the accident. He had become withdrawn. His grades had slipped. He wrestled with drug dependency. The mother closed the letter by writing, "I am not trying to affect the course of this case, but I felt that things just couldn't go on this way. I felt I must do something to make a connection with you."

It was hard not to be moved by that letter and to reflect on its deeper meaning. For years, the lessons I drew from it were how limited the law is in solving basic human problems and how sometimes law (in this case, as manifested in the adversary process) actually interferes with the resolution of those problems. Our client needed a good legal defense, but she also

needed far more; she needed reconciliation, forgiveness, and the healing of the soul, both for herself and for her family. These were obviously things that the law and its machinery could never provide. Moreover, under our prisoner's dilemma-like calculus,<sup>2</sup> what she really wanted potentially conflicted with our goals as her representatives.

That the law is limited and that it sometimes interferes with the fulfillment of legitimate human needs are important lessons to be sure. But more recently, I have come to see that the mother's letter teaches yet another, perhaps even more important lesson about being helpers and the helped, experts and novices, about being ourselves. It is a lesson that shows itself in a story from Luke, to which I now turn, and runs through the law, our classrooms, and beyond.

2.

One day, an expert in Jewish law came to Jesus and asked, "Teacher, what must I do to receive eternal life?"<sup>3</sup> In what amounts to a Socratic exchange, Jesus replied, "What is written in the law? How do you read it?" The lawyer<sup>4</sup> answered with a quote from the Torah, "Love the Lord your God with all of your heart, soul and strength, and your neighbor as yourself."<sup>5</sup> Jesus said, "You have answered correctly; do this and live." The exchange could have ended there. But the lawyer wanted to justify himself. Perhaps now that he had been assured that he had correctly identified the right commands, he wanted to make sure that he was obeying them. Perhaps he was dissatisfied with Jesus' answer or with his encounter with Jesus. Perhaps he wanted to see if there were any qualifications to the command. In any event, the lawyer asked a follow-up question: "And who is my neighbor?"

Jesus responded by telling the story of the Good Samaritan. Most of us are familiar with it. A man who was traveling from Jerusalem to Jericho was attacked by thieves. They stripped and beat him, took his belongings, and left him to die in the road. By chance a priest came along, saw the man

in the road, and moving to the side, walked on. A Levite came up, saw the man, and passed by on the other side. But then a Samaritan happened by and, realizing what had happened, felt compassion for the man. The Samaritan bound the man's wounds, pouring oil and wine on them, and put him on his own donkey. The Samaritan took him to an inn. He gave the innkeeper two denarii (altogether about two days wages for a laborer) and said, "Take care of him, and if you spend more, I will pay you when I come this way again."

Then Jesus asked the lawyer, "Which of the three in your judgment proved neighbor to the man who fell among thieves?" The lawyer answered, "The one who showed mercy to him." Jesus said to him, "Go, and you do likewise."

3.

Like many passages of scripture, it is impossible to draw out the full implications of the story or to give it a definitive interpretation. Much has been made, for example, of the Samaritan's act of altruism; perhaps this behavior is so admirable because it appears to so rarely happen. This is probably the aspect of the story that has had the broadest impact on our culture, including the law. For example, the Samaritan is memorialized in laws that bear his name; to some extent they shield persons who render aid to others from tort liability. Yet we conclude with some regret that the law does not and cannot force people to act like the Samaritan. Justice Parker had the Good Samaritan in mind when he held unenforceable Seth Wyman's promise to pay Daniel Mills for expenses Daniel had already incurred in caring for Seth's dying son, Levi.<sup>6</sup> With barely concealed contempt for the father, Parker wrote, "General rules of law established for the protection and security of honest and fair-minded men, . . . will sometimes screen men of a different character from engagements which they are bound in *foro conscientioe* to perform."<sup>7</sup>

The Good Samaritan story is also a study in contrasts and surprises. Both the priest and the Levite were part of the social and religious elite of their day.<sup>8</sup> The Samaritan, by contrast, was a pariah.<sup>9</sup> Samaritans were not mentioned in polite company. (Note that the lawyer does not refer to the Samaritan directly but uses a circumlocution instead: “the one who showed mercy.”<sup>10</sup>) Yet, even though the Samaritan was an outsider, it was he who had compassion for the man in the road and went out of his way to help while the priest and Levite walked on. But whether the Samaritan is viewed alone, or in contrast to others, the chief application of the story is to be like the Samaritan.

Similarly, for Günther Bornkamm the message of the story is: Be a neighbor. Bornkamm argues that the lawyer asks the question, “Who is my neighbor?” to put distance between himself and the command to love his neighbor as himself. For the lawyer and those in his society, his relationships and duties to others were defined by concentric circles: “our nearest neighbour, our neighbour, our not so near neighbour, until we come to those towards whom we have no further obligation, indeed whom we have a right or even an obligation to hate.”<sup>11</sup> Bornkamm argues that Jesus used the Samaritan story to break through or collapse those circles. First, Jesus forces the listener to identify with the man lying in the road. For a dying man, questions about circles, about who is in and who is out, become irrelevant. The hearers of the time would expect those in the inner circle to come to the rescue, yet they do not. They would never expect a Samaritan to show compassion to a man who probably despises him, yet he does.

Then, as discussed earlier, immediately after introducing this surprise character, Jesus flips the lawyer’s question and asks him to identify the neighbor in the story. According to Bornkamm, Jesus does this to force the listener to place him or herself and the neighbor in such close proximity that it becomes useless to ask the question of who is neighbor. “The question: Who is my neighbour? has been changed into another: To *whom* am I a neighbour?”<sup>12</sup> “Thus,” writes Bornkamm, “the questioner, in being asked

to make his neighbour's position his own, finds himself directed to himself, and learns what it means to love one's neighbour as oneself."<sup>13</sup> For Bornkamm then, Jesus uses the Samaritan not so much to identify one's neighbors as to demonstrate in an almost visceral way what it means to love one's neighbor as oneself. It means to just do it, without hesitation, no questions asked.

In my view, Bornkamm's interpretation comes very close to the heart of the matter.<sup>14</sup> Yet I want to focus on something Bornkamm alludes to but treats only briefly as he moves to his main point. The message of the story might indeed be, "Be a neighbor," but the story also has something to say about who we are before we become neighbors, who we are as the concentric circles are collapsing. Jesus answers the lawyer's question, "And who is my neighbor?" with a story and a counter-question, "Which one proved neighbor to the man in the road?" In his response to that second question, the lawyer names not only his neighbor; he also names himself. He is the dying man in the road, in need of help and in need of a neighbor.

As the story collapses the distance between individuals along the horizontal axis, at the same time, it collapses the distance between individuals along the vertical axis. Too often, the helper can be miscast in relation to the one helped. The helper is the powerful one, the knowledgeable one, and sometimes the rich one. In contrast, the one helped is miscast as weak, ignorant, and often poor. Within that structure, love of one's neighbor is unilateral and directed downwards. The readers of Luke's gospel, primarily non-Jewish people,<sup>15</sup> would have been familiar with an extreme form of this phenomena: the helper would be a *patron*, doling out as it were, love. Under those circumstances, love of one's neighbor would have the subtle effect of reinforcing the existing order: loving someone would be best expressed in the giving of alms, to be received by the lower strata with gratitude that in turn justifies the patron's status.<sup>16</sup>

Jesus, however, draws from a tradition in Judaism that has an entirely different view of relative positions and of right relationships within a society.<sup>17</sup> Given Jesus' understanding of the nature of God, where God holds sway, all such things are turned on their heads. The story of the Samaritan teaches in part, "You may think you are in a position to love your neighbor, but you do not know how precarious your situation is. Truth be told, you need your neighbor far more than your neighbor needs you."<sup>18</sup>

4.

The lawyer in the Samaritan story is not the only person capable of condescension, the result of which can be forms of injustice. Audrey Vokes brought an action seeking to rescind on grounds of misrepresentation a series of contracts she had entered into with a local dance studio affiliated with Arthur Murray, Inc.<sup>19</sup> Her complaint alleged that the studio had duped her into signing up for tens of thousands of dollars worth of dance lessons by flattering her with false statements of her dancing ability. The instructors told her that she was very promising as a dancer and improving quickly with her lessons; in turn, she continued to pay for more instruction. The case is primarily known for the court's holding that although mere statements of opinion are generally not sufficient to constitute misrepresentations, under the facts as alleged in the complaint,<sup>20</sup> what would be taken as just an opinion when people are dealing on equal terms can be taken as a statement of fact when one of the parties has superior knowledge.<sup>21</sup> If the allegations were true, it could be concluded that the defendant's dance instructors had superior knowledge of Ms. Vokes's potential as a dancer and her progress, and the court reasoned it could be inferred that the flattery that preceded each additional contract was motivated more by monetary gain than by an appraisal of her true potential as a dancer or her progress.<sup>22</sup>

There are arguments pro and con as to the substance of the decision. For purposes of this reflection, however, what is interesting is how the court views Ms. Vokes. This is how the court begins its recitation of the facts:

Plaintiff Mrs. Audrey E. Vokes, a widow of fifty-one years and without family, had a yen to be ‘an accomplished dancer’ with the hopes of finding ‘new interest in life.’ So . . . a dubious fate, with the assist of a motivated acquaintance, procured her to attend a ‘dance party’ at Davenport’s ‘School of Dancing’ where she whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as ‘an excellent dancer’ was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight half-hour dance lessons to be utilized within one calendar month therefrom, for the sum of \$14.50 cash in hand paid, obviously a baited ‘come on’.<sup>23</sup>

One wonders how Ms. Vokes must have felt when she read that paragraph. The court reinstates her suit, thereby giving her a chance to receive some measure of justice, but the cost of that justice is her dignity. The court portrays the plaintiff as a lonely woman who has, for all intents and purposes, been seduced. She is widowed, alone, and in search of something more in her life. Along comes an elegant stranger who sweeps her off her feet, in a private room no less, and who gives her hope for the future, but it is all a “come on.” For purposes of this litigation, this is Ms. Vokes’s identity, memorialized for all to read.<sup>24</sup> The court’s condescension perpetuates the image of the victim as weak and in need of help and keeps her there.

But the Samaritan story turns the tables and makes the lawyers and judges the victim. It is, to say the least, disconcerting to be asked to identify oneself with the victim of a violent assault, left to die on a road. Simone Weil writes:

To acknowledge the reality of affliction means saying to oneself: ‘I may lose at any moment, through the play of circumstances over which I have no control, anything whatsoever that I possess,



including those things which are so intimately mine that I consider them as being myself. There is nothing that I might not lose.<sup>25</sup>

It is not by chance that violence is inserted into the Samaritan story. The man is the victim of a brutal, physical attack. Violence is particularly effective in demonstrating how vulnerable a person can be.

Two people see the man and walk on. We see how quickly a person can be transformed into a victim, from an insider into an outsider, out of fear,<sup>26</sup> ignorance, or malice. Such transformations put everyone in peril: the tragedies and injustices that befall outsiders are well known, but there is a cost to insiders too. In his novel *Hawaii*, James Michener relates a rather poignant scene in which a missionary woman lies dying in childbirth.<sup>27</sup> Two missionaries fumble through the pages of a book on midwifery while native Hawaiian midwives wait outside with expertise and medicines that could save both the mother and the newborn. The missionaries refuse to ask for help because it would not be right for a Christian baby to be born with the assistance of the people they have come to convert, so the mother dies. They could not bring themselves to ask for help from someone “outside” or “below” them; perhaps it was beyond their intellectual or psychological power to do so. It would have meant radically revising their beliefs about themselves, their mission, and the people they had come to “serve.” But regardless of their reasons for inaction, the result was deadly.

5.

The good news, however, is that the man is not left lying in the road. He is helped, and Jesus says, “Go and you do likewise.” But now as the lawyer goes his way, hopefully it is with a better understanding of who he is in relation to those he helps and who helps him. The story of the Samaritan asks lawyers to pose the question: Is it possible that the litigant in our courtroom, the client in our office, or the student in our lecture hall is our rescuer? How could that possibly be? There is of course the rather obvious fact that we in the legal profession make our livings from this work. We

would not be here but for those who use the legal system or find themselves caught up in it. But there is more to it. There is a way in which every person who appears before us and asks for help or for justice invites us to participate in that help and justice as well.

I am a teacher now and write this reflection at the beginning of the academic year. Already, there are students in my first year class who are asking questions about the rightness of the result of a particular case, or the ethical implications of a particular legal rule. We are already beginning the dialogue that will lead to Justice Parker's conclusion in *Mills v. Wyman*, that sometimes law is unable to achieve justice and creates injustices when it attempts to do so. But my students remind me that it is possible to become too comfortable with that conclusion, and that there is something in the human experience that cannot be captured in the doctrines, concepts and activities that make up contemporary legal thought and practice.

But the story of the mother and the letter that began this reflection highlights this possibility even better. I never learned what happened to her. I trust that she and her family found some measure of peace. Now I realize that in her letter, she was telling those of us who legally represented her that she was more than a defendant, more than a client to be guided through the legal labyrinth. She was a person, who was extending to us a silent offer of help, a reminder, and an invitation. She, like the Samaritan, was asking us to recall that in the end there are no concentric circles, no insiders or outsiders, no top or bottom. There are only people who move in full circle, from people who need their neighbors, to neighbors, and back again. She was inviting us to join that circle. She was inviting us to community.

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<sup>2</sup> The prisoner's dilemma is a situation out of game theory in which it is irrational for the players to cooperate.

<sup>3</sup> The text is found at *Luke* 10:25-37.

<sup>4</sup> The Greek word, *nomikos*, is often translated “lawyer” and as it appears in *Luke*, refers to Jewish experts or teachers of the law. Hans Hübner, *νομικός* in 2 EXEGETICAL DICTIONARY OF THE NEW TESTAMENT 470-71 (Horst Balz & Gerhard Schneider eds., 1981); *νομικός*, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE 541 (William F. Arnt & F. Wilbur Gingrich trans., 2d ed. 1979).

<sup>5</sup> The lawyer is quoting from *Deuteronomy* 6:4-5 and *Leviticus* 19:18.

<sup>6</sup> *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825). According to the court, Levi, 25, was seriously ill after having returned from sea. The court states, Daniel “acted the part of the Good Samaritan, giving him shelter and comfort until he died.” *Id.* at 209. Daniel informed Levi’s father, Seth, of his son’s illness and what he had done for him. Seth replied and promised that he would reimburse Daniel for the expenses he had incurred on Levi’s behalf. Later, Seth refused to pay. At issue was whether the promise was enforceable under contract law. The court found that it was not. Since the promise had been made with respect to services that had already been provided, the promise was not supported by consideration. *Id.* at 211.

<sup>7</sup> *Id.* at 208-09. The court appears to have had its facts wrong. See Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749, 1756, 1761 (1997) (presenting evidence that Levi was very much alive and that Seth had actually promised to pay for future services, which would have rendered the promise enforceable).

<sup>8</sup> Alexander Sand, *ιερεός* in 2 EXEGETICAL DICTIONARY OF THE NEW TESTAMENT, *supra* note 4 at 174-75; Gerhard Schneider, *Λευίτης* in *id.* at 350. As N.T. Wright explains, priests and Levites were considered to be at the very center of the prevailing religion of that day, which placed great emphasis on ritual purity. N.T. WRIGHT, JESUS AND THE VICTORY OF GOD 307 (1996). Wright suggests that the priest and Levite might have passed by to keep themselves ritually pure. *Id.* See also MARCUS J. BORG, MEETING JESUS AGAIN FOR THE FIRST TIME 54-55 (1994).

<sup>9</sup> Samaritans were considered a separate ethnic and religious group and thus by definition outside of the society. For more information, see Gijs Bouwman, *Σαμαρείται* in 2 EXEGETICAL DICTIONARY OF THE NEW TESTAMENT, *supra* note 4, at 226-27 and the bibliography listed at 226.

<sup>10</sup> Bouwman points this out. *Id.*

<sup>11</sup> GÜNTHER BORNKAMM, JESUS OF NAZARETH 112 (Irene McLuskey et. al. trans., 1960) (emphasis added).

<sup>12</sup> *Id.* at 113.

<sup>13</sup> *Id.*

<sup>14</sup> Although, to say that the lawyer’s self is being directed to himself has the flavor of an existential overlay on the text. Other scholars draw different, though not inconsistent, lessons from the parable. For Wright, Jesus uses the Good Samaritan story to show that the walls between insiders and outsiders have been broken down. WRIGHT, *supra* note 8 at 306-307. For Borg, the story is a critique of the then prevailing purity system in which one was acceptable to God through keeping ritually pure. BORG, *supra* note 8 at 54-55.

<sup>15</sup> See WERNER GEORG KÜMMEL, INTRODUCTION TO THE NEW TESTAMENT 149-50 (Howard Clark Kee trans., 1975) (arguing that the author of Luke was almost certainly a Gentile Christian); WILLI MARXSEN, INTRODUCTION TO THE NEW TESTAMENT: AN APPROACH TO ITS PROBLEMS 161 (G. Buswell trans., 1968) (concluding that Luke was writing to a Greek audience).

<sup>16</sup> For a discussion of the patronage system in Roman society, see JOHN DOMINIC CROSSAN, THE HISTORICAL JESUS: THE LIFE OF A MEDITERRANEAN JEWISH PEASANT 43-71 (1991).

<sup>17</sup> For a discussion of this tradition, see JOHN DOMINIC CROSSAN, THE BIRTH OF CHRISTIANITY: DISCOVERING WHAT HAPPENED IN THE YEARS IMMEDIATELY AFTER THE EXECUTION OF JESUS 182-208 (1998).

<sup>18</sup> This message would be consistent with other passages in Luke. Luke uses other passages to portray the religious elite as failing to comprehend the reign of God while it is almost intuitively grasped by those purportedly on the margins of the society. See, e.g., Luke 7:36-50, 14:7-14, 16:19-31, 18:9-14.

Economic hierarchies are also on Luke's mind. For example, in Luke's version of the Sermon on the Mount (in Luke, the Sermon on the Plain), Jesus says, "Blessed are those that hunger, for they shall be filled." Luke 6:21. Later he follows with a series of 'woes', one of them being, "Mourn, those of you who are filled now, for you shall be hungry." Luke 6:25. Contrast this with Matthew's telling of the Sermon. According to Matthew, Jesus says, "Blessed are those that hunger and thirst after righteousness, for they shall be filled." Matthew 5:6. The corresponding list of 'woes' is absent in the Matthean version. See also Luke 1:46-55 (the Magnificat).

For a discussion of how the parables can be understood as a critique of the then-existing social structures, see generally WERNER R. HERZOG II, PARABLES AS SUBVERSIVE SPEECH (1994).

Finally, under Wright's argument that the story is a critique of artificial boundaries between insiders and outsiders, *supra* note 14, the Samaritan teaches that the person you have rejected as an outsider is the one you need most.

<sup>19</sup> *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. 1968).

<sup>20</sup> The appeal challenged the lower court's dismissal of the case with prejudice for failure to state a claim. *Id.* at 909.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 907.

<sup>24</sup> The court continues to poke fun at Ms. Vokes in its description of the allegations in the complaint. Ms. Vokes signed up for a large series of lessons through fourteen different contracts. *Id.* The misrepresentation claim was that "All the foregoing sales promotions . . . were procured by . . . false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no 'dance aptitude', and in fact had difficulty in 'hearing the musical beat'." *Id.*

The complaint alleged that such representations to her 'were in fact false and known by the defendant to be false and contrary to the plaintiff's true ability, the truth of

plaintiff's ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons'. It was averred that the lessons were sold to her 'in total disregard to the true physical, rhythm, and mental ability of the plaintiff'. *Id.* In other words, while she first exulted that she was entering the 'spring of her life', she finally was awakened to the fact there was 'spring' neither in her life nor in her feet. *Id.* at 908. (emphasis added). The court must have known its Tennessee Williams.

<sup>25</sup> Simone Weil, *On Human Personality*, reprinted in THE SIMONE WEIL READER 313, 332 (George A. Panichas ed., 1977). Weil gets a bit extreme. She continues, "It could happen at any moment that what I am might be abolished and replaced by anything whatsoever of the filthiest and most contemptible sort." *Id.*

I might be accused of misquoting Weil because for her, the affliction she describes serves as a portal through which one enters into truth. Affliction reduces the individual to a state of non-being that for Weil is almost a precondition for openness to that which transcends the individual, namely, truth and beauty. *See id.* at 332-33. Weil is not the only one who has alluded to the transformative power of affliction. In WAR AND PEACE, Pierre Bezuhov undergoes such a transformation when he is captured by Napoleon's army and dragged along as it retreats during the Russian winter. *See generally* LEO TOLSTOY, WAR AND PEACE (Modern Library, 1931).

It is tempting to overlay the themes of redemptive suffering on the Samaritan story. As I discuss in the main text, the violent imagery does serve a purpose, but it would probably distort the story to read into it a call for the annihilation of the self.

<sup>26</sup> Weil would probably explain that no one really wants to be confronted with this bare truth. She writes "To put oneself in the place of someone whose soul is corroded by affliction, or in near danger of it, is to annihilate oneself." Weil, *supra* note 25, at 332.

<sup>27</sup> JAMES A. MICHENER, HAWAII 270-71 (Fawcett Crest 1959).