

1-1-1985

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Recommended Citation

Thomas L. Shaffer, *A Word for the Common Good*, 42 Wash. & Lee L. Rev. 37 (1985),
<http://scholarlycommons.law.wlu.edu/wlulr/vol42/iss1/4>

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A WORD FOR THE COMMON GOOD

THOMAS L. SHAFFER*

If any value is worth holding without examination, I suppose it is the value of relationship—what the trendy would call dialogue, and what the traditional and academic would call, as Professor Burt does, argument. In the way he writes of it, it is a democratic value: The state rests on conversation. That is not far from Aristotle's saying that the state rests on friendship, and relating his argument to Aristotle's may be useful because Burt's subject faces an issue Aristotle did not face: Who is admitted to the conversation? If Burt's point were seen as resting on people in relationship with one another, two at a time, there might be an examination of it that would lie deeper than politics; one might then say, with Martin Buber¹ and, say, H.R. Niebuhr,² that the other, the one I can come to call "thou," is the means for discovery both of morals and of being. Maybe Burt doesn't need to go that deep, but I think he needs to say why it is that argument is important, morally important:

Consider two people waiting at a bus stop. The first principle (the unexamined principle) in Burt's argument is that they should talk to one another and that those who influence them should help them to talk to one another. Is that because it is a good thing for *any* two people who are together to talk to one another? Maybe so; but I can imagine that one of them is waiting for the bus north and the other for the bus south. I can imagine that it might seem appropriate to their friends, north and south, for them not to talk to one another. To argue that they should *not* be separate is to claim something in common for them—a community, a morality, an existence, or something else. If they are, in their separateness, not treating one another as people should treat one another—if I (you) say that—then isn't a claim made, a claim about *each* of them, that is not evident from the situation?³

There is an ethnic implicit in Burt's argument for argument, and it could,

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1. See M. BUBER, *I AND THOU* (W. Kaufmann trans. 1972).

2. See H. R. NIEBUHR, *THE RESPONSIBLE SELF* (1963) (Harper and Row ed. 1978); T. Shaffer, *Moral Implications and Effects of Legal Education, or: Brother Justinian Goes to Law School*, 34 *J. OF LEGAL EDUC.* 190, 201 (1984).

3. Buber's argument is ontological—I don't even come to be until there is, for me, a thou. He was not talking about "Some Enchanted Evening," though he sometimes said a bus stop would do. See M. BUBER, *BETWEEN MAN AND MAN* 5 (R.G. Smith trans. 1947); M. BUBER, *THE KNOWLEDGE OF MAN* 71 (R.G. Smith trans. 1965). "A society," he said, "may be termed human in the measure to which its members confirm one another." *THE KNOWLEDGE OF MAN*, at 67.

usefully, be explicated. There may be more to it than good commentary on two moments in the melancholy story of a fractious and pretentious political authority in North America.

Burt does rest some or all of his argument on an intuitive commitment to equality. That may be enough, but I think the argument could rest on something deeper. Something deeper than, say, Locke and Jefferson and the French Revolution.⁴ Relationship, culture, and virtue mean more in this admirable thesis than equality does. Buber, Moses, and Aristotle, with notions of *common* good, are in there somewhere.

4. S. HAUERWAS, *A COMMUNITY OF CHARACTER* (1981); R. RODES, *THE LEGAL ENTERPRISE* (1976); Rodes, *Pluralist Christendom and the Christian Civil Magistrate*, 8 *CAP. U. L. REV.* 413 (1979). Karl Barth argues that the significance of family, town, class, and nation is ethical—that God finds us where he puts us: “As the true object of right, one will necessarily become its bearer, the bearer of the social order with all that is to be said for and against [it].” K. BARTH, *ETHICS* 385 (1928-29) (G. Bromiley trans. 1981).