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ADDRESSES

THE MORAL DELEGITIMIZATION OF LAW

RICHARD JOHN NEUHAUS*

The title that I suggested for this address is: "The Moral Delegitimization of Law." Of course this title presupposes something which cannot readily be presupposed today. Something that cannot be taken for granted but indeed must be argued for quite explicitly—there is a need for the moral legitimation of law. Obviously the very idea of legitimation assumes something that is external to that which is to be legitimated. That is, aside from the most abstract level of discussions of the first principles, nothing is self-legitimate.

Law does not and cannot stand on its own feet, especially in this kind of society. It cannot stand by itself, and yet a very long history in American jurisprudential argument suggests precisely that. Whether under the banner of positivism or varieties of realism, the basic proposition put forth is that talk about the moral legitimacy of law is nonsense on stilts. The law is the law is the law.

I suggest that this does not make philosophical sense. It is counter-intuitive, and it is contrary to our historical experience. Finally, such a proposition is not sustainable in a society that professes to be legitimated by a theory of democratic governments.

Now if one talks about what it is that can legitimate the law, some resort immediately to another law. They employ various terms such as a higher law, a natural law, or a fundamental law. All such terms presuppose that we live in a moral universe; not, of course, in the sense that people behave morally, or even in the sense that the non-human aspects of the universe behave in a morally approvable manner. Rather, a moral universe in the sense that life itself is an engagement that has consequences for good or evil—right or wrong—and that human beings in par-

* Director, the Center on Religion & Society. This text is adapted from an address given to the Notre Dame Community, April 7, 1988, as part of the Thomas J. White Center Lecture Series.

ticular are moral agents. My own belief is that there are enormous resources as yet undeveloped, certainly undeveloped in terms of their public articulation in a persuasive manner, in the natural law tradition, or, perhaps more accurately, the natural law *traditions*.

Father James Burtchaell, here at Notre Dame, has recently written a paper for us at the Center in New York for a conference we are doing on what I call "The Return of Eugenics." It has a very interesting excursus on why natural law language is resisted in our culture. He suggests in part, and I think it is a suggestion worth pondering, that it is the word *law* that meets with such resistance. *Natural* should not be the problem, he says.¹

The last twenty years has shown an enormous resurgence in the perception of the importance of the natural. In particular, one thinks of the environmental movement and ecological concerns. There is an awareness that things have certain connections of a causal nature built into the way they are. If these connections are disregarded or violated, very unhappy consequences will result. I think it is possible to develop this insight, in a way that I find intriguing, with respect to our understanding of law as a part of a moral universe. Now were I to pursue this in an explicitly Christian context, I would certainly find myself sympathetic to the insights of Romans, Chapter 1, for example.² Some call this natural theology, but I think that a misnomer. More accurately, it is an awareness of a divine creative source, end, and purpose universally available to all persons of reason. To develop that awareness in an explicitly Christian sense is terribly important. However, the subject at hand is the question of the delegitimization of law in American society. In any event, given certain perverse understandings of the religion clause of the first amendment, many people would consider it not only an unfruitful line of inquiry, but one outside the legitimate discussion of law in the public arena because it is obviously "tainted" by religion.

Does the answer to the legitimation question finally come down to one that will inescapably be religious in character? Yes, I think so. At least if one is using the term *religious* in a more sociological frame of reference and speaking of religion

1. See J. BURTCHAELL, *THE GIVING AND TAKING OF LIFE: ESSAYS ETHICAL* ch. 5 (1989) (forthcoming, Univ. of Notre Dame Press).

2. "For since the creation of the world his invisible attributes are clearly seen—his everlasting power also and divinity—being understood through the things that are made." *Romans* 1: 20.

as a functional phenomenon, namely, as that which is binding in terms of a set of ideas and beliefs in a society, civilization, or tradition. I, along with Paul Tillich and a host of others, agree that politics, including law, is in the largest part a function of culture and that at the heart of culture is religion. I think it important we see the movement from law, to politics, to culture, to religion. At the heart of this is the question of religion as *religere*, as that which has the binding force.

It is not easy to make this argument today, for many think any reference to religion is in the service of the obscure. But the understanding I propose is, I think, well embedded in ordered liberty—the American experiment, this democratic republican or republican democratic form of governance. It is the understanding shared, it seems to me, by the founders, including some of those who were viewed as being least sympathetic to traditional religions such as Jefferson, who himself was an exception within the community of the founders.

Today, this understanding has become very strange to a world of jurisprudence that subscribes to various forms of realism which I think are aptly described by the term “crackpot realism.” That realism is deeply unrealistic. It believes that the law is the law is the law and seems to think that this notion is capable of sustaining this American experiment in ordered liberty. I do not think it is. I do not think any historical evidence exists to suggest that it is. On the contrary, it seems to me many of those who advocate what I take as a rather cynical view of the law and who would not consider the question of the moral legitimacy of the law are operating on deeply anti-democratic impulses. They are strongly out of sympathy with the notion of democratic theory and sovereignty resting with “we the people.”

Of course, one can be cynical about the capacity of a realistic view sustained in a manner that would muddle us on through. It is a little like Gibbon’s remark about religion and the Roman Empire. There were many religions in the Roman Empire, he noted. To the common people they were equally true; to the philosophers, equally false; and, to the rulers equally useful.³ It seems to me a great deal of current thinking about law is exactly that way. However, even this kind of thinking indicates a readiness to make a token gesture toward the validity of the question concerning the moral legitimacy of law.

3. I E. GIBBON, *DECLINE AND FALL OF THE ROMAN EMPIRE*, ch. 2, at 34 (H. Milman ed. 1883).

By contrast, philosopher Richard Rorty endorses what he frankly calls, a bazaar of pluralistic choices in American life.⁴ I cite Rorty because he is particularly candid and lucid in setting forth what is presupposed in the writing and minds of many other people. We must relentlessly refuse to ask the question about moral legitimacy, says Rorty, except within our private enclaves—what he calls our contemporary equivalents to the English gentleman's club. He argues that it is not only possible but it is imperative to exclude those questions from public deliberation. I consider this position to be a refusal to engage in the whole civilizational tradition of law and morality in the politics of which we are part.

I find this position, as exemplified by Rorty, a rejection of politics because I believe that Aristotle rightly defined politics, including law, when he said that *the* political question is how ought we to order our life together.⁵ That is, politics is an extension of ethics. It is the process in which rational persons (he said men) engage one another in civil discourse around the question of how ought we to order our life together. Yet, this is inescapably a moral question, as the single word *ought* indicates. What is the good and the right, such that when law and politics are in its service, it is then legitimate morally? And when law and politics undermine that good, that right, then such politics and law are delegitimated.

In our time people such as Rorty view themselves, strangely enough, as being in the lineage of people like John Dewey. They call themselves pragmatists in the Deweyan tradition. I find this rather astonishing, for John Dewey, however misguided in much of his thinking, shared a very profound understanding of the need for the moral legitimation of law, especially in a democratic society. In 1934, you recall, he published his little book, *A Common Faith*. It seems to me it was flawed but well directed. It was aimed at doing what many thoughtful Americans, in this century and before, have attempted to do: to provide something like a public philosophy which would at least offer a common vocabulary and a shared vision to allow conflicting answers and discordant questions to be discussed within the bonds of civility and rationality. The trouble with John Dewey's *Common Faith*, of course, is that it was not common. It was essentially the faith of John Dewey and a few other products of an elite, non-representative slice of

4. See generally R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

5. See generally ARISTOTLE, *POLITICS*, bk. I, ch. 2.

American culture. However, this common faith, which he thought would displace the traditional faiths he viewed as riddled with superstitions and irrationalities, was nonetheless a serious and noble effort to try to reconstitute a common conversation.

Not-so-incidentally that effort today has been most confused and agitated in the realm of education, especially public education. People in education who, interestingly enough, claim Dewey as one of their patron saints have abandoned Dewey's effort almost entirely. Having found it difficult, they have declared it futile even to attempt. Thus we have, particularly in the public school classroom, a frequently self-conscious and systematic abandonment of the central task of education itself, a failure to transmit to another generation the constituting visions by which a society answers the question, "How ought we to order our life together?"

We have descended not only in the public school classroom, but in the public square generally to a kind of possessive individualism. It is a purely procedural and sterile understanding of law and of politics, divorced from a culture that is itself increasingly divorced from its religious grounding. It is a law and a politics incapable of asking the question: "How ought we to order our life together?" because there is no reference, no point of discussion which gives meaning to the "ought." Thus the ought is dismissed, if not as meaningless, then as capable of being given meaningful answers only in the personal and private sphere, hermetically sealed off to keep from disrupting our public business in a way that might lead to impassioned conflicts over conflicting moralities, and maybe even to religious warfare. An old cliché sums this up: we cannot deal with moral judgments and values in public because we are a pluralistic and democratic society. Raise a question concerning public morality, and the objection immediately comes: "Whose morality or whose values will be imposed upon whom?"

These clichés that invite us to abdicate the task of moral deliberation in public are really a rejection of politics as such. They certainly are a rejection of politics as defined in this democratic experiment. In this experiment it was understood, at least in theory, that sovereignty or legitimacy is borne by "we the people." The founders were quite explicit (even Jefferson, and especially the older Jefferson) about the impossibility of this kind of polity, this kind of social experiment, without a radical dependence upon public virtue and public virtue's radical dependence, in turn, upon religion.

The daring thing—it seems to me one could say the single most daring thing in the American experiment and that which makes it truly an experiment—is that the founders said that the foundation of the state, that is, public virtue, is beyond the purview and control of the state. The state has no business to control or define that upon which the whole experiment is premised. This, I think, was without precedent in all human history. This daring to disaggregate the political, the culture, and the religious continues to be highly experimental. It assumes that a state, by letting that which it admits to being foundational out of its control, is acknowledging its very limited character. I take it as a substantive statement, not merely rhetoric, that in the pledge of allegiance we say “one nation under God.” Although only added in 1954 during the McCarthy era, and although it upset many who assume it means a nation somehow specially chosen or exempt from the sins and the corruptions of other powers, I take it to mean that ours is a nation accountable to God. “Under God” means, first of all, under judgment. This is what the founders, some explicitly and others intuitively, meant by the relinquishing of governmental control over that public virtue and its religious ground. I think this was in our history as a society, fleshed out and articulated most majestically and persuasively by Abraham Lincoln both in his ponderings of the ambiguities of providential purpose in human history and his bringing together the Declaration of Independence and the Constitution as one corpus, as one constituting statement for the continuing experiment.

Now there are those who would say all that is interesting and historically sound. Indeed there was this grounding in public virtue, which was in turn grounded in religious belief and behavior. But, they maintain, this is not the America of today. The America of today, we are told, is increasingly secular and pluralistic. I, however, would say that neither of those claims are true, nor are they supported by empirical evidence. In the last forty to fifty years it seems we have become the opposite of a pluralistic society in the conduct of our public business, in our public deliberation, and in our decision making. We have become a society of monism which has increasingly excluded the most significant diversities in American life—those differences over how we answer the question: “How ought we to order our life together?” Our society is not a pluralistic society. It is for pluralism that we need to contend. True pluralism is not pretending that our differences make no difference, but true pluralism is engaging the differences that

make most difference within the bond of civility. We need to restore pluralism in American life.

This is, far from being secular America, a society incorrigibly and increasingly religious in character.⁶ Whether one is skeptical or even cynical about the religiousness of the American people (and we should at least be skeptical about it), one must acknowledge the political significance of the fact that with few exceptions the American people—"we the people" again—profess to believe that morality is derived from religion. The question is asked, "What is the source of morality?" The answer, from eighty-five to ninety percent of the American people, is religious in character. That is, they will answer the Bible is the source of morality or the Ten Commandments, the teachings of the Church, the Sermon on the Mount, or the Torah. We may be very skeptical, and indeed should be, about how real the knowledge of Scripture is or even whether people are able to name three of the Ten Commandments. But sociologically, and in terms of our understanding of democratic legitimacy, their answers are a matter of enormous import. Religion is increasingly, not decreasingly, perceived to be the source of moral legitimacy. To rule religion out of order in our public deliberations, including our jurisprudence, is indeed to throw down the gauntlet to the entire democratic proposition. Those who would rule it out of order must, it seems to me, be challenged as to whether they are not taking a position that is fundamentally and in principle opposed to this way of structuring a society in ordered liberty.

It is quite possible, of course, to construct morality and schemes of moral judgment and ethical deliberation from sources other than religion or at least from sources other than what are traditionally identified as religious sources. We all know that. Certainly it is possible to be a morally exemplary person without reference to what is ordinarily perceived or described as religion. The curiosity in American life is that even those who recognize the need for the moral legitimation of the political order, including its law, often tend to seek some source other than the source acknowledged by "we the people." One thinks, for example, of John Rawls and his *Theory of Justice*. That book may not accurately reflect Rawls' position today, but it nonetheless remains an exceedingly useful point

6. I recommend a book that we did at the Center, *Unsecular America* (Eerdmaus 1987). It brings together most of the data, I think, of the last 40 to 50 years that we have with respect to secularity and religiosity in American life.

of reference for constructing a notion of justice. Justice is the primary public virtue from which other public virtues are derived. But Rawls attempts to construct a notion of justice without reference to any community, its history, its traditions its mores, its aspirations and hopes. This is to construct an ethic on the premise, quite precisely, of selfishness and ignorance. The basic theory about the "original position" in Rawls has the persons deliberating totally ignorant of their particular life situation, their historical placement, their interests, their bonds of loyalty, affection or happiness. Indeed, they are totally ignorant of themselves. It is not really radically individualistic because it destroys even the individual. These individuals behind this "veil of ignorance," which constitutes the "original position," ask only one question, a totally selfish question: What is in my interest, given the contingencies I cannot know or control? Rawls, it is fair to say, in terms of the discussion of public morality in American intellectual life, has written the single most studied, remarked upon, debated book of the last twenty years. And it is premised upon this construction of reality which I find surreal, quite frankly. Even if one found it persuasive, it clearly rejects in most unmistakable terms the notion of the founders of this experiment in ordered liberty.

All this leads inevitably to what is the single most fevered and egregious instance of the abandonment of Aristotle's understanding of politics in recent jurisprudence—*Roe v. Wade*, the 1973 abortion decision.⁷ As John Noonan and others have pointed out, perhaps for the first time in Western jurisprudence, the religious, philosophical, and moral traditions that constitute a civilization are explicitly excluded from consideration on a question of great public moment. I think the question before the Court was about as elementary a political question, indeed a prepolitical question, as one can imagine. The question was: Who belongs to the community for which we accept common responsibility? Who is the "we"? And how do we exclude some from the "we" of the "we the people" without, by the same criteria, excluding many others whom we may not wish to exclude? In biblical language the question was, "Who is my neighbor?"

In Justice Blackmun's opinion, in *Roe v. Wade*, this question was to be addressed without reference to the constituting moral traditions, including religious and philosophical traditions, of Western civilization and of this American experiment.

7. 410 U.S. 113 (1973).

This does not mean, of course, that moral judgments will not be made, only that moral judgments will be made by default. These are moral judgments that dare not speak their name as moral judgments. These are moral judgments about the primacy of privacy and the role of technology and power in the disposition of life that is inescapably (by any criteria rational or scientific) part of the continuum of humanity. Blackmun's reason for why these other considerations could not be taken into account was that the moralists and theologians and philosophers do not agree on this question of life and when it begins. I always found this a particularly amusing reason because you similarly might have ruled out constitutional law since constitutional lawyers obviously do not agree. (There are many who would say that indeed Justice Blackmun did rule constitutional law out of order in that particular case.)

Roe v. Wade has already shown itself to be the portent of many things to come, and many more are coming at us hot and fast. Under the guise of "technological breakthrough," we are confronted with questions of the care and the non-care of human life, and indeed of the extinction of human lives. In the guise of technological breakthrough, but actually representing cultural and moral breakdowns, we are witnessing a return of eugenics. Eugenics suffered, I believe, only a momentary pause after the horrors of the Third Reich. People who are enthusiastic about the return to eugenics now refer to the Holocaust and the eugenic policies of Hitler as being excessive or extreme or unbalanced. Seldom do they ask of what principle is it the extreme.

I am not sure that today, and certainly not in the world of American law, we have the capacity, even if we had the will, to respond with a firm, persuasive, and effective "No" to the things now being done and being proposed. One thinks of the farming and harvesting of fetuses, and, inescapably, more than fetuses are involved. The development of new criteria in a "quality of life index" will extend such grotesque notions as wrongful life to serve legally-sanctioned programs of involuntary euthanasia. On Tuesdays and Thursdays it is very easy to despair, but I think that we have not the right to despair. When we consider current confusions in the understanding of politics, morality, and law, it seems apt to describe our moment—in Allan Bloom's happy phrase about our unhappy state—as one of debonair nihilism or "nihilism without the abyss."⁸

8. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 155 (1987).

What should our response be? Among other things, we have to challenge very emphatically what I call the Pfefferian inversion of the first amendment. I refer, of course, to Leo Pfeffer, a person for whom I have great admiration, but whom I think was quite wrong-headed. He says he is unapologetically, and always has been, an "absolutist" with regard to strict separation. His notion of democracy is comprised of an absolutist on one side and an absolutist on the other. These two then have at one another, and from this conflict emerges something like an approximation of truth and justice. Pfeffer has suggested that the reason he won again and again is that the absolutists on the other side weren't there when they should have been. They were trying to accommodate him.

The Pfefferian inversion, of course, is to turn the first amendment religion clause (and I would insist that it is indeed one two-part clause) upon its head. This inversion only happened in the last forty to fifty years. So completely has it happened that people even refer to the clause today simply as "the establishment clause." I would argue that, historically and logically, the entire purpose of the religion clause is to protect the free exercise of religion. Why is the no-establishment clause even there? Because the establishment of religion would violate the free exercise of religion. The establishment clause serves the free exercise clause. It makes no internal sense unless one simply happens to be an anti-clericalist who loves no establishment for its own joys. The logic of no establishment, the logic of the debates in Congress, all point to no establishment as serving free exercise. But this understanding has been turned on its head so completely that in Laurence Tribe's much used text in constitutional law he says it is possible to carve out from the establishment clause a "permissible zone of accommodation" for the free exercise of religion.⁹ The founders would not feel terribly grateful to Professor Tribe for allowing a permissible zone of accommodation for that which was their entire purpose to begin with, namely, the free exercise of religion. This is the Pfefferian inversion.

Any interpretation of the no-establishment provision that violates or inhibits free exercise is a misinterpretation. Obviously this understanding of the religion clause is not the one that has prevailed for the last several decades of American jurisprudence, and maybe it is not the one that will prevail in the future. I, however, think it is one worth contending for.

9. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4, at 1169 (2d ed. 1988).

Law is a function of politics; politics, a function of culture; and, culture, a function of religion. All are required if we are truly to engage in that exercise of asking and arguing with one another over how we ought to order our life together.

