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Why a Journal of Law, Ethics & Public Policy

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FOREWORD

WHY A JOURNAL OF LAW, ETHICS & PUBLIC POLICY?

DOUGLAS W. KMIEC*

Undertaking the publication of a new Journal, especially a journal of public opinion, requires some justification in the light of the many scholarly and popular periodicals already devoted to this task. Perhaps this brief foreword may serve as that justification, or at least, a tenable explanation.

Notre Dame is a religious institution. Its school of law is the oldest Catholic law school in the United States. As an institution, the law school has emphasized throughout its history that "moral and religious questions are important [and that] no one need apologize for raising them or for taking them seriously when others raise them."¹

Given the trend toward secularization at other religiously-affiliated law schools some might think this statement to be no more than catalogue hyperbole. It is not. Faculty members in courses from property to business associations to jurisprudence challenge students to search for the ethical justification, if any, for legal outcomes. Since much modern-day legal scholarship either pretends to be "value-free" or ignores moral questions altogether, the curricular inquiry encouraged by the faculty is often difficult.

In part, the *Journal of Law, Ethics & Public Policy* is designed to mitigate that difficulty by rigorously and consistently examining legal propositions through an ethical lens. In this way, its efforts differ both from the traditional law review as well as those journals which regularly discuss legislation or public law. So too, the *Journal* is not intended to duplicate the fine efforts of those publications devoted to an examination of law and religion or those exclusively devoted to philosophic inquiry. Rather, the *Journal's* aim is to draw upon religious teaching and philosophy within the broad spectrum of

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1. BULLETIN OF INFORMATION, UNIVERSITY OF NOTRE DAME, THE LAW SCHOOL 1985-86, at 4.

Judeo-Christian values in order to make practical application of those insights to timely issues of public concern.

While our name may imply a concentration on public law, it should not be narrowly construed, since virtually every private transaction now has public dimensions. In this light, our inquiry may be likened to the work of economists and lawyer-economists who, for the past two decades, have scrutinized both private and public law by asking how well each maximizes the value of resources. That the economic analysis of law — in both its normative and non-normative poses — has had a profound effect on legal scholarship and teaching is now undeniable. In this regard, the range of issues addressed has prompted an intellectual leader of the law and economics movement to pen a book entitled *The Economics of Justice*.² Not surprisingly, this *Journal* will have occasion to examine the justice of economics.

Having differentiated our efforts from law reviews and journals of legislation, religion and philosophy, a word about our format and the nature of our content is in order. Law as a university discipline is inevitably activist in orientation. In its most useful form it is a study of "now," rather than "then." The introduction of ethics allows lawmakers, scholars and law students to ask "what the law ought to be." In view of that, we intend to regularly invite contributions from all three of these groups. While we anticipate that the contributions of policymakers will frequently be in the form of speeches or essays, we view this "public scholarship" as critical to an appreciation and consideration of more scholarly works. Moreover, through the faculty-guided research efforts of senior law students, we hope to bridge the theoretical work of scholars and the public perspectives of world and national figures with practical, carefully prepared proposals for legislative reform or judicial analysis which incorporate the insights of both.

Each of the *Journal's* quarterly issues will be devoted to a single topic. This symposium approach not only permits a concentration of effort unavailable to the typical legal periodical with unlimited topical horizons, but also increases the ultimate utility of the issue for readers wishing a comprehensive, balanced ethical appraisal of a public topic. We believe this inaugural symposium issue devoted to law and morality is illustrative, with the exception that we have not incorporated separately authored student work.

2. R. POSNER, *THE ECONOMICS OF JUSTICE* (1983).

Some might suspect that an issue devoted to law and morality was deliberately chosen to take advantage of the recent public debate over religion and politics. Indeed, a good many of our authors comment directly upon this phenomenon. In fact, however, law and morality was chosen well in advance of its emergence as part of the 1984 presidential campaign as a suitably general subject which might serve to introduce our efforts to readers who share our interest in an ethical examination of public policy. Of course, once the campaign turned to serve our purposes, so to speak, we readily took advantage of the outpouring of public opinion. The result, we believe, is a compelling mix of public and scholarly thought dealing with specific issues ranging from abortion to pollution control as well as the moral authority of law generally.

As a brief overview, this issue of the *Journal* consists of speeches, essays and full-length articles. Included are three major speeches from well-known participants in the public arena, two of which were delivered at Notre Dame. President Reagan's affirmation of the inseparability of morality and politics at a prayer breakfast in Dallas has generally been viewed as the start of the debate. The President suggests that while the First Amendment does require "tolerance and freedom and open-mindedness," it does not require the exclusion of religion from public inquiry, and that those who seek exclusion may themselves be said to be somewhat "intolerant."

In a lecture sponsored by the Notre Dame theology department, Governor Mario Cuomo of New York acknowledges that religion was part of the public debate, but that whether it was conclusive or even influential largely depended upon the "consensus of the community at large." With respect to many questions, including abortion, Governor Cuomo finds either an absence of consensus or a consensus against the view espoused by the Catholic church. Further, Cuomo argues, the church does not expect a Catholic office holder in every case to struggle to have moral positions adopted into law; rather, the officeholder should apply "prudential political judgment."

Responding to Governor Cuomo in a lecture sponsored by Notre Dame's Thos. J. White Center on Law & Government, Representative Henry Hyde of Illinois acknowledges the lack of consensus on moral issues, and the necessity of prudential judgment, but urges Catholic officeholders "not to bemoan the absence of a consensus, but to help lead the effort to achieve one." Hyde speculates that if the "public arena [is] shorn of religiously-based values," the vacuum will

be quickly filled "by the raw pursuit of interests." To avoid this, Hyde prods Catholic "intellectuals, writers, [and] public officials" to help create a "new public philosophy, able to provide moral coordinates for the conduct of the American experiment in ways that can be followed by both religious believers and their non-believing fellow-citizens."

Three essays by noted Catholic clergymen expand on several of the themes raised in the speeches. First, Father Theodore Hesburgh, the President of Notre Dame, suggests that "a moral consensus in our country [already] finds our present legal permissiveness on abortion excessive and intolerable. . . ." Acknowledging that this consensus may not support an "absolute prohibition of abortion," Father Hesburgh argues that Catholic and other politicians should "relive the civil rights revolution in [the] ultimate context of life and death."

In his essay, "The Church and Politics," Father Richard P. McBrien, chairman of Notre Dame's theology department, explores modern ecclesiological documents of the Catholic church to demonstrate the complexity of the church/politics relationship. Among his many conclusions, Father McBrien states that it is possible to agree on moral and religious "principles and disagree on their political application, without necessarily sacrificing our Catholic integrity." Nevertheless, McBrien stresses that "a prudential judgment that political solutions are not now feasible does not justify a failure to undertake the effort."

In a strongly worded essay, Father Virgil Blum, founder of the Catholic League for Religious and Civil Rights, underscores the duty of both the church and Catholic officeholders to act. Abhorring "the efforts of some Catholic politicians to privatize their religion," Father Blum concludes by emphasizing that the heaviest burden rests with the church to carry out the mandate of Pope John Paul II to "preach, educate individuals and collectivities, form public opinion, and offer orientations to the leaders of the peoples."

With the concentration of the speeches and essays on the relevance of religion to politics, and ultimately law, it is perhaps significant that the substantial article by Professor Thomas Shaffer cautions us to recognize that "law is radically limited: Law is not God." Shaffer's cautionary statement follows an intriguing exploration of the possibility of an Hebraic Jurisprudence that is "deep enough and broad enough" to sustain a conversation among Jews, Thomists, Lutherans, Calvinists, Anabaptists, and Liberationists.

Oxford scholars, Dr. John Finnis and Dr. Joseph Raz, contribute a thought-provoking extension of a longstanding disagreement concerning the origin of the obligation to obey the law. Dr. Finnis argues, and Dr. Raz agrees, that contemporary social choice or game theory, does not supply an adequate justification for obeying the law because such theories are instrumentalist in character; that is, they assume that all concerned have a well-defined interest in producing a given outcome. Raz disputes, however, Finnis's central claim "that the law presents itself as a seamless web: [with subjects] not allowed to pick and choose." Suggesting that Dr. Finnis has begged the question to be answered, Raz concludes that "if there is a general obligation to obey the law it exists because it was voluntarily undertaken."

This then is our inaugural issue. Because it unites what is politically volatile with what is philosophically fundamental, it is likely to be viewed as somewhat controversial. If so, perhaps a final word about political orientation is in order. As a *Journal*, we have none. Of course, we recognize that every public figure and every scholar, whether they freely admit it or not, does have one.

In the traditions of the University, we are open to all reasonably articulated points of view, subject only to the willingness of each author to address our symposium topics from an ethical perspective. Our openness is also guided by the words of the Pastoral Constitution on the Church, *Gaudium et Spes*: "Christians should recognize that various legitimate though conflicting views can be held concerning the regulation of temporal affairs. [Proponents] should always try to enlighten one another through honest discussion, preserving mutual charity and caring above all for the common good."³

With this issue, we ask that the discussion begin.

3. Second Vatican Council, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*Gaudium et Spes*) nos. 75, 43, reprinted in THE DOCUMENTS OF VATICAN II 199-308 (W. Abbott ed. 1966).

