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A RESPONSE TO BRIETZKE AND GAFFNEY

RICHARD JOHN NEUHAUS

At the end of twenty-six pages of text and footnotes Professor Brietzke says, "I hope to have paid [Neuhaus'] lecture the sincerest form of respect, that of taking it seriously." (Brietzke at 62.) One wishes that were true. Professor Brietzke's prolixity is animated by a hostility the source of which entirely escapes me. Perhaps it has something to do with his stated and somewhat defensive displeasure with having a "layman" trespass on the lawyer's turf. If so, his argument is with the law school that invited me to address the relationship between law and theology, assuming there is a relationship. Brietzke apparently doubts that there is or should be and therefore, one suspects, opposes the lecture's enterprise on principle. Rather than speculating about his motives or trying to match his vehemence, permit me merely to point out a few of the ways in which Brietzke fails to take seriously the lecture in question.

Brietzke states that "a theory is of little practical value if concrete policy prescriptions cannot be derived from it in a fairly unambiguous fashion." (Brietzke at 38.) By that criterion, says Brietzke, the lecture is a failure. It strikes me as a very doubtful criterion, bordering on the anti-intellectual. There is much about which reflective persons theorizes simply because it is inescapably important, quite apart from the concrete policy prescriptions it does or does not yield. In any case, Professor Gaffney (*see infra*) and others do seem to perceive some rather clear policy implications in the lecture's argument. At another point Brietzke makes a related complaint that my argument was "directing its appeal primarily to intellectuals." (Brietzke at 57.) Well yes, it is an unabashedly intellectual exercise. But Brietzke's impatience with theory leads him to overlook the fact that the subject matter of the theory has to do with how ordinary people perceive the law; namely that there should be some believable connection between law and what is thought to be morally right and wrong. I would suggest that that is a simple, practical, and even populist, proposition that would be appreciated even by those with the shortest attention span for mere theory. Of course like most apparently simple phenomena, it is filled with astonishingly complex ramifications and I make no apology for exploring some of those complexities with the distinguished faculty and students of a law school which, I am glad to note, seems more inclined to such disciplined exploration than those whose interest is limited to what to do next.

At another point Brietzke expresses his amazement that I do not use the terminology of "natural law" and he leaves the reader to infer that I am attempting to sneak natural law concepts in by the back door. (Brietzke at 40.) I did not refer to natural law because it is freighted with conceptual and historical baggage that would have distracted from the chief argument of the lecture. Also, in distinction from much of the natural law tradition, I want to underscore the historical and political nature of law as a human enterprise. Whether elements of the natural law tradition can be accommodated to the argument I make (I do think it quite possible) is the subject of another lecture. Brietzke says that "Neuhaus seems to have bitten off more than he can comfortably chew," (Brietzke at 37.) and then he proceeds to complain that I did not address a host of topics which he raises far beyond the scope of the lecture in question. I readily confess that in a lecture less than half the length of his response one cannot exhaust the subject of the nature of law in its relation to morality and theological reflection.

More annoying is Professor Brietzke's attributing to me positions that are nowhere to be found in the lecture and are explicitly repudiated in my other writings. The context of the lecture seems to be of little interest to Brietzke, despite his protestations that he is trying to understand my argument. In his mass of citations there is no mention of any of my writings other than this one lecture, nor does his critique reflect any familiarity with my work. Admittedly, a great deal of the world is blissfully indifferent to what I have written, and that may be just as well. But since Brietzke did choose to address himself to my understanding of law and theology one might reasonably have expected that the rigorous professionalism and scholarship which he espouses would have bestirred him to the library. It might have spared him the embarrassment of some of his more egregious errors. True, it is effort-saving to infer and invent positions that are not mine, but it hardly advances the discussion. His procedure, in sum, falls far short of taking another person's argument seriously.

Specifically, Brietzke attributes to me the notion that there is a universal moral consensus about what is right and wrong and he then goes on to debunk that notion in some detail. Nowhere do I advance such a notion. I do suggest that there is a probably universal phenomenon that I describe as the moral sentiment, namely that there is such a thing as right and wrong. I also suggest that that sentiment has something to do with our attitude to the rules by which we do or do not live. Brietzke makes the obvious point that

different cultures have different ideas about what constitutes, for example, stealing. Of course. My point, agreeing with Harold H. Berman, is that in every culture, so far as we know, stealing, however defined, is viewed as violative of that moral sentiment. My point is phenomenological. It is not to write a universally valid law with respect to stealing, but to appeal to our own experiences in a clear recognition of the historical and contingent character of law. In a particular community, I contend, the law must be perceived as responsive to that community's sense of right and wrong if that law is to be perceived as legitimate. (Incidentally, Brietzke's idea that the legitimacy of law can be maintained through "coercion and terror" is exceedingly strange. The ethical and social science literature regarding legitimation theory assumes that power maintained only or chiefly through coercion and terror is, by definition, not legitimate.)

Brietzke proposes law as a "process characterized by tension and conflict rather than the consensus [Neuhaus] assumes." (Brietzke at 51.) In the lecture I suggest that law "is the historical, living process of people legislating, adjudicating, administering, and negotiating the allocation of rights and duties." (Neuhaus at 6.) Does Brietzke think that all that happens without conflict and tension? Presumably against my position, he asserts: "There is no hard evidence that ours is the acme of civilization." (Brietzke at 52.) Further, Brietzke states I am indifferent to the diverse moral values of "small groupings in society" other than the state. Were he interested in what I really think, he might have noticed that I recently co-authored a book accenting the importance of such groupings. See P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1976).

Brietzke also asserts that I espouse the position repudiated by Reinhold Niebuhr; namely "that a society and its state can live up to the sense of right and wrong applied to individuals." (Brietzke at 55.) I am genuinely at a loss to understand where he gets his ideas: "Neuhaus' arguments optimistically require us to love each other as we love ourselves"; (Brietzke at 58.) or again, "Contra Neuhaus, religious belief *is* privileged [in American law]"; (Brietzke at 60.) or finally, "Fuller, Hart and Neuhaus would have us rely on the empathy and benevolence of politicians and administrators" (Brietzke at 60-61.) Such positions are not found in the lecture nor are they compatible with my public statements and writings.

I frankly do not understand why Brietzke has resorted to such inventions and rendered such reckless disservice to what might

have been a useful exchange. I sincerely hope that was not his intention. However, if his good intentions miscarried perhaps the reason is to be found not in his understanding of law but in his understanding of theology. He says at the outset of his criticism: "I am not qualified to evaluate the no doubt abundant theological merits of the lecture and will thus confine myself to examining its contributions to legal discourse." (Brietzke at 37.) But I invite the interested reader to look again at his critique and ask whether it is not precisely his view of theology that makes him so hostile to the lecture and to the enterprise of which it is part; namely relating law and theology. He cites Barth, Stone and others to build a wall of conceptual separation between law and theology, between reason and revelation, between logic and faith. He correctly views this as a kind of theological positivism (divine revelation is "a kind of extreme positivism in which God plays God, instead of man playing God." (Brietzke at 42.)). That view makes dialogue between theology, derived from revelation, and other sources of truth quite out of the question. That of course is one theological position, with which I obviously am not in sympathy. It is understandable that Brietzke accuses me of confusing the task of theology with that of philosophy. That reflects his theological position contra an at least equally venerable theological tradition that views theology and philosophy as a single enterprise. Along with his reading of Karl Barth, he might want to consider the approach espoused in, Wolfhart Pannenberg's *THEOLOGY AND THE PHILOSOPHY OF SCIENCE* (1977). Brietzke says he is not qualified to deal with the theological aspects of the argument I have, no doubt inadequately, advanced. Be that as it well may, it is on theological rather than legal grounds that his critique most essentially dissents from my thesis.

Permit me to turn, much more briefly, to the response by Professor Gaffney. My first and most emphatic point is to disclaim Gaffney's excessively complimentary association of my work with the work and life of Dietrich Bonhoeffer. This is not just modesty on my part, although that in itself would warrant such a disclaimer. I do warmly agree with Gaffney that Bonhoeffer's witness has been distorted by those who have used his later writings to erect a "religionless Christianity" that is in sharp contrast to Bonhoeffer's classic and catholic theological commitments.

Gaffney admirably describes the limitations of natural law thinking in relation to a truly historical understanding of law as process in anticipatory relationship to the future. I also agree with his list of questions in need of "further elaboration and correction."

(Gaffney at 24.) There are some I would add, but it is apparent that, once one embarks seriously upon so comprehensive a search or the "meaning of law", the range of issues is large indeed—so formidably large that it is not surprising that some thinkers, both theologians and jurists, would prefer to call off the search before it gets started.

I can understand Gaffney's question about whether my approach is "authentically Lutheran." (Gaffney at 24.) I am far from indifferent to that question, but it is not my primary concern. One is many things, most importantly a human being and a Christian, before one is a Lutheran Christian. The issues posed in this discussion are, as I am sure he recognizes, inescapably ecumenical. At the same time, he is right in saying that most Lutherans would want the discussion to address more directly the law/gospel dialectic that has been a characteristic theme in Lutheranism. This I have tried to do in various ways (*see, e.g.,* R. NEUHAUS, *CHRISTIAN FAITH AND PUBLIC POLICY* (1976)), but not, I am afraid, to the complete satisfaction of some of my fellow Lutherans.

I have no argument with Gaffney's call for more of a "class analysis" in our understanding of law (Gaffney at 28.)—if that is understood not so much in Marxian terms as in terms of the biblical understanding of the victim, the marginal, the *anawim*, through whom comes the revelation of God's judgment and the call to repentance. That of course is also the theological context in which the right, and perhaps the obligation, to resist illegitimate authority arises. (For my views on justified revolution, *see* R. NEUHAUS, *MOVEMENT AND REVOLUTION* (1969)).

I certainly have no experience in administering law schools, but Gaffney's practical suggestions in that respect—especially about admissions and career guidance—sound very promising. Most importantly his sketch of an agenda for the discussion that is now being opened, or reopended, on a wide front should claim the attention of students of law and of theology for a long time to come.

