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GOD, MAN AND THE LAW

JOHN KUHN BLEIMAIER*

I

Laws are the rules of conduct within society. The laws of society are distinct from and should not be confused with the laws of nature. The laws of nature are self-enforcing. The pull of gravity, the speed of light, and the temperature at which water boils are immutable and fixed. Man can only accommodate himself to the laws of nature; to defy them is to reap the inevitable consequences. On the other hand, compliance with the laws of society is subject to the exercise of free will. Defiance of society's law is punishable only to the extent that the social unit has the means and desire to enforce its rules.

Society, the community of human beings living together in a cooperative, interdependent unit, presupposes the existence of laws. In order for society to exist, it must be founded on the basis of agreed upon rules of conduct governing social intercourse. The establishment and perpetuation of the social unit requires that the members of society observe common norms in their interaction. Historians and contemporary anthropologists have yet to uncover the existence of any association of human beings not governed by laws, or rules of conduct which were known to all members of the unit.

There is a substantial consensus across all temporal and cultural boundaries as to what the law of a civilized society ought to prescribe and proscribe. While falling far short of unanimity, this community of values shared by virtually all legal systems represents a sort of moral lowest common denominator, and can be called natural law. As distinguished from the law of nature, natural law is still the object of the free will of the individual. Empirically, however, we may reach the conclusion that because it represents the common morality of all man's

* Mr. Bleimaier's article is based on a lecture delivered at Princeton Theological Seminary on March 25, 1997.

disparate societies, it is the law which is part of human nature—both innate and universal.

II

Secular philosophers have posited that the first society was a consensual association of human beings who decided to trade the total freedom and total lack of security of the presocial state of nature for the enhanced security but circumscribed liberty of the social unit. As Thomas Hobbes stated, in this state of nature life was “nasty, brutish and short,” characterized by the war of all against all. To prolong life and to render existence less brutal, men banded together in units for mutual protection and cooperative exploitation of the environment. The fundamental premise upon which such a social unit is established is agreed rules of conduct, i.e., the law. It can be cogently argued that only in the context of his first society is man truly human. Certainly, the organization of the social unit is the first step and required condition precedent for the ascent to civilization.

This secular analysis of the foundation of society and of the origins of law might lead to the simplistic conclusion that the law is nothing more than a utile instrument, a purely logical list of regulations which promote security. However, this view ignores the fact that man is a complex, spiritual being. Thus, the law of every society reflects its morality, its abstract concepts of what is right and wrong, and of what is desirable or reprehensible in human behavior. Indeed, every society has laws which contradict the dictates of simple utility and prescribe conduct which is designed to achieve a higher good, dictated by moral conscience.

III

For Christians, the law has a fundamentally different significance than its role as merely a tool of social cohesion. The law as laid down in the Old Testament represents a code of conduct promulgated with divine authority. It represents the unity of law and morality. The law of Moses codified the rules of social interaction and individual behavior of the biblical Israelites. It was immutable and fixed, not subject to legislative modification or supplementation.

It is important to note that in biblical times, those learned in the law and those learned in the scriptures were closely allied

and sat together in the Temple discussing their common theme: The interaction of God and man in society. The callings of the law and the priestly arts were intimately related, and both occupations looked to the same source for their authority. From the perspective of church history and the history of the Jewish people, it can be postulated that the division of secular and religious law dates from the time of the assimilation of Palestine into the Roman Empire. At the time of Christ, although the daily lives of the Jewish people continued to be governed by Mosaic law, there was a contemporaneous overlay of Roman law imposed by the conquering empire. Gradually, there evolved a distinction between the law of God and the civil law. The law of God came to occupy a position of moral suasion, while civil law assumed control over the life of the community.

Historically, it is not without significance that the high priests of Israel were compelled to deliver Jesus to the Roman authorities for execution. Arguably, the high priests would not have had the power to condemn a man to death for an alleged blasphemy against the law of Moses. In order to effect His crucifixion, the high priests and their colleagues of the law had to allege a threat to public order, and thus an infraction against the law of Rome. The continuing importance of Mosaic law as a social force at the time is illustrated by the fact that while Pilate found Jesus guilty of no crime against the laws of the empire, he confirmed His death sentence as a purely political act to appease the local religious authorities.

IV

From the standpoint of Christian theology, the crucifixion of Jesus represents a crucial turning point in the relationship between God, man, and the law. From the perspective of the chief priests at the time, His death was an act of law enforcement. From our Christian perspective, His death represented a fulfillment of the law. The law required the making of a sacrifice for the sins of the people. The voluntary sacrifice of the Lamb of God met the requirements of Mosaic law once and for all. With His subsequent resurrection, Jesus ended the tyranny of the law and established salvation by grace, through faith. Thereafter, the strictures of the law were forever divorced from the requirements for salvation.

For the early Christian church, the law had two meanings. The law as found in the books of the Old Testament continued to establish a code of morality. The early Christians no longer followed the strict procedures and ceremonial requirements of Mosaic law. But this law did establish what was right and what was wrong in interpersonal conduct. The law of Moses defined what constituted transgression in social intercourse, but it had lost its authority to force remedial action. For example, it continued to be an infraction to do violence to one's neighbor; however, the remedy of an eye for an eye and a tooth for a tooth had ceased to represent the valid redress for injury sustained.

The second way in which the early church had contact with the law was in the form of the temporal authority of the Roman Empire which held sway over the civil lives of the early Christians. They knew the Roman law of every day commercial life, but they also most particularly knew the rule of imperial law which rendered them and their co-religionists outcasts and criminals solely on the basis of their Christian faith. The law of Rome originally proscribed the Christian church and visited horrendous depredations on the community of early believers. Many early Christians suffered martyrdom in the name of the law of the Roman Empire. At the church's outset Christ abrogated the absolute strictures of Mosaic law, and the Roman state branded His followers as outlaws within the civil structure.

Early Christians realized that they had been freed from the fetters of the Mosaic procedural law, that the death and resurrection of Jesus had fulfilled the legal requirements for the expiation of sin, and that the civil law of the community in which they lived was opposed to God as it proscribed the faith which He prescribed as a means for the attainment of salvation. The followers of Christ in the first centuries plainly recognized that the law was not the ally of their religious conviction. They perceived that Jesus had fulfilled the law, that God had abrogated the law's ritualistic stricture, and that the law of the state was in opposition to the law of God as it related to His worship.

V

All this changed dramatically when Christianity suddenly became the official religion of the Roman Empire at the time of Constantine. What a dramatic historic reversal! It must have

initially seemed that truly the meek had inherited the earth. The passive faith of the down-trodden was transformed into the accepted religion of man's most advanced and organized civilization. While the life, death, and resurrection of Christ forever altered the relationship between God, man, and the law, the ascension to official power of the Christian church within the Roman Empire was pivotal in altering the relationship between the church and the law. The church was transformed from an outlaw organization into a formal part of the societal structure. No longer could the church maintain its pristine aloofness from the practical application of society's rules of conduct. The church was compelled to collaborate in the administration of an empire. At a philosophical level, the church was co-opted into turning back the clock and resuming the pre-Christian relationship between religion and the law. In the interests of practical administration, the church looked to the law of the Old Testament for its moral anchor and blended these sources with the rich jurisprudence of classical civilization.

It was in this spirit of practicality that the church embraced such elegant doctrinal formulations as the concept of the just war. The precedents from the Old Testament proved serviceable in the evolution of a Christian jurisprudence for the Christianized Roman Empire. Christ's fulfillment of the law and its abrogation by grace through faith became purely theoretical concepts of relevance to the life of the spirit, but divorced from the practical requirements of the imperial administration. The religion which had eschewed the law and sought transformation of mankind on the basis of a revolutionary faith, now rehabilitated the law in the interests of practical governance.

This relationship between the church, the state, and the law persisted throughout all the historic travails of western civilization, from the rise of Byzantium, to the division between eastern orthodoxy and Roman Catholicism, to the establishment and ultimate decline of the Holy Roman Empire. The assumptions which underlay the collaboration between the church and the state dictated the continuous evolution of a hybrid construct: Christian jurisprudence. This law, premised upon Old Testament morality, structured on the basis of classical Roman antecedents, and alloyed by Christian concepts of equity and mercy, ruled western society from the time of Constantine, through the medieval period, to the Reformation.

VI

The Reformation and the Counter Reformation were revolutions of conscience. They represented a re-examination of the fundamental assumptions underlying the church in the stark light of original Christian doctrine. It is no coincidence that the Reformation took place in the context of the translation of the scriptures into the vernacular, and simultaneously, with the mass publication of the Bible after technological advances in book printing. The Reformation held the church's structure up to the light of scripture and found it wanting. Such a dramatic re-evaluation of doctrine and re-orientation of faith could hardly fail to impact the relationship between Christianity and the law. Predictably, the Reformation began the shift of the church away from its intimate collaboration with the law and back, ever so gradually, to the position of the early Christians who saw their church as free from the procedural stricture of Mosaic law and beyond the jurisdiction of the temporal law.

Many of the great thinkers of the Reformation espoused pacifism as a fundamental tenet of Christ's teaching. They reasoned that turning the other cheek, giving one's cloak when asked, and loving your enemies was inconsistent with temporal administration of the law. They saw the teachings of Jesus as requiring forgiveness not enforcement, the dispensation of mercy rather than provision of retribution. Not surprisingly, pacifists never came to power in the real world. The intellectual contributions of the pacifist reformers have to date been marginal in relation to the history of the church.

However, even the practical main line reformers played an important role in redefining the relationship between the church and the law. By striking at the root of the church's claimed unified legitimacy, the Reformation effectively reasserted the separation of church and state. If the church was revealed to be an imperfect human institution, then the law of society was also a fallible human construct. This new conscience could critically analyze the body of church doctrine in the light of the scriptures. So, also, this new conscience could question the temporal law in the light of the same scriptures. The Reformation broke the church's artificial hegemony over temporal authority and the law which the historic alliance of the Roman Empire and the Christian church had established. The church was once again

free to stand aloof from the social fray and to preach God's word independently of the dictates of practical governance.

VII

Ironically, it was in England that the new status of the church in relation to the law and temporal authority was first and most strikingly manifest. While the Church of England emerged as the official successor to the Catholic Church after England's break with Rome, the timing and nature of the break made plain that this break was a political act on the part of an individual sovereign rather than a divinely ordained reform. The obvious cynicism of Henry VIII's schism with the papacy made it possible for English thinkers to appraise critically the relationship between the church, the law, and the state.

The Reformation made it possible to question the authority of the church, the divine right of sovereigns, and the validity of the law in the light of Christian conscience. It was inevitable that the spiritual revolution effected by the reformers would ultimately lead to political revolution. The Puritan Revolution, and most certainly the American Revolution, represented the application of the Protestant conscience to the legal problems of the day. When Thomas Jefferson drafted the Declaration of Independence, he established the independent legal authority of the Continental Congress by stating: "We hold these truths to be self evident that man is endowed by his Creator with certain inalienable rights . . ." Jefferson thus nullified the authority of the English King and Parliament to the extent that their actions were inconsistent with the inalienable rights bestowed by a higher authority. This represented the triumph of the Christian conscience over the temporal law, and struck a mighty blow against the alliance of convenience between the spiritual and temporal authorities.

Jefferson's establishment of the juridical underpinnings of the American Revolution created a most far-reaching and important precedent. It took the freedom of conscience of the Reformation into the political arena. Once and for all, it was posited that the authority and the very laws promulgated by a sovereign were invalid if they contravened God-given rights. This goes beyond the *freedom* of conscience and establishes the *supremacy* of conscience.

VIII

The subsequent French Revolution, with its anticlericalism, and the Russian Revolution, with its institutionalized atheism, have substantially muddied the waters. In Roman Catholic France, the identity of interests between the church and state rendered the attack on the civil authority of the monarchy also a simultaneous attack on the prerogatives of the Catholic Church. Because the church was still in league with the state in pre-revolutionary France, the French Revolution took on both the secular and religious powers in the name of the rights of man. But, the absence of a perception of God as outside the chain of temporal command deprived the French revolutionaries of the divine authority which Jefferson had been free to invoke.

Fortuitously, the backwash of the French Revolution served to establish the separation of the church from the state in Western Europe. When Napoleon decided to crown himself emperor of France without the sanction of the Pope, he clearly demonstrated the division between the power of the state and the power of the church. Napoleon further undertook the codification of the civil law, thus divorcing the civil administration of justice from the suzerainty of the church. Napoleon's France did for Catholic societies what the Reformation had done for the Protestants: It reestablished the division of secular and spiritual authority.

The significance of the Russian Revolution in the evolving relationship between God, man, and the law can only be assessed in the context of Marxist ideology. Karl Marx had promulgated an intellectual framework for the attainment of the ideals of fraternity and fairness which represent the distillation of Christian social doctrine. While his ends were largely identical to the objectives of Christ's teaching, however, Marx confused Christianity with the follies of the church that he perceived in the world around him. Marx identified religion as the opiate of the masses which kept them from asserting their claim to a just share of the economic pie. He saw Christianity as the agent of the strong in the subjugation of the weak. Marx's perception and misconception were caused by the age-old misalliance that had joined the church with the temporal authority back in the time of Constantine. Having identified the church as an enemy of fraternity and fairness, Marx expounded an ideology that was inherently quixotic.

The "New Socialist Man" which Marx postulated would arise on the heels of the dictatorship of the proletariat entailed a transformation of human nature away from materialism and toward altruism. However, Marx did not realize that such a transformation, indeed required for the attainment of fraternity and fairness, was impossible in the absence of a spiritual transformation. Thus, the fundamental contradiction of Marxism is that it seeks a spiritual change in mankind by materialist means, yet it vilifies the very spiritual message necessary to attain the desired transformation.

IX

In the twentieth century society, ceased to wrestle with questions pertaining to God, man, and the law, and drifted free of spiritual, philosophical, and even intellectual anchors. We somehow manage to believe in our own individual, human self-sufficiency despite all empirical evidence to the contrary. This state of intellectual anarchy, devoid of faith or theory, is the product of historic accident. The ascent of western civilization was premised on the concept of progress. From Christianity, to Darwin's theory of evolution, to Marxism, all western theory has been based on the possibility of improvement, on the desirability of progress. The historic accident of the First World War shattered this fundamental underpinning of western civilization. All western man's perceived advances in the technical, social, and intellectual realms had led to a monstrous, mindless bloodletting of unprecedented proportions, completely beyond the control of any institution or individual. The experience of that first international conflagration, followed by the Second World War and the subsequent unraveling of all the institutions of western culture, have seemed to render irrelevant the study of the position of God, man, and the law. Such a nihilist position is, however, a self-fulfilling prophecy. The conviction that there is no answer renders finding an answer impossible. Let us put the aberration of the twentieth century behind us and take up the quest for progress in the twenty-first.

The church should look to the Mosaic law as the strict source of social morality. However, the church should be forever divorced from the enforcement of the law in the component units of society. The function of the church is to teach morality and forgiveness in the social context, and to teach repentance and

righteousness in the spiritual context. In so doing, the church completely fulfills its mission before God. To do more or less is to become part of the problem instead of being part of the solution. The history of man's struggle in attempting to establish the correct relationship between himself, God, and the law teaches us that temporal solutions to temporal problems will all surely unravel and fail. Only the spiritual solution to the problems of man remains untried and holds forth all promise of success. As Christ overcame the law of death by His resurrection, so His followers must overcome the ills of the temporal world with the rebirth of the spirit.

X

It has been my experience that members of the clergy today have an inordinate faith in the efficacy of the law as the implementation of social policy. Perhaps it is natural that professionals who come daily into contact with the frailty of the human spirit should be willing to place their trust in a large, impersonal, and abstract concept such as the law. As an individual who has spent a long and variegated career at the bar, I have come to a contrary conclusion as to the ability of the law to effect the proper organization of society. I would, perhaps, feel guilty in spreading the unwelcome news that the law will never achieve social harmony if I were not also prepared to present an alternative panacea. But first, let us look at the inherent obstacles faced by the law in the attainment of justice in America at the dawn of a new millenium.

The criminal law is the most obvious organ of social control. It proscribes certain conduct and imposes penalties for infractions. A single example of the critical problems faced by the criminal justice system should be sufficient to establish its fatal flaw. How does a prosecutor derive his professional satisfaction? As any other lawyer, the prosecutor takes greatest pride in his professionalism and ability when he can win a difficult case. But what is a difficult case from the perspective of the prosecuting attorney? Obviously, it is the case where the evidence of guilt is most flimsy, or where the evidence which tends to exculpate the accused is strongest. Thus, the brilliant and successful prosecutor is that public servant who is most likely to convict an innocent defendant against whom the case is weak in the absence of the eloquence and forensic skills of the

state's advocate. The attainment of justice is incompatible with human nature.

The civil practice of law is equally imperfect. The civil law concerns itself with the resolution of disputes between individuals that do not involve a threat to public order, and are thus inherently private in nature. In general, civil litigation revolves around the award of compensatory damages to a party who has been wronged by another's negligence or other misconduct. How does the civil justice system attempt to resolve the myriad disputes that arise in a complex society? The answer: By settlement. More than ninety percent of civil cases are compromised. But is compromise socially healthy? Are there not many instances where one party is right and another is wrong? Does splitting the difference serve justice? Ready compromise encourages the filing of frivolous suits which will ultimately be settled for their nuisance value, and also rewards intransigence and unreasonableness. The prospect of litigation with inevitable compromise colors all interpersonal relations as right and wrong become practically irrelevant. The settlement game encourages further litigation and thus ever increases the burden on the courts. Yet, a practical system of civil justice can choose no alternative route to settlement when faced with the contentiousness of human nature.

And what of administrative law, the law of bureaucratic regulation? The sad fact is that most administrative law has become so divorced from social policy that it is frequently impossible to determine what desirable social end a particular regulation is designed to foster. Indeed, the interests of the bureaucracy and the "regulatory industry" (attorneys and accountants, for example) become ends in themselves. When administrative law bears no relation to social morality, it becomes mere nuisance. Yet the bureaucratic component of human nature seems to preordain the proliferation of regulation, and leads to the irony of regulation to regulate regulation.

Family law is the euphemism that we use for the dissolution of the family. The failure of the law to positively impact the survival of this fundamental human institution is so obvious as to make the provision of examples unnecessary. It is, however, tempting to discuss a little recognized contradiction in the system which will expose its bankruptcy from a new perspective. One of the very few remaining morally-based prohibitions in the

field of family law is the prohibition on polygamy. Despite this prohibition, constitutionally guaranteed notions of privacy and freedom of association dictate that any number of individuals may live together as a family and the diverse offspring of the various consequent misalliances may be duly recognized. Thus we see the rather anomalous situation where, let us say, a man may live with four women and father children by each, whom he may legally recognize as his own. If, however, he chooses to take an oath of loyalty to each of these women, he is guilty of a crime. What social end is the law serving?

The adversary system is the backbone of the practice of law in American courts. It is premised on the notion that if each party is represented by a zealous advocate who will present his client's position in its most favorable light, the trier of fact and law—jury and judge—will reach the correct conclusion. A problem arises here, however, because while zealous advocacy is not dishonesty in the conventional sense, it is a far cry from honesty. Thus, zealous advocacy is but the first inevitable step on the road to moral cynicism. If the legal profession is, by necessity, led to a relativistic morality, what ideal result can the legal system realistically hope to attain?

Finally, let us look at the law-making process. Prince Otto von Bismarck's observation that those who wish to retain their respect for law and sausages would do well not to look closely at how either are made, is an apt point of departure for this discussion.

Historically, the sovereign enforced laws which represented rules of social intercourse based on God-given morality. There was no legislation, only the enforcement of immutable principles. If a sovereign attempted to implement laws inconsistent with morality, he was a tyrant and subject to overthrow on that basis. The idea of democracy led to the establishment of laws by consensus of the governed. This worked well in small homogenous units. In large, complex, and diverse societies, however, the evolution of law becomes haphazard. In our own two-party system, one hand tends to wash the other. A neat example of this mutual hand-washing occurred in the presidential election year of 1996. A bipartisan commission on television debates ruled that a third-party candidate could not participate despite ample, well-financed organization. We

learned the lesson that bipartisan is very different from nonpartisan.

The process of horse trading whereby legislators effectively say, "I'll vote for your bill if you'll vote for my bill," is widely understood and nonetheless infamous. If legislated law is made independent of any coherent social policy, how can such law hope to achieve any particular social objective?

XI

The foregoing analysis leads me to conclude that the law is not a suitable implement for effecting human progress in the coming millenium. The only proper tool for improvement of the human condition is spiritual transformation.

It will never be possible to field sufficient constabulary to police effectively the foibles of humankind. Indeed, even if it were possible, it should be necessary to police the police themselves. No system of dispute resolution can hope to rein in the contentiousness of unreformed human nature. No system of legal administration crafted by human hands can fail to fall victim to human moral frailty. Thus, it is in vain that we put our trust in the law and exalt its position among human institutions. The law cannot fundamentally transform imperfect man, and it is the fundamental imperfection which thwarts the highest objectives of society.

It is rather the church, as vehicle of spiritual transformation, which holds the key to social progress. This mission of betterment of the human condition must be undertaken completely independent of the law, for it is in its past affiliations with the law that the church has grievously undermined its moral authority. Whenever the church has been associated with civil power, it has been logically implicated in the excesses and misdeeds of temporal governance.

Furthermore, when the church is linked to the law of social organization, the requisite spiritual drive for mercy becomes hopelessly intertwined and confused with the practical dictates of secular administration. Thus the church, motivated by compassion, improperly removes the stigma from immorality so that the civil authorities will not impose harsh penalties on malefactors. Only when the church stands aloof from the administration of society's laws can it proscribe improper conduct while simultaneously proscribing unforgiving penalties.

The object of the church is the attainment of a state of affairs where man conforms his conduct to God's will, not because of fear of social retribution, but because of the rebirth of a new creature. Thus, God and man attain reconciliation and unity when God's law becomes man's nature.