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DISPELLING FALSE NOTIONS OF THE FIRST AMENDMENT:**The Falsity, Futility, and Folly of
SEPARATING MORALITY FROM LAW**

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SUMMARY

Because every law springs from a system of values and beliefs, every law is an instance of legislating Morality. Further, because a nation's laws always exercise a pedagogical or teaching influence, law inescapably exerts a shaping effect over the beliefs, character, and actions of the nation's citizens, whether for good or ill. Those who seek to separate morality from law, therefore, are in pursuit both of the impossible and the destructive. The question before us is never whether or not to legislate morality, but which moral system ought to be made legally binding.

The constant or determined repetition of an error does not make it true. Errors are errors regardless of their prevalence or the persistence of those who advance them. Indeed, given the egregious foolishness of some of our most widespread beliefs in the recent past, the great popularity or predominance of a notion sometimes is enough to raise suspicions about its truthfulness. We moderns too eagerly and too often live our lives on the basis of insupportable, indefensible, half-true "truisms" that cannot stand up to close analysis. The assertion that you cannot legislate morality is just such a notion. No matter how often one hears that you cannot legislate morality, the truth is that you can legislate nothing else.

All laws, whether prescriptive or prohibitive, legislate morality. All laws, regardless of their content or their intent, arise from a system of values, from a belief that some things are right and others wrong, that some things are good and others bad, that some things are better and others worse. In the formulation and enforcement of law, the question is never whether or not morality will be legislated, but which one. That question is fundamentally important because not all systems of morality are equal. Some are wise, others foolish. Few are still in their first incarnation, nearly all having been enshrined as law at some time or place, often with predictable results. For better or worse, every piece of legislation touches directly or indirectly on moral issues, or is based on moral judgments and evaluations concerning what it is we want or believe ought to be, what it is we want or believe we ought to produce and preserve.

LAW, MORALITY, AND THE FOUNDING OF AMERICA

When the Founding Fathers drafted our original Constitution, they did so on the basis of competing belief systems, competing assertions of right and wrong, which they endeavored to build into the Constitution.

One or more of those belief systems permitted slavery, others did not. No side in the slavery debate at the Constitutional convention argued that you could not legislate morality. They all recognized that notion as balderdash. They knew that indeed you could legislate morality, and they intended for that legislated morality to be theirs.

Nor did any side in the struggle to legislate morality at our nation's founding say to its opponents that trying to legislate morality was a breach of the wall of separation between church and state. Morality, after all, is not a church. They would have laughed at the confusion of mind revealed in one who thought that separating church from state meant separating morality from law. They wanted the nation to be moral. They wanted its laws to be just. But they did not want to give any one church a national legal advantage over the others. They did not want the nation to be Presbyterian, Baptist, or Roman Catholic, which is a far different issue from whether or not to have ethics-driven law.¹ Under the Constitution the Founders enshrined freedom of religion, not freedom from religion. In seeking to avoid a state-established church, they were not thereby establishing secularism or separating law from morality.

The very fact that the Founders were creating a new Constitution for their fledgling nation arose because they understood the actions of King George to be morally evil, and politically unjust.² They all knew quite well that morality belonged in politics, in fact that politics was simply morality applied to the public square, to the public's business.

The Founders sought to establish what they called an "ordered liberty." The order they sought was provided in part by the morality they intended to enshrine in law. By seeking ordered liberty, the Founders were not seeking anything new or unprecedented in political thought or in political history. They well knew from reading the ancient words of Aristotle, for example, that morality encoded in civil law helped to provide order, since law inescapably has a teaching function, or pedagogical effect. Law teaches the citizens what is right and good, and it punishes those who cannot or will not learn that lesson.

To make the point from a different angle, when we pass laws that require drivers to drive their vehicles at 20 mph or less in school zones, we do so because we have a value system that rightly puts greater worth in human life than in vehicular speed. That valuation is a moral judgment. That moral valuation we properly and wisely seek to translate into binding and enforceable law. We propose and pass such laws because we think it wrong for drivers recklessly to endanger the lives of defenseless children, who lack the experience, foresight, and physical dexterity to keep themselves out of harm's way on the streets. We punish drivers who do not do as the law requires. No one, in the face of such proposed legislation, says to the local authorities that those authorities have no right to impose their morality on others, even though that is precisely what such laws do. Much less does anyone seriously argue that to propose such values-laden laws is an effort to tear down the wall of separation between church and state.

Those objections are not raised in the case of low speed limits in school zones because all serious-minded citizens are in agreement with such laws. That these laws are morals-based, or values-driven, creates no problem when people find the laws agreeable. Rather, people tend to complain that laws are morals-based only when the law in question is based upon a moral valuation with which they disagree. To be consistent, those who object to morals-based laws would have to raise the same objection to all laws whatsoever, including the laws they themselves support. But they do not. They never do. When their own morals are encoded in law, they raise not even the faintest whimper of protest. Yet when laws are passed that they dislike, they say almost nothing else. They seem to want a sword that will cut only others, never themselves. But any sword of objection sharp enough to cut Jack is sharp enough to cut John as well, even though John might not like it.

Legislating morality, in other words, is not an option; it is a necessity, an inevitability. Justice, equity, fairness — characteristics that all thoughtful citizens want from their government and on which they think government and its laws ought to be predicated — these are all moral categories. We outlawed slavery, theft, murder, fraud, rape, and so forth precisely *because* they are immoral and we wanted them stopped, or at least radically curtailed. We proposed, passed, and enforced these morals-based laws specifically toward that end, and in so doing we were right.

Let me make the point still more explicitly. When it comes to prohibiting sexual harassment or sexual discrimination in the marketplace, feminists do not complain that the proposed legislation attempts to enshrine morality in the civil or penal code, even though it most definitely does. No serious feminist has ever sought to undo or to oppose such legislation because it was based upon a system of morals. On the other hand, they complain about legislating morality when it comes to outlawing abortion. They object to legislating morality only when the morality in question is one from which they dissent. When the law in question encodes a morality they support, their objection to morals-driven law disappears.

By the same token, when a civil rights leader supports affirmative action laws and opposes the Jim Crow legislation of the old South, both that leader's support and opposition are based on the moral judgment that all persons are created equal and ought therefore to be treated equally under the law. That civil rights leader cannot then turn around and say to someone else, pro-life advocates for instance, that they are imposing their morality on others because the pro-life advocates are doing exactly what the civil rights advocate is doing, and on precisely the same basis, namely upholding the dignity and worth of every human being. Like the civil rights advocate, the pro-life advocates are affirming the obligation of a just nation to insure that all persons enjoy equal protection under the law.

LIBERTY AND LEGISLATING MORALITY

Sometimes those who resist legislating morality do so not because they object to the morality being legislated, but because they value freedom and wish to defend it. They do not seem to understand, however, that their allegedly morals-free proposals will be the death of the freedom they value, not its protection. Without the guidance and constraint of morally informed law, liberty degenerates into mere license, which is not the same as political freedom. One simply cannot reject moral authority and yet live in an orderly world. When a people banish morality from the public square, they give birth to an outlaw culture, not to freedom. To live outside the moral law, to live without the wisdom of the ages and of God, is to court slavery and death. Because human nature is what it is, without great volumes of enforceable law political freedom is short-lived, and finally impossible. Indeed, without great volumes of enforceable law, chaos — not freedom — always results. Authentic political freedom, if it is to remain true to itself and avoid the excesses of license, must be exercised according to the dictates of truth and virtue. Freedom must be limited by the demands of justice and morality. The most important consideration regarding any action is not "Is it free? but "is it good?"

Legislating morality is not only inescapable, it works. The proof that laws change behavior is widely known and not far to find. Almost no one in the South today argues that slavery is moral, even though many of their great-grandparents thought it was and, as a result, owned other human beings as property. What stands between today's southern Americans and their slave-owning ancestors is morals-based law, specifically the thirteenth amendment and the Civil Rights laws of the mid-twentieth century, all of which helped radically to reshape the behavior and beliefs of those who grew up in their wake. Similarly, before prohibition the average annual consumption of alcohol in America was nearly three gallons per person. After prohibition that number fell to slightly less than one gallon. In fact, alcohol consumption did not return to preprohibition levels in America for nearly 40 years. By the same token, before the Supreme Court

legalized abortion in 1973, about 100,000 abortions were performed in the US annually.³ After *Roe v. Wade*, however, the number rose to between 1.2 and 1.5 million a year.⁴ In short, whether the laws in question are good or bad, law has an effect. The morality in the law, whatever it might be, tends to become the morality of the people. Law is always a tutor to morals and a shaper of national character, both for good and ill.

To digress: While legislating morality is an inevitability, I am not saying anything so silly as that all sins ought to be made crimes. No government could effectively enforce laws against lustful thoughts, gluttony, or so-called white lies, even though such activities are sinful. If somehow the impossibility of enforcing such laws were overcome, the immediate result would not be less lust, for instance, but rather the overcrowding of penal facilities on an unimaginable scale.

Back to the point: When people object to legislating morality, they fail to recognize or to remember that their own understanding of morality is the impulse behind the laws they themselves propose and defend. It is also the impulse behind their opposition to other laws. Yet, despite their inescapable dependence on their own moral code when designing, proposing, or opposing laws, they seek to deny that same moral impulse to others who wish to be heard, and have their own ideas taken seriously, who wish to have their own beliefs and values prevail. But people must not withhold from others in the public square what they wish to make use of themselves. If they would banish the moral basis of the laws proposed by their political opponents, they must banish it from their own. No one does that, and no one can.

Furthermore, if such people object to legislating morality, they could not, for that very reason, raise any effective moral objection to execution as a punishment for jaywalking, or decapitation for tax evasion or speeding. Their objection to such penal atrocities and to the laws that permit or require them is a moral objection, which they say ought to be banished from law.

Because law is not a substitute for parental authority, one must not therefore also argue (as some do) that moral education is the function of parents only and not of the state. The fact that parents teach morality does not mean that law does not or must not. Parents and law share at least this: they function inescapably as moral educators, whether for good or evil. In cases where parents fail to perform this task wisely or well — a not uncommon occurrence — law must function in this capacity all the more. The fact that morality is meant to be implemented by individuals does not mean that there must be no public morality, no civil, social, or legal standards of conduct. The fact that morality has a personal dimension does not mean it can have no social or political dimension. Nor does the existence of personal morality do away with the need for public morality.

CIVIL VIRTUE NEEDS A VIRTUOUS PEOPLE

The case for morals-based law rests on a wider and more profound basis than the internal contradictions found in those who oppose legislating morality but are themselves unable to do as they insist. Those who wish to banish ethical considerations from legal affairs forget that civilizations are not founded on considerations of mere personal comfort and pleasure, or on science and technology, or even on self-expression and self-preservation, but on virtue — both public and private. A good society, in other words, depends for its preservation and well-being on the character of its people, on the virtues that accompany, perhaps even define, good citizenship. Only on the foundation of courage, self-control, and self-denial can a good society be found and continue.

Such civic virtues are not natural to us. We are not born into the world as good and competent citizens. The civic virtues and public responsibilities that define good citizenship must be acquired. They need to be learned. In that sense, we all enter this world unequipped by natural endowment for effective citizenship

and self-government. This is why one of the oldest political insights available to us is that we are always only one generation from barbarism. Every newly born generation needs to be civilized, or culturally housebroken, as it were. Those necessary but unnatural social skills and civic virtues require nurture and guidance for their growth — even for their existence. Consequently, moral education is a prerequisite for a sound and flourishing civil society. The laws of a nation help to provide for this moral nurture, this aid to character formation, by setting before the citizenry examples of acceptable behavior and incentives toward adopting that behavior as their own. Law divorced from morality, law that poses as morally agnostic, cannot accomplish that task. Instead, morally evacuated law teaches the citizens that moral conduct is not necessary, either for their own happiness or for the establishment and continuation of a good society and civil order.

In short, the rule of law is necessary to a civil society, and a just rule of law requires adherence to a strict moral code. Perhaps an analogy will serve to clarify the point: computer programmers employ the acronym “gigo,” derived from the first letters of the words “garbage in, garbage out,” a phrase warning those programmers that no bad program yields good results. One gets back from the computer results that reflect the worth of the program it employs. And farmers likewise understand that one could not reasonably expect to gather a harvest of corn from a field planted with beans. You reap what you sow; you harvest what you plant — a principle that applies to law and to culture as well as to farmers and programmers. Only a legal code counseled by virtue and rooted in goodness can yield civil justice. Justice cannot be harvested from a legal system into which it was never planted. Moral outcomes are not to be expected from a legal system into which morality was never programmed, never cultivated. Except by the happiest of chances, moral results — in other words, just results — do not grow from a field in which those seeds were never planted and nurtured. If a society neglects to plant morality in the legal code, they must not expect to harvest it in court, or in the character of those citizens whose moral nurture is provided partly by the laws of the society in which they are raised.

One of the most distressing facts about America today is that we are undergoing a deliberate deflation of our traditional ideals and values, both in the culture in general and in our laws in particular. We are enduring what Gertrude Himmelfarb called the demoralization of society,⁵ or what George Will described as the slow-motion barbarization of America,⁶ in the wake of which politics and life have become impoverished, coarsened, and tawdry. This disaster we deliberately and foolishly inflict on ourselves by insisting, in the face of history and of clear thinking, that we ought not to legislate morality. It is reckless to think that governing and government have no effect on the character of the nation and the persons who constitute it.

We all have a natural penchant for self-seeking and personal satisfaction, for which we are sometimes sorely tempted to sacrifice almost anything. In our moments of honest self-reflection, we know that at times of moral weakness we would have altered both the government and the law to suit our whims and desires, however perverted they might be, had we but opportunity to do so. Only enforceable laws based on unchanging morality can obviate this threat. Civil society requires morality from its legal code for its very existence, because our natural character does not suffice to constrain us. We must never forget what thinkers as divergent as Burke and Rousseau knew: the act of establishing a civil society is identical with that of establishing a binding morality, something a morally agnostic legal code is impotent to help produce.

Government does not exist simply to make possible whatever delights and advantages its citizens might happen to prefer at any given moment, whether privately or collectively. Because some types of pleasure are better and more socially and morally suitable than others, one of the purposes of government is to help educate the citizenry to pursue the higher pleasures rather than their lower or more base alternatives. Moral education, one of the functions of law, helps make those right-thinking and right-choosing citizens — and the culture they desire and seek to preserve — more likely. Good societies depend on good and decent

people. Such people do not simply happen. They are nurtured, and one of the institutions that helps nurture them best is well-informed, morally responsible law. Public institutions, like law and law enforcement, need to be concerned with the bridling of egoistic motives and actions. If they are not, something worse than chaos ensues, namely cultural perversity and moral decay.

Put differently, political questions are moral questions. For example, every government asks and answers, whether knowingly or not, “What things in life are worth having and preserving, and at what price to the nation, the community, and the people?” Public policy issues are simply the political and economic application in the present of the enduring moral questions. In the public arena and in the marketplace, our policies are in appropriation of and approximation of the permanent values. To form wise public policy, and the system of laws under which it is best pursued and applied, requires not a flight from morality, but a resort to it, a resort to prudence. This is worlds removed from a legally encoded moral agnosticism.

Law and morality share the function of governor — morality for those with self-control and self-restraint, law for those without it. Morality and law are like the two banks of a river, the river in this case being human action and the passions and desires that drive it. The banks of a river run roughly parallel. Where one turns left or right the other tends to do the same. If they did not, the river would become a swamp — putrid, fetid, and stagnant. Like the banks of a river, law and morality ought to move in roughly the same direction in order to help curb the defects in human nature. If they do not, human action and human society quickly become a swamp, a morass of polymorphic perversity, something that always occurs in the absence of public virtue and the enforceable law that upholds and nurtures it. To protect us from the moral and cultural swamp that threatens to engulf us, law must take its cue from morality.

Well-framed law helps us make the best use of our freedom by teaching us to avoid both excess and deficiency. Without the pedagogy of law, we are deprived of one of our best potentially wisest instructors and are vastly impoverished, both individually and corporately. Those who are frightened by the moral pedagogy of law seem not to understand that human beings can be oppressed by an excess of freedom, which is another name for licentiousness. Good law leaves room for liberty, not for license. Good law helps curb human excess, while morality helps curb the law. What a bridle is to the horse, law is to human nature. And what law is to human nature, morality is to law. Law helps regulate the people; morality helps regulate the law.

In that light, some of those who object to morals-based law seem not to appreciate the great cultural and moral value of shame, guilt, and the proper fear of just punishment. Beneath this lack of appreciation lies a distorted view of human nature. Given the overwhelming empirical evidence undergirding the biblical doctrine of original sin, it is naïve to assume that human beings can hold together a culture without moral education and laws.

Morally sound law helps us to distinguish right from wrong, innocence from guilt, and justice from injustice. If the law from which we learn is not rooted in true morality, what we learn is misshapen, misguided, and misleading, because law always teaches. In such cases it teaches error. In other words, ideas have consequences, and bad ideas have bad ones. The bad ideas encoded in supposedly morals-free law are corrosive of virtue, duty, civility, and human fulfillment. One of the disastrous effects of allegedly morals-free legislation is that it tends to produce deep and widespread doubt in persons across the culture about what is right and wrong, which leaves only a resort to power as a way out of our moral dilemmas. In a moral vacuum, power and doubt rule all. Doubt makes us unsure of ourselves and our beliefs; power makes those who have it despotic over those who do not. Without morality in law, we know less well and less surely what is right. If we are ignorant about what is right and wrong, we can raise no compelling argument against evil, or even know it when we see it. Our ignorance makes it so.

A RECIPE FOR CULTURAL SUICIDE

Government and governing involve questions of value, questions about what is good, and what is good for us, as well as what is evil and what will do us harm. To instruct us regarding the good, to lead us toward it and to protect us from evil — whether our own or someone else's — are all part of the function of law. Those who wish to exile virtue from the legal code, who wish to banish virtue from law and to render legislation a morality-free zone, set these important and valuable functions of law at naught. Were those persons to succeed, we and they would suffer incalculable harm, having had one of our most useful moral educators shut down or censored, as it were. They would stop the moral voice of law. In so doing they would silence one of our most valuable instructors of civic virtue and thereby destroy one of our most effective guides to prudent social behavior, and to the blessings that attend it.

All cultures are expressions of deeply rooted values. Cultures are the historical outgrowth of those values — the historical human consequences of those values — values that sometimes lead to compassion, beauty, war, deprivation, heroism, or degeneration. Law is a function of culture — all cultures have law — which means that law is a function of values or morality. Law without values is cultural suicide, which is what those who wish to separate the one from the other are going to produce, whether they wish to or not. In our age of increasingly complex moral problems, where technological advances outstrip moral growth and understanding, we must do our level best to cultivate the wisest persons, the noblest motives, and the highest actions of which we are capable. We need to make far better use of the law as tutor and moral ennobler. We must remind ourselves repeatedly that the best habitat in which to raise ennobled citizens is a well-ordered society, one in which law is rooted in morality. We dare not forget that law is both an expression and shaper of the conscience of a nation. Consequently, the near-sighted and misguided movement to separate law from morality is as dangerous as it is impossible. Both for our nation and for us as individuals, our character is our future. Morality is destiny.

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NOTES

- 1 See Robert Dord, *Separation of Church and State: Historical Fact and Current Fiction* (Grand Rapids: Baker Books, 1988).
- 2 See *The Declaration of Independence*.
- 3 For documentation, see Francis J. Beckwith, *Politically Correct Death: Answering the Arguments for Abortion Rights* (Grand Rapids: Baker Books, 1993), 54–59.
- 4 Ibid.
- 5 Gertrude Himmelfarb, *the De-Moralization of Society: From Victorian Virtues to Modern Values* (New York: Knopf, 1995).
- 6 This is a paraphrase of something I heard George Will say on a Sunday morning news program more than 10 years ago.