

## ON THE MAJESTY OF THE LAW

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In the choice of my topic, I unknowingly filched the title of Justice Sandra Day O'Connor's memoirs. I meant to call upon what is awesome and venerable in the law, as I think the good Justice did as well. Majesty is not in our style of democratic informality, in which everything is open to change in the hope of reform. But we are still attached to the formality of procedure and the solemnity of judicial garb designed to maintain respect for the law. We do not need regal magnificence in our judges, but we do require republican assurances that public justice is serious business. Above all, any appearance that the law can be circumvented by private approach or by interested calculation—and this warning is directed to professors—is to be avoided. What happens behind the scenes must stay behind the scenes.

Against this intimation of majesty practiced in our time is the movement of thought known as "legal realism." I will argue in my brief that majesty is good and that legal realism is inadequate. Legal realism is not all wrong, but the view that it is enough is all wrong.

Legal realism has several modes, but they all declare that something other than, and more powerful than, law is the cause of law. The "realism" consists of seeing through mere appearances and establishing the fact of this more powerful force. Once established, that fact must be published, taught, and spread. Legal realism is expected to bring good to society by its inventors, who quickly become, if they were not from the first, its advocates. It asserts that our law will be better if through clear thinking we dispense with its irrational majesty. This realism is really idealism. In the old days, when philosophy was young, the pre-Socratic philosophers thought that laws were made for the convenience of rulers and nothing

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good was to be expected from politics. They thought that was realism. In America, advocates of legal realism have arisen from the Progressive tradition, joined now by libertarian conservatives, who claim public good will result from their public unmasking of law. Despite the fact (as they maintain) that no one aims for the public good, they believe it does exist; Socrates was right about that.

The sort of thinking our legal realists recommend can be seen in the famous prisoner's dilemma that is the essence of game theory, the most fashionable mode of legal realism. The prisoner's dilemma posits a situation in which a prisoner must choose between defecting from a fellow prisoner and cooperating with him. We do not know whether the prisoner is guilty and should therefore confess his crimes. We do not know whether the law he may or may not have violated deserves to be respected. But the example is not as neutral as it seems. One's sympathies are unjustifiably enlisted on the side of the prisoner by adopting his point of view. From the standpoint of the law, he is defecting from the law instead of cooperating with it by confessing, as is his duty. The example substitutes calculation for duty and is actually about how to evade the law if it is advantageous to do so.

It is not unreasonable to question the coherence of such allegedly neutral strategizing. How is it consistent with respect for the law? Shouldn't people believe that two murderers, two rats, should rat out each other? The phrase "rat out" expresses a noble disdain to which murderers are not entitled. It may be objected that respect for the law is due only when the law seems good to us. But if this were correct, people would simply do what is good for them, harmony would result, and there would be no need for law. It appears that law needs to seem good even when it may not be; it needs, as we say, legitimacy. Does legitimacy require majesty to give it authority?

I have been speaking so far of "the law," as if law were one whole. Even we in pluralistic America use that expression. Yet the law consists of laws, each of them by itself and not necessarily coherent with other laws. A whole such as an animal organism has parts with a definite order, each with its functional contribution to the whole. But the law is a whole without articulated parts. It is a whole of a peculiar kind in which every law carries the wholeness of the law. Law is composed of laws but every law is the law; disobey one and you have disobeyed

“the law.” You cannot plead that you obey most all other laws; one-hundred percent obedience is required. Law is a whole that when cut into parts is no less of a whole than before it was cut, for every law is a cut as well as a whole.

One could compare law as a whole with stone and with gold. When you cut a stone, you get stones, each *a* stone in which the new stone, part of all stone as a whole, is now a whole on its own. But when you cut gold, you get *some* gold, not a gold; this is the partitive construction. Some gold is part of all gold but not a whole on its own. It is as if the whole of gold wanted to hold on to its wholeness, jealous of any new whole. The law is like both stone and gold, divisible into parts yet with each part reflecting the status or dignity of the whole. Law is also common, like stone, and precious, like gold.

For example, take a law against jaywalking. This law makes a cut, distinguishing the legal from the illegal way of crossing a street. Yet the whole remains: Why was it cut, why was the law passed? With this law a community shows its concern for the health of its citizens, though not necessarily tender concern since accidents cause expense to it. And why such a concern? These are not just any bodies being protected, but human bodies. Human bodies have minds, possibly souls. The bodies of dogs, cats, and deer are not as valuable as these bodies, and besides, they are not capable of obeying a law against jaywalking. The law against jaywalking protects citizens from death. It therefore assumes that death is bad, life is good. Is that true, and how do we know? Add up all the implications of this law and one sees that a comprehensive whole is assumed to be true by the law, one that gives a special status to human beings, among other questionable assertions.

A law is both a cutting and an inclusion. A cut is the result of a decision or choice of what should be legal and what should be illegal, and it reminds us of the positivist theory of law or of the notion of sovereignty. In this theory, law is made law by its efficient cause, by the positive or sovereign power to decide. But there must be some reason for the cut, some justification, and the necessity for a reason compels us to include in our consideration all the things that surround the cut. As we have seen in the example of jaywalking, we would have to go as far as to establish the order of nature detailing what is man’s as well as what is above and below man. We could not omit the question of the existence of God as possible governor or creator of the

whole that is nature. Is the law against jaywalking consistent with the startling findings of modern physics that challenge the idea of the “order of nature”? Now we have arrived at the theory of natural law, rival to positivist law, which says that law is a rational determination of what is naturally and thus truly right. The law is determined by its rationality—the formal cause—and by its purpose, the final cause.

Unfortunately, it seems difficult to choose between the two theories because both seem to be true, but only up to a point, and not so that either can dispose of the other. It seems true that law is an arbitrary decision that could have been otherwise than it was. Consider the various conflicting laws in different countries and in different times, or conflicting proposals by different parties in the same time and place: Think of “Obamacare,” now much disputed. Yet these decisions are choices made for a reason, not arbitrary whims of fate. The reason for the law may be stated in a preamble (or prelude) that moves toward a statement of an aspiration concerning the whole. Think of the (partial) title of the Affordable Care Act, stating its purpose. Observe all that stems from the word “affordable,” meaning within rather than beyond our means. What are the limits of human attainments? And what of “care”? Does God take care of us or does He leave us unprotected so that we must scramble to do so on our own? The welfare state is translated in French as *l'état providence*. Does that mean that law is made in consonance with God's Providence or to substitute for it? Here we have a fleeting glimpse of the majesty of the law: Does law reflect God's majesty or substitute for it? One should not believe the answer does not matter, but either way, law has or needs majesty, perhaps all the more if it wants to do without God or the divine.

These are not questions that citizens or professionals such as judges, policemen, and professors of law habitually think about. They take the majesty of the law for granted, believing that because they are not mere instruments of powerful rulers, they deserve the respect they regularly receive. They are not on the level of cunning, strategizing criminals like the players of game theory! They are something higher. So there must be something higher, and this, whatever it is, is on the side of the law: That is the working presumption of professionals in the law.

The law, however, is not simply good as the notion of natural law seems to require. “The law” consists of the laws of any city

or state, however contradictory they may be. But since the law is a whole, it tries for consistency and insists on generality. It is a brave overstatement, Procrustean in character. Procrustes was a host who fit his guests to the beds he had, cutting off their limbs if they were too long, stretching them out if too short. The law is Procrustean with an easy conscience because it doesn't have a sense of proportion in its parts, all of them being laws that are equally law.

For example, does the law on jaywalking apply to the police? The late James Q. Wilson, in an excellent book with a superlative title, *Varieties of Police Behavior*, contrasted the behavior of the Oakland Police Department with that of other police departments in this regard. It happened that the parking lot of the Oakland Department was located across the street from the Department, so that policemen had either to walk a distance and cross at the corner or jaywalk. Under the watchful eye of some graduate student, it was seen that in Oakland the police took the trouble to obey the law. Elsewhere the police, with more discretion, would be more relaxed and excuse themselves from a law they did not enforce on others. This small difference was the sign of grander contrast between the spirit of legality in one department, preferring to "go by the book," and the common sense in another, ignoring the law when convenient or more efficient to do so. One can see reason in both ways, and the most reason when both are combined. But they cannot easily be combined because the spirit of each is antithetical to the other. It is just because law wants to be consistent that it must be arbitrary and Procrustean.

Any time that a legislator makes a law, he makes a cut between something declared legal and something illegal. As we have seen, in making a cut, he makes a whole. But he usually does so unwittingly, thinking only of jaywalking and forgetting the greater implications. If he tried to take into account these implications, however, he would need to have great scientific, philosophical, or superhuman knowledge. He has no time for this sort of study, and meanwhile jaywalking is a present evil. So he has to make a stab at it, looking ahead to the consequences he can foresee and at the same time meeting a present need. This is something like a professor's opening lecture in a course; to begin, he needs to look inexactly at the end. The preamble to a law states its purpose quickly and tendentiously, introducing the law proper, which by itself is not argument but command. But

one could also say that the law *is* the preamble by itself because it includes by implication all those things that are suggestively set forth in the preamble. The trouble is that it is easier to change the professor's opening lecture than the law. The professor simply says that this first statement was tentative or even wrong, but the law cannot say that. Every change of law implies a new whole, different from the one implied by the previous law, requiring a new explanation replacing the old one. But the very arbitrariness of the law makes it difficult to admit its arbitrariness. The old law, after all, was no less "the law" than the new one, and the new one is no more so than the old.

Modern political science had a cure for this arbitrariness in the law. It was to lower the horizon of law so that it covered only minimum human necessities, as for example bodily security. Law would no longer claim to comprehend the whole of human life, or what you do with your secure body. The law would merely free the citizen to do what he pleased, having satisfied the demands of his and others' security of body. The soul and its requirements would no longer be part of the law. To do this, it is necessary to prevent the law from including these larger matters in order to make a whole of itself. One should define law as cutting, or as the act of cutting, making a decision. From this comes the modern theory of sovereignty, which sacrifices the nobility and beauty of the law for the power of the legislator. In keeping with this theory, it is no doubt better to divide power in the "separation of powers" so as to make sure it is safely confined to a necessary minimum while simultaneously contrived to do the job with energy. Once the problem is defined as one of power—power made both safe and capable—the rational element in law is ignored, and cutting no longer implies including. Then it becomes more appropriate to speak of laws as "settled standing laws" in the plural, rather than of the law as if it were a whole, though that phrase continues to be used.

If "the law" somehow seems to express something useful, then perhaps the whole of the law can be understood as a "system," meaning a network of conceptually related items. One could make a whole out of all the human necessities, with the necessities of the soul abstracted, and call the result "empirical political theory." The necessities of the soul, reflecting the human desire to do better than the minimum, to demand justice and stand up for it, to seek excellence rather than mediocrity,

beauty rather than dullness, greatness rather than pettiness, would be left open, unconnected to the necessities of the body. A society could change its beliefs and practices without touching its laws on the minimum necessities. Having no whole, it could change without changing the whole; it could experiment harmlessly, risking only bloodless revolutions. It would take three or four centuries of evolution and experiment after the invention of modern political science, but at the end we could call this result "pragmatism." Pragmatism was the theory of the Progressives, who were also patrons of legal realism. The spirit of pragmatism was stated well by Franklin D. Roosevelt in a speech on May 22, 1932, at Oglethorpe University before he became President: "The country needs, and unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something."

It is remarkable that this demand for almost desperate ingenuity could be considered "common sense" (what happened to "look before you leap"?) and connected to a theory known as "legal realism." It would seem that the real realism is illegal. As Machiavelli said, "because there cannot be good laws where there are not good arms, and where there are good arms there must be good laws, I shall leave out the reasoning on laws and speak of arms." Of course arms are not enough; he also speaks of conquering by fraud so as to maintain the "majesty" of the prince. So "law schools" would still be needed, in Machiavelli's considered view, as a branch of the military schools. That is genuine realism.

What people used to call majesty was reverence or veneration for the prince or the law. Majesty could be calculated in the ways that Machiavelli shows us, but obviously it cannot appear unmasked as calculated. A sense that there is a noble or divine source of law is necessary in addition to its goodness or utility. As Max Weber implied in his clumsy way, by both affirming and denying the legitimacy conferred by reason, the law must have legitimacy through charisma even when it is rational. What the people hold to be good comes more from what they think to be a good source than in consequence of self-interested calculation. The source used to be *vox dei*; now it is *vox populi* or "our Fathers." Abraham Lincoln referred to the Founders as fathers to give them authority as spokesmen of, and to, the people.

The law needs a good source, not just good content. Having a good content will not by itself get the law respected and obeyed. The good content would have to be appreciated by those to whom it applies, but they may not understand its goodness or will interpret it in their own favor when the law frustrates them. Even when the law is confined to minimum necessities that one might think universally appreciable, such as the law against murder, one will be confronted with honor killing as justifiable homicide. And merely explaining why murder is limited to fellow human beings requires an appeal to the specialness of human life. One must make this appeal to a higher order than human beings can make, the order of nature that permits us to make laws to guide our own lives. Human beings did not make their capacity to make, after all. Now we are at the verge of dangerous territory, where superhuman merges into the divine. But let us leave it unsaid whether God is a person or the personification of an impersonal order. One can speak of "the divine" as did the ancient philosophers and still retain the sense of the sacredness of human life. One certainly cannot retain that sense under the aegis of the pragmatism that sees our freedom as subjecting us to ephemeral motions baptized as "change."

Thus the law, despite being a whole that confers on each particular law the importance of "the law," has a higher and lower content. How to define "higher" and "lower"? We can listen briefly to those who want to rationalize our lives with their clever schemes. They think highly of "reason." Reason is or ought to be in charge. The human being is one who can control himself by reason and control others by manipulating or "nudging" their sub-rational tendencies; sub-rational means "below reason."

Let us call law facilitating the use of reason the higher part, and law dealing with ways in which reason is necessarily and deplorably constrained the lower part. A lawyer could pick apart the distinction, but let it refer to the difference between facilitating and constraining the freedom of our reason: a law providing support for education versus the law against burglary. This distinction is something like the older conception of "higher law" that used to be spoken of in law schools. The trouble with the higher law is that it detracts from the wholeness of law, and thus from the legality of the lower law, and thus from the majesty of law as such. In America the higher law is constitutional law, a definite source which does indeed



detract from the majesty of ordinary law, particularly when frequently appealed to. Still, constitutional law bestows favor as well as frown.

A related difficulty is the triviality of many laws and regulations. The noble city of Cambridge should not be so concerned with specifying exactly when its citizens place their trash bags (as opposed to their trash barrels) out for collection, one feels. The law must deal with small matters, but when it does so, it gives the full weight of "the law" to measures that do not deserve it. I doubt there is any solution to this problem, but it does show further why the goodness of the law in content is not sufficient to secure its respect. Only the goodness of the source can keep the law whole as it needs to be: not what it is so much as where it comes from. To say where it comes from gives access to "the divine" in law, the higher source that promises the rule of the higher good. I made shift to identify the higher good, reason, by looking at the order of nature presupposed by the pragmatists, for to understand the law it is necessary to consider its goodness in content, not only in source. How otherwise would one learn that the source is good? But "the good" is too general and too particular, and too difficult and too easy, for human society to understand.

Society needs a law that is good because it has a good origin—because it is *ours* as well as good. Its origin may be God or man outside the law, but it has the form of law, the form of a certain whole, that makes law its own cause. To be its own cause law must be a whole. To be a whole the law must have a whole community in view. "The good" and "nature," considered simply without reference to what is ours, become too divisive when they are distinguished, as they must be, from the folly of the many. Goodness is needed, but together with harmony, so as to make a whole of a community. The folly of the many must be taken into account and included in the whole.

A common source provides the necessary mix, though necessarily at the cost of consistency; some difficulties must be glossed over. The U.S. Senate, for example, is a democratized aristocratic institution with a democratic composition and an aristocratic function. It is impressive that such a mix could be thought up and put across, both a resounding departure from the republican tradition of an aristocratic senate and a quieter bow to it. We seem to have moved from God as the source to the founding of a regime that cares for the whole of a free coun-

try. The Constitutional Convention was formerly lauded as an assembly of demigods or heroes. Progressives cannot abide this designation, as it does not include them, and now one hears it less frequently, at least among the sophisticated. The consequence is an indecent scramble for the title of their majesties, the replacement demigods.

The law does not depend so much on an opinion that it is legitimate, as with Weber's types of legitimacy, as it does on plain law-abidingness. With any opinion of what is just, people must be taught to obey the law—the law as a whole, not the legitimate law as a distinction within it. Human beings have by nature the capacity to make laws and to live by them, but only after a primary education in obedience, which they also need by nature. For some reason it is natural, in the lower sense of our nature, to resist the law, as well as to resist reason, or in general to resist what is good for you. Parents know these facts and try to cope with them. The law needs education in obeying the law, which means any and all laws. The temptation to pick and choose must be firmly put down. It's true that Progressives try to make their children into little Progressives, but there are limits even to pragmatism, which one can either anticipate or discover.

That humans resist the law is the main reason in practice why the law must appear as a whole, without having the consistency in reason that would commend it to a philosopher. The law does not address philosophers, those who are convinced by reason and only by reason. It does not agree with Machiavelli that "it is good to reason about everything." As a whole, the law has an answer for everything—or for everything it needs, which is very extensive. The law must be inculcated in the young, and repeated to those of the old who forget. This process is elementary education in the virtues, particularly the virtue of justice. You learn to follow the rules by playing the game. Even our liberal law requires education in courage when it drafts soldiers and teaches military discipline. It requires moderation in not driving when drunk and wisdom in learning to read and in filling out forms correctly. These are the first virtues, dealing with our resistance to reason, the transition from the life of unreason to reasonable maturity, from low to high but guided by the high.

Not having the savvy of a law professor, my view from the outside tells me that law professors greatly underestimate the importance and the difficulty of moral education against un-

reason. Education in the law is preceded by education in obeying the law. No other professional school needs to have its students arrive with an education in its subject learned as toddlers. From this fact we see that the law has priority and is inescapable. Living outside the law is nothing but living on the wrong side of the law. The law with its blind spots may not always see you, but it always has its eye on you. If you think this is not the case in a free society, ask an illegal immigrant. Legal realists believe that as social scientists they can live harmlessly and even respectably outside the law as if they had no stake in it. They are like illegal immigrants, except that they do not understand themselves and are not understood as such. Our society allows them this confusion and includes them under the protection of the law they obey but, as social scientists, do not respect.

At this early stage, the reasons given to children should be reasons for obedience. Later on they can learn that even unreasonable laws must be obeyed. Authority needs an authoritarian beginning, not necessarily with spanking but with firmness. Reason comes when the laws are seen to embody principles, and the person of the authority fades into the background, obedience being no longer merely commanded by his say-so. This beginning education is needed just as much in our free society, if not more so than in an authoritarian one, where no one is ever left to guide himself. It is what we do, often without realizing it.

Education in obeying the law is supplemented by enforcement of the law. The law decides not only who should be educated and how, but also who goes to jail and for what. It is not enough for us to talk of virtue; we also must consider the less pretty topic of vice and punishment for it. It seems to question the majesty of the law that it can send human beings with their natural dignity to jail, greatly curtailing their natural freedom. But in this aspect the law protects their dignity by holding them personally responsible for their misdeeds, Kant tells us. In any case, the police need the power that goes with majesty, and they do everything they can to preserve it. They need the power to over-awe possible miscreants and to make such people fear to attract their attention. Of course this fear is in good part expressed in calculation, but calculation out of fear rather than calm consideration.

I have one more base to touch. We need to know about the soul, or the psyche, if using the Greek word makes people feel better. The ancient philosophers have all the answers, but they do not have the solutions that we like. The subject of the soul arises from the question always asked about punishment: Is it for deterrence or for vindication, or for some mix of the two? Deterrence by itself says nothing about the moral responsibility of the malefactor; it just wants to prevent him from doing the deed again. Under that principle, a wife-murderer might be paroled if one were sure he would not commit the crime again, and a bicycle thief could be executed if he showed himself to be incorrigible. The gravity of the crime committed is not relevant, only prevention of the next crime, whatever it takes.

Why is moral responsibility not in question? It is because the crime was committed through mistake; the criminal did what he thought was right but was not. It was a mistake of intellectual virtue, not of moral virtue. This case is the same as the excuses used for living in a bad neighborhood, not having had a healthy family environment, and so on: The criminal did not know what he was doing. Do not get angry in such cases—but also, do not show mercy; prevention is the goal. You cannot say that murder or capital punishment is wrong because human life is sacred, for under the assumption that sin is ignorance, nothing is unquestionable, or beyond reason, and nothing is sacred. In this difficulty you cannot have recourse to God suddenly when you need Him. God will have some questions, some commands for you. Proof, please, that man is sacred! When you produce it, we will wait while you quietly drop Darwin's theory into the trash can. For those who live by reason alone cannot have one reason to justify human rights and a contrary one to explain human evolution.

The trouble with moral responsibility by itself, practically speaking, is that it insists too much on vindicating justice in the least detail, never letting go, vengefully crossing the boundary between just punishment and cruelty. Another trouble is that one cannot use punishment prudently, taking account of circumstances that aggravate or palliate and times that call for action or quiet. Moral responsibility assumes, contrary to deterrence, that you knew or should have known that what you were doing was wrong. Your crime was voluntary. You have a soul that permits you to choose what you do, as you very well know whenever you begin some action. So do not say you did

not know what you were doing; just find out the law and follow it. If the law is complicated, buy yourself the services of a clever lawyer. It is clear we need both moral responsibility and deterrence, but also that the two theories are contrary to each other. We have encountered this difficulty before: the law demands an impossible mix of arguments. It is indeed a whole, but by the main force of compromise of the moral with the intellectual. We want moral responsibility but we also want to be able to guide it prudently, with judgment.

This compromise of contraries is invisible to legal realism. Legal realism wants to be rational even more than it wants to be realistic, in fact much more. It wants everything to be calculated so that the morality of actions disappears into incentives and disincentives. Therefore it does not get angry. But how can one be realistic about the law if one does not recognize the anger that people feel at a crime? How is it realistic not to see that this anger must be both expressed and controlled? The solemnity of a judge, arising from the majesty of the law, honors both the accusation and the defense, because it respects the seriousness of both sides. A judge could not be impartial, or seen as impartial, if he were not, as representative of the law, above both parties—and this is again partaking of majesty. Legal realism addresses the motives of the parties, seeing them as self-interested rather than exposing their intellectual mistakes as Socrates would have done. It is somewhere in limbo between philosophy and morality, and with understanding of neither.

What is needed is a philosophical understanding of both. Men have souls that cause them to move into action and also to pause and reflect. Why do we need to act rather than merely think? Because our souls are encased in bodies, each of them private and individual, hence with separate interests. But we also have the capacity to rise above our interests and reflect, possibly to feel shame. The majesty of the law helps us do this. It is both moral and intellectual and with both their contrary qualities. The majesty of the law is not an obsolete irrationality but the prime feature of the phenomenon of law. It is necessary in our time as in all times. It serves to give expression to our moral outrage, but also to control it precisely in the interest of our common humanity. At the same time it requires us to reflect on what enables us to rise to that level and on what justifies our sense of the sacredness or specialness of man.