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Introduction

Backing into Treason

I had been asked to do a piece, for a magazine, on the Holocaust Museum in Washington, and I asked my wife to come along with me. But she had lost family in the camps, and she was not ready to see the scenes played out in vivid pictures, still and moving. I asked then my friend Alan Greenberg, the architect, to come with me, and as we walked through the museum, he offered his commentary on the building, and his reflections, formed over many years, on the characters and politics brought back again in the tableaux set before us. But then we took a turn, and we suddenly came upon a scene that must have been encountered by many other visitors to the museum: a vast vat filled with shoes. They were the shoes of the victims, collected by the Nazis, as they sought to extract anything they could use again or sell. And what came flashing back instantly, at that moment, were those searing lines of Justice McLean, in his dissenting opinion in the Dred Scott case:

You may think that the black man is merely chattel, but “He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.”1 He has, in other words, a soul, which is imperishable; it will not decompose when his material existence comes to an end. The sufficient measure of things here is that the Nazis looked at their victims and thought that the shoes were the real durables.

I have several colleagues, in the academy, who have taken as their own signature tune that line from Nietzsche, amplified by

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2 ■ Natural Rights and the Right to Choose

Dostoyevsky, that “God is dead” and everything is permitted. They are people of large natures, with sensitivities cultivated to the most exacting liberal temper, and so they are prepared to engage their sympathies for all species of hurts suffered by the mass of mankind. When the conversation turns, say, to a homeless man in the gutter, they are quick to insist that there is, about that man, even in his diminished state, an irreducible human dignity. There is still, about his life, a certain sanctity that commands our concern. And we ask, “Sanctity?” Do they mean, of the sacred? Does that not rather point to – well, You-know-who?

We find ourselves in a curious situation in which so much of our language of politics and law is rooted in layers of moral understanding and religious persuasion, which have departed from the recognitions of most of our people. My colleagues in the academy speak firmly of “rights,” or of the “injuries” done to “persons,” and they seem serenely unaware that their language here is grounded in understandings that they have professed, at least, to have rejected long ago. They have, as I say, the most generous reflexes, but whatever can be said on their behalf, even they would have to concede this point: that they cannot possibly give the same account of the wrong of slavery, or the wrong of the Holocaust, that McLean was in a position to give. Some of those homeless characters, living in the streets, might have broken their own lives, and the victims of racism might be reduced and abused; and yet, McLean could look through it all and see beings who were made in the image of something higher. The modern liberal will proclaim his social sympathy and strike a militant posture in defense of rights, but he can no longer explain why that biped who conjugates verbs should be the bearer of “rights.”

The malady I am describing here is not confined to those rare quarters of the academy, where professors, swollen with “theories,” may talk themselves into brands of imbecility so exquisite that they elude the common man. But in our own day, that imbecility has been imparted to the common man, taught now by his betters. The man on the street may know nothing of Nietzsche, to say nothing of Heidegger and “post-modernism.” And yet, over the last 25 years, that man on the street, and the members of the political class, have absorbed the moral relativism retailed in the academy. It is not, of course, the sophisticated relativism or nihilism of Heidegger; it is a
“soft” relativism, a receding from “judgmentalism,” or the casting of judgments, but it is hardly without consequence. One result is that many of our people who take an interest in matters of politics and law have gradually talked themselves out of the ground of their rights, without being quite aware of it. For like those professors in the academy, they can no longer offer a moral defense of those rights; and worse than that, they have talked themselves into premises quite at odds with the premises of the American Founders. To put it another way, they have talked themselves out of the premises on which their own freedom rests.

It might even be said then, of that common man, interested in politics, that he has been drawn, with a benign haze, into a kind of inadvertent treason: He cannot be counted on to preserve the regime of freedom left to him by the founders. He cannot give an account any longer of the premises of this regime, and therefore he cannot offer a moral defense of that regime and the rights it was meant to secure. He cannot vindicate then his own rights, and for the same reason, he is not in a position any longer to vindicate the rights of anyone else. He has become then, in effect, an un dependable ally, or even an unwitting enemy, of the regime established by the American Founders and preserved by Abraham Lincoln.

The common man acts through inadvertence, and moves in channels that have been carved out by others. He gives voice, in sentiments grown common, to maxims shaped by leaders of the bar and politics, who should have known better. As the classical philosophers recognized, the law teaches. When the law forbids, say, acts of racial discrimination, it removes those acts from the domain of private choice or personal taste, and forbids them to people generally or universally. It treats those acts, in other words, as matters of moral consequence. As the public absorbs the understandings of right and wrong contained in the laws, the character of the public becomes shaped, for better or worse. That, as Aristotle understood, was the vast promise and the vast danger of politics; and it was the condition that could never be removed. The law could never stop teaching lessons of right and wrong, for human beings could never repress the inclination, built into their natures, to form judgments on the things that were right or wrong, just or unjust. Law there must needs be, and the men and women who shape the laws must be, perforce, teachers of morality,
4 ■ Natural Rights and the Right to Choose

Even when they profess to teach that there is no morality. In fact, we have discovered in our own time that judges and political men are never more rigid and moralistic in their teaching as when they are ridiculing moral judgment and professing to free people from the tyranny of moral truths.

The public has been schooled now to a different temper because it has been schooled, quite deliberately, by lawyers and jurists with serious pretensions to philosophy, but schooled in a philosophy that attacks at the root the teachings of the American Founders. At the very beginning of the American law, in *Chisholm v. Georgia* (1793), Justice James Wilson observed that the law in America would be placed on a strikingly different foundation from that of the law in England. That law in England, made familiar by Blackstone, began with the notion of a sovereign issuing commands. But the law in America, he wrote, would begin “with another principle, very different in its nature and operations”:

[L]aws derived from the pure source of equality and justice must be founded on the consent of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.  

As we shall come to see, judges in our own time have shifted radically from the understanding of the founders because they no longer profess to understand, in the same way, just what constitutes a “man.” They affect the skepticism of the age, or an uncertainty about all “settled truths,” including the understanding, settled among the founders, that one could know the difference between a man and a horse. And so, as Jefferson remarked, anyone who rejected the notion of government by consent would suggest that the “mass of mankind” had been “born with saddles on their backs,” and that a privileged few had been born, “booted and spurred, ready to ride them legitimately.” The judges, in our own day, profess to be far less certain about the meaning of “nature” and “man.” As we shall see, they are more disposed to leave to the “political process” the power to resolve that question of what constitutes a person or a human life. But in the name of philosophic

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2 Dallas 419.  
doubt, the judges back into an arrangement quite ancient: Since there is no “objective” standard of what constitutes a human being, the decision will be left in the hands then of people with political power. And when they flex their power, in reaching a judgment, that judgment will be tested by no standard of right or wrong apart from power itself. That may sound quite portentous, and yet the moves are all familiar to us, and we have heard them, in different forms, over the years: “Are those black people, held in slavery, really human beings, or are they creatures falling somewhere between human beings and animals? And those creatures in the womb – they are conceived by human beings, but does that mean that they are human at all times? Can we not rid ourselves of them if they strain our interests, just as we may rid ourselves of certain animals, with discomfort, perhaps, but without moral strain? But who is to say?” Indeed, who is to pronounce on the question if there are no right answers? And who is to say that self-interest may not be a sufficient and defensible ground for the taking of a life, even the life of an innocent being, if there is no ground on which to say that self-interest is any better or worse as a standard of judgment than anything else?

As the judges advance in their work, at the end of the century and the beginning of a new millennium, they have removed from our law any fixed notion of what constitutes a “man” or a human being. But they have removed that part of James Wilson’s understanding precisely as they have removed the rest: Human beings were stamped as different because they could give and understand reasons over matters of right and wrong. As Aristotle observed, in the first lines of The Politics, animals may emit sounds to indicate pleasure or pain, but human beings may do something notably different. They can “declare what is advantageous and what is the reverse, . . . what is just or what is unjust.” But if there are no moral truths, no standards of judgment in matters of right and wrong, then that difference between men and animals dissolves: If “right” and “wrong” simply mean “I like it, or I dislike it,” then the giving of reasons over matters of right and wrong is no different in substance from emitting sounds to indicate pleasure or pain.

And yet, if that were the case, we may merely take the matter one step further: If there are no moral truths, no ground of right and wrong, then law itself turns simply into a system of power, without the least pretense of finding a moral justification for itself. That sense of the matter, stated directly, may still shock the sensibilities of common folk. But it is no longer a shock to the professors in the law schools, who teach the doctrines of Critical Legal Studies or Legal Realism, or the legal version of postmodernism. They know that the law is about power, and they insist that there are no “foundations” for moral judgment. Their aspiration then is to become possessed of political power, or the powers of the law. And once possessed of that power, the object is to use it for their own ends, without moral inhibitions, or without at least those fairy tales that were offered in the past to the gullible as “the moral law.”

Just after the Battle of Gettysburg, General Meade had not realized the full depth of the victory won by the forces of the Union under his command. He was still, in the aftermath of that battle, shaken by the severity of the casualties. He was given, quite understandably, to the task of assembling the men who had survived, and taking stock of his army in its reassembled state. But President Lincoln did grasp the depth of the victory—and its potential significance— if the moment were not lost. Lincoln understood, as not all of his generals did, that the tactical objective was not to “take Richmond” but to destroy Lee’s army, the military force that alone sustained that “pretended government” known as the Confederate States of America. With a proper delicacy, but with the sense of the moment, Lincoln sought to jar Meade from the haze that engulfed him. Lee and his forces could not yet cross the Potomac River while the tide was high, and Lincoln urged Meade to strike at Lee before the general could get back across the Potomac into Virginia. Meade, however, held back, and in holding back, lost the moment. He telegraphed to Lincoln and remarked that they could take consolation at least in this: that the army had been successful in “driving the invader from our soil.” His dispatch could not have had, though, for the president, a consoling effect. Lincoln remarked to his secretaries, John Nicolay and John Hay, that it was just like McClellan all over again—the same spirit that led the general to proclaim a great victory because “Pennsylvania and Maryland were
safe.” Lincoln wondered how he could convey the point to his officers: “Will our generals never get that idea out of their heads? The whole country is our soil.”

It must be the most sobering thing when one’s own people begin to absorb the premises of the other side. I would take that incident, or vignette, as an analogy for the kind of lesson I would try to convey in this book: I would suggest that, in the most affable and serene way, many Americans, and especially, members of the political class, have come to talk themselves out of the premises of the American Founders and Lincoln. They have done it without the least awareness, and indeed they have done it even while they have had the impression that they have been expanding their constitutional rights. In the name of “privacy” and “autonomy,” they have unfolded, since 1965, vast new claims of liberty, all of them bound up in some way with the notion of sexual freedom. In the first steps, there was a liberty, for married couples, but then soon for unmarried persons, to have unregulated access to contraceptives. Next, the claim of privacy was extended into a private right to end a pregnancy, or destroy a child in the womb, at any time in a pregnancy, for virtually any reason. That same claim of privacy was soon extended to the freedom to end the lives of newborns afflicted with Down’s syndrome or spina bifida. After the briefest interval, that same doctrine of personal autonomy was applied to the other end of the scale of age and converted into a claim to assisted suicide.

Ironically, this unfolding scheme of liberation has advanced even while privacy, in other domains, has been progressively crimped and disrespected by the law. Private corporations, private clubs, private households, have found themselves under thicker regulation, and the overhanging threat of lawsuits. The combined effect has been to remove the attribute most prized about privacy: the freedom to arrange one’s own association, or private enclave, according to one’s own, private criteria. But this recession of privacy and freedom seems to count for very little when set against the expansion of rights associated with sexual freedom. The dismantling of restraints on sexuality has evidently been taken as far more liberating, even exhilarating, perhaps because it has been taken as a matter of the most irreducible

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“personal” freedom. And yet these freedoms, celebrated as pre-
eminently “personal,” have required the assistance or intervention of
surgeons and counselors, and they have quickly annexed to their cause
the demand to have the support of public monies, drawn from tax-
payers with the coercions of the law. It must surely count, too, as one
of the paradoxes of this new phase in our law that people seem to
identify their well-being, not with an obligation to preserve life or go
to its rescue, but with the creation of vast new franchises to destroy
human life, for wholly private reasons, without the need to offer a
justification.

Each step in liberation has been marked, then, by a further detach-
ment of people from the traditional restraints of the law. The corol-
rary, of course, is that, as restraints have been removed, persons once
protected by those restraints have been removed from that protection.
Vast new liberties come along with vast new injuries – unless, of course,
the victims no longer count. In any event, there is little doubt that
these alterations in our law over the past thirty years have been taken
as the hallmarks of a new regime of personal freedom; a freedom so
vital to those who savor it, that any threat of having it qualified or
diminished in any degree is taken as nothing less than an assault on
the constitutional order itself. For them, it would seem, an America
without the right to abortion would simply no longer be America. For
them, there has been little doubting that each step in the receding of
the law has brought a deepening of their freedom. But they seem
blithely unaware that, with each step, they have been talking them-
selves out of the premises of the founders and Lincoln. And if I am
correct, they have done nothing less than talk themselves out of the
grounds of their own rights. As a consequence, we are less able as a
people, than we were even 25 years ago, to vindicate our own rights,
or the rights of the people around us, the people who thought they
were joined with us in this political community.

I don’t mean to offer in these pages an historical account of how
we got here. My burden is to show us that we have, and I would do
that by looking at the doctrines that have been put in place as a result
of the arguments that have been woven into our law, in some of the
most significant cases, over the past 25 years. The story of this shift is
really a story about the notable changes that took place in the fur-
nishings of mind of American judges. But that in turn is a reflection
of the changes that took place in the schools, and especially the schools of law, that formed the sensibilities of those judges. The heart of the matter is that the schools sought to mark off a new genius in philosophy by undercutting the false certitudes that were thought to have enthralled an earlier generation. The most celebrated minds at schools such as Harvard began to teach a new variety of moral skepticism. As those teachings carried over from the nineteenth century, as they were translated in the 1930s and converted into caricatures, they made their way into the minds of men and women who would come to exercise judicial power in the 1970s and 1980s. And when they began to find expression in our law, those shifts began to describe a judicial mind of matchless vulgarity. The playwright Tom Stoppard had one of his characters, a professor of moral philosophy, offer this candid account of his career: that he had managed to take a subtle thesis and traduce it into a proposition of “staggering banality.” So much could be said for several justices of the Supreme Court in our own time if they could stand back, with a comparable detachment, and give us the same, pithy summary of their lives’ work. The main difference, however, is that this banality comes at a serious cost in lives. For the men and women engaging in these affectations of philosophy have done that while they have been wielding the powers of the federal government.

But my point, again – my point, ever – is that this alteration is not to be taken as a shift merely in style. The sensibility engaged is a moral sensibility, which encompasses the understanding of moral things. That is not merely the knack of having finer intuitions, but of grasping propositions. James Wilson observed, in that first case to elicit a set of opinions from the Supreme Court, that the jurist who would grasp the first principles of law must be able to grasp, at the threshold, the principles of understanding themselves, or what Wilson called, following Thomas Reid, the “philosophy of mind.” The change in the judges has to do precisely with the shift away from judges who could engage the problem at that level and explain the ground of natural rights. The shift involves then a move away from the understanding of what the founders regarded as the “axioms” or the “first principles” of a government of law.

That first generation of jurists understood that they could not speak seriously of the things that were truly rightful, and the things that stood in the class of “rights,” unless they could speak seriously of
“truths” in matters of right and wrong. They could not grasp or explain the principles of justice unless they could grasp the grounds on which any proposition could claim to be true. That first generation of jurists saw no disconnection then between the world of law and the most demanding work in philosophy. For them, “natural law” was not one “theory” among several to be chosen. What they understood as the natural law was bound up with “the laws of reason,” or the very grounds of judgment. To gauge the depth of change in our own times is to measure a shift, then, away from the understanding of “natural rights,” and a drift into one form or another of legal “positivism.” In our own day, that drift has carried so far that observers, looking back, may be stunned when they find, say, Alexander Hamilton, without the least strain, striking off axioms, or first principles, in the sweep of an essay on the politics of the day. Suddenly, there comes an awareness of how truly elegant, how deeply accomplished, that first generation of lawyers was. The evidence, almost springing from the page, is so plain that it cannot be gainsaid; it can merely invite our admiration. The attempts to reconstruct those understandings are condemned to look clumsy in comparison. But any attempt to understand the nature of our current discontents must take, as a standard of comparison, the understandings that furnished the minds of that founding generation. It would offer the most sobering commentary on the state of our law, and the condition of our own citizens instructed by that law, if we cast a look back for a few moments and reminded ourselves, even briefly, of what that first generation of judges happened to know.