

LAW AND MORALITY IN OUR POLITICS

Remarks delivered before the
Guild of Catholic Lawyers
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on the occasion of the Red Mass, His Eminence
John Cardinal O'Connor, Presiding
by
William B. Allen
Chairman, U. S. Commission on Civil Rights

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Thank you for the warm reception, and particularly for being such gracious hosts to my daughter and to me. It is a pleasure for us to be with you today and a pleasure for me to have her to join me. Now that she is a student in Princeton, we will have fewer such face-to-face meetings. My daughter.

I am particularly grateful to you for inviting me, Guild, members of the Board, President, and Executive Director. For I was so touchingly affected by Cardinal O'Connor's homily today, that I would have traveled the distance for nothing more than to sit and to listen. So you have done me a great favor. I particularly enjoyed it, because it put me in mind of things that had long since been out of mind, not just for me but largely in this country. One of the first things I thought about as the Cardinal spoke was how wrongly we take the separation of church and state. It is certainly correct that we do not want our churches to make our public decisions. It is certainly correct that we do not wish to pose as qualification for public office religious faith. I am always mindful of the day in 1787—July 13th in fact, I believe—that a petition to the Constitutional Convention meeting in secret came in from the Jewish community living in Philadelphia asking the members of that Convention who were at that time considering the fate of this nation to do something to remove religious incapacities from participation in public life for citizens who otherwise could show themselves to be complete Americans. They were concerned that, in the State of Pennsylvania, there was an oath prescribed which called for declaring one's fidelity to both of the testaments, which of course was a barrier to their service. And I always thought it so remarkable, that that petition came into the Convention on the 13th of July, the day after the Convention had voted not to require religious oaths for service under the Constitution of the United States. It showed something about the spirit, the temper of those times, that the members of that Convention did not have to wait for representations from interested groups in order to do the right thing.

Separation of church and state does mean, as it meant for Charles Carroll of Carrollton, that he could call himself "First Citizen" even when he remained incapacitated for his Catholic faith from holding public office in the State of Maryland. He could subscribe his name to the Declaration of Independence, although he still recognized the indignities and the loss of rights that he suffered in the customary civil practices of his state.

People in that day and age were able to keep two things in mind very clearly. One was obviously the appointed or providential destiny of these United States, in which they as human beings could figure largely. The second was, of course, the continuing necessity to struggle, to overcome those legal incapacitates, those shortcomings in our customs and our morals that would make that promised destiny a continued future state rather than a present state, until we had completed all of the revolutions then

contemplated. They had the faith to affirm the Revolution, as Carroll did; they had the foresight to remove religious oaths, as the Convention did before they were requested to do so.

Those are the testimonies that show what separation of church and state meant originally—namely, not that we expected to rid America of religious faith but that we expected to live in America with our religious faith secure. And as the Cardinal spoke today, it occurred to me how irresponsible it is of us, having gone to all of this effort to secure religious faith, then to insulate ourselves from its salutary influence in our public lives and deliberations. I listened to an intelligent man speak, not about doctrine or dogma, but about public questions, public policies, and urgent necessities. I heard him witness to matters of fact that ought to command the attention of any honest public representative in this city, in this state, and in this land. And I asked myself, are we really so far gone as to deprive ourselves of that insight, merely because of the nominal distinction that he was cloaked in red this morning? If we have gone far, if that's what we now take separation of church and state to mean, then we have impoverished ourselves. You might say, we've gelded our nation.

It seems to me that it is time for us to reconsider, to recognize that we do not put aside from us the clearest visions that we can find, the greatest intelligence that can serve, the direct experience that can inform our public responsibilities, by insisting on the separation of church and state. If that is what we take it to mean, then it means nothing at all.

Taking on that frame of mind thus suggested to me that I might speak rather differently than I planned to speak this morning. But I will address the questions of the day, for there are some things that I wish to clarify with respect to my own role and with respect to the current state of the question in the United States touching upon Operation Rescue and, of course, the question of abortion. I want to do so, however, by first setting a context, talking about the law. You will be comforted to know that I did determine not to speak at length on the law. As you are lawyers, you will account that a blessing. For you know how rare it is that one can speak about the law without telling all the horrible lawyer jokes, which start with Jack Cade and proceed endlessly. In fact, I sometimes think the only thing more common than lawyer jokes are lawyers themselves.

It is true that we can never reflect too much about the law, for it is the thing that provides our society the cement that holds it together. Now, we can develop law in society in ways that are thoughtful. And we can do it thoughtlessly. The reason we need to think about it is that, when we begin to do it thoughtlessly, we often produce consequences that we never anticipated. I will give an example of this. In California I am a sometime participant in litigation as an expert witness. I participated in a case several years that involved a school district and a redistricting question—touching elections. It was a case not unlike the case that was heard here in New York several years back, *United Jewish Organizations v. Carey*. The case in California was strictly local, however, not federal. I served on the defense team for the school district. They won the case, but they did not merely win the case on technicalities. They won it on the strength of a rather fulsome opinion from a superior court judge, discussing the principles and issues. The case was appealed to the appellate court, which upheld the ruling and itself entered into a full discussion of matters that, at that time, anyone could see would be urgent in this society. That case was subsequently appealed to the state Supreme Court of California. That Court decided not to review the case. It used a particular procedure, which is almost unique to California. It *depublished* the case. The appellate opinion had come down on the wrong side, from the point of view of the justices who reviewed it at the Supreme Court level, but they did not consider the context of the case ripe for them to undertake a full review and to set forth alternative principles. So, they depublished it—reminiscent of 1984, they said that this case “does not exist” as a matter of law.

Depublication does not affect the rights of the parties; they won their case fair and square. That is settled. But no one else may appeal to that decision as precedent. Now what is the significance of this? Depublication in California has become one of the principal procedures used to deal with decisions from lower court levels by our State Supreme Court. It is literally a dumping of opinions into a black hole in the law. It permits the justices to accomplish one thing in particular to limit the effect of opinions that they find repugnant, without having to declare themselves publicly on those opinions. Accordingly, what it does is to make apparent to the observant what we wish never to indicate in fact: namely, that we confuse the necessity to rely upon the reason of judges with the will of judges.

In the California system, the phenomenon of depublication encourages people to believe that the law is what the judges will it to be. They are no longer under the obligation to provide a rational account of what the law is, to defend themselves before the bar of reason, the bar of moral principle. If we detach law from reason and moral principle, we begin to tread on the dangerous ground, that the law need be nothing in particular and may be anything we will it to be so long as we happen to be in power.

Plato, in a minor dialogue, once has Socrates to say, "the law wishes to be reason." In that elusive expression we find represented what is in some respects the best in the law as well as the necessary shortcomings of the law. Why does the law "wish" to be reason? Because the law must necessarily be spoken through the lips of human beings. Could it be otherwise, there would be no difference between reason itself or the moral law and the law by which we live. But we require an intermediary; we require man. And that means that we are always striving towards an end that we imperfectly attain.

When we say that the law "wishes to be reason," we can still bear in mind that there is something beyond the law, which is reasonable and to which we may refer as standard. This is the aspect of our lives that has most been called in question in the late twentieth century. I do not want to induce a spirit of *mal de siecle*, where we all begin to panic with the approach of a changing cycle of centuries and as that has sometimes filled the pages of literature. But we do need to reflect that we are at the end of the twentieth century. And being at the end of that century carries with it certain historical associations that are inescapable. In our time the historical association that is most inescapable is the accumulated weight in the twentieth century of principles of nihilism and moral relativism.

In short, we are about to seal this century as the century of the greatest debasement and degradation that the human spirit has ever experienced. Now I do not speak with hyperbole in saying that. I know much to praise in the twentieth century; I know that mankind has made enormous strides morally and materially. I know that we have seen political progress that is undeniable. But my perspective perhaps varies from some people's perspectives. I sometimes think that we are too quick to claim credit for what may well be nothing less than the inexorable force of progresses put in motion two hundred years ago, and which continue to unfold despite our various incompetence's.

In other words, I would say that we need to pause and wonder, if the achievements we recognize in the late twentieth century are really our own achievements, or whether they are not the consequences of good deeds previously done and which continue to have an influence despite our neglect.

Now, to come to the question of neglect in a more pointed fashion. It is true that I am Chairman of the U. S. Commission on Civil Rights. As you know, the Commission on Civil Rights is not permitted to discuss the question of abortion. It is in our statute, our authorizing statute, that we may not discuss it in any fashion whatever, absolutely. We may not make up a study on it; we may not make a presentation as to what rights are involved with it. You may not be aware why that is in our statute, and I must at least tell you briefly that it is there because there were people who recognized in 1979 that the Commission on Civil Rights had become an instrument in the hands of those who were in favor of abortion. It was they

who were responsible for placing this restriction in the legislation, so as to diminish the influence of what they perceived at that time to be a radical agency of the government moving in a direction with which they were uncomfortable.

Now, you need to know that I am not uncomfortable with the restriction in the legislation. I have not raised an objection to it. It is true that I recommended to Congress that they repeal the prohibition in the next authorization. But I have never once sought to violate that restriction; I have sworn an oath to the laws and Constitution of this country and I continue to uphold that oath most zealously.

When I have talked about Operation Rescue I have been mistaken by some people to mean to talk about abortion. I do not mean to speak of abortion when I speak of Operation Rescue. Congressman Don Edwards thought I wanted to talk about abortion. He wrote me a letter in what I regarded as rather intemperate language, to warn me against doing so. The manner in which he warned me was to say that, perhaps the appropriation for my agency would be affected. Now I thought that a puerile, a petty thing for him to do. Does he realize that we are talking about the dearest rights of our fellow citizens, his and mine? He can't threaten me, he can only threaten America. I wrote back to him, and I said to him, in effect, that I can respond to the language of duty, the language of nobility, the language of justice, the language of truth, the language of virtue, and if he wants my attention that is how he should speak to me. He should not speak to me the language of chastisement; that language should be reserved for slaves and not for gentlemen. That is how I respond on one side and the other to the question, am I trying to talk about abortion.

But you need to know something more, and I think it is well within the responsibilities of my office for me to tell you. You need an historical account of how it is possible for me to defend the humane treatment of nonviolent social protesters without getting involved in the question of abortion. For I cannot deny that, historically, I have been involved with the question of abortion, and that I have defended the rights of the unborn.

When we got involved in this torturous discussion now it seems so long ago, back in the 1960s there were very many of us whose initial reaction was to say, in response to portraits of suffering and violence and mangled bodies of women, well, of course, we must not let that happen. Our instinctive reaction was to say that we should support the liberalization of abortion laws. I was in California and active in Governor Reagan's first campaign. Not only did I not resist the Governor, when he signed the Bielsen Bill to begin this process, but I supported him.

It was, however, very soon afterwards that many of us realized that we had made a mistake. We realized that we were responding to one life in danger, while failing to recognize that in fact there were two. Therefore the response was not only inadequate but morally suspect, at least, if we didn't change. So many people began to try to change it, and in that environment I noticed certain things. I noticed that the debate had developed for some people, in fact, everybody, in terms of the "rights of the fetus," and that those who wished to defend the "rights of the fetus" were being defeated. They were being defeated because they had adopted a techno-social scientific language, which itself robbed the unborn child of moral significance. (Few of us have come through high school without performing minute operations on "fetuses" in the form of the fertilized hen's egg so common in that curriculum. In light of that background it is most difficult to imagine a "fetus" as anything other than a subject of experimentation, a mere "mass of tissue.") It was in that context that, in the early 70s and thinking about Aristotle and how appropriate for us it is to think about the end of human life in order to set our course in human life, I recommended strongly that we stop using the language of the "fetus," which is a technical term and not a term of humanity. I suggested that we begin to talk about the unborn child, so that all could instinctively see what was meant.

So, I confess; I have done those things. I have tried to create a moral language, a moral discourse that would permit us to see clearly what our duty was. But I did that, further, with a sense of reminding people that there are certain questions that are not to be decided by law merely. I was asked, when I ran for the United States Senate in California, what my position was on a constitutional amendment to ban abortions. When I answered that I was opposed to it, many people thought in the context that that means, of course, that I favor abortion. I paid dearly for the stand that I took, but I repeatedly explained to people that I ask myself one question when confronted with proposed constitutional amendments. I ask myself whether, should the amendment fail, I will consider that to have settled the question; will I accept the result of the majority vote. Will I accept a vote against what I believe to be morally commanded? I always answer no. I will accept no vote, the result of which is not in fact consistent with moral command. If you take a vote on slavery, and the vote is in favor of slavery, I will not accept it. That vote will not determine the question for me. The same is true with respect to the life of the unborn child.

Now what does that mean? Do we live in a state of anarchy? Does that mean that there is no way for us to resolve the question through processes of law, to form a social consensus, to develop some kind of express public statement to which we all may assent? No, it does not mean that. It means rather that we have to work toward that consensus; we often make the mistake of believing that what we work for is a law, and everything else takes care of itself. I see the question in exactly the opposite light; the law is the least, or the last of our victories, in some respects. We are first to be persuaded that slavery is wrong, and only then to worry about crafting the laws to protect ourselves. We don't want to use the law as the instrument to protect us against our own weaknesses. We want to eliminate the weaknesses themselves.

Abraham Lincoln was clear about this; when he resisted the Dred Scott decision, he did not attack the law as law, he attacked its errors. He made clear that the last word on the law had to be the commitment of the people of this land to the promise of the Declaration of Independence that all men are created equal. He realized that the danger was not the continued existence of slavery in the south, the danger was the erosion of that view that slavery was fundamentally incompatible with equality.

The same is true for us. (Unfortunately, we had no Abraham Lincoln to warn us when our physicians abandoned the Hippocratic oath, in which they once swore never to "assist suicide" or to "perform abortion." Because we had no Lincoln at that moment, we no less than the physicians suffered the erosion of our moral commitment in that respect. But we now have a chance to restore it.) When in 1986, therefore, I responded that we cannot look for the magic bullet to turn the question of abortion around, I called for restoring the debate throughout the country, in our respective states. But it is not that I want the debate to lead to a vote; it is that I want the debate to reemphasize, to reinforce the moral responsibility of each and every one of us to carry out the mission to make our national soul healthy again.

Now, that's the historical background. Those are things I did before I became a member of the United States Commission on Civil Rights. You may think that a person holding those views could not possibly take the position I have taken concerning Operation Rescue, except from his biased commitment to the life of the unborn child. But I ask you to think again about what I have just said. What is it that fosters an environment in which people can freely work to perfect the moral conscience, the soul of a nation? Is it not a powerful consensus, a powerful commitment to permitting debate and expression to go forth? We aren't concerned simply that the Rescuers can carry out non-violent social protest. We are concerned that our commitment to defend the right to non-violent social protest protects the single thing we have left that gives us the opportunity to cleanse our nation on any question that might arise.

I have witnessed, in reviewing statements from participants in Operation Rescue and in reviewing videotapes, conduct which, visited upon Americans in other causes by our police officials, would be a genuine scandal in the nation. And I have been scandalized by the absence of scandal. What it told me was not simply that Rescuers were being abused, not simply that today the defense of life was unpopular, but that we had also made a dangerous transition, amounting to recognizing, accepting, and condoling official punishments without trial against those unpopular causes. And that is what it amounts to when people are brutalized in non-violent social protests. They break the law; I recognize that; everyone recognizes that. They ought to be arrested. But we have previously said that they should be arrested with humane treatment, with dignity, with respect. We do not walk along a line of unresisting people and spray mace into their faces. As one of the participants at our Commission meeting put it, mace is a chemical compound designed to make an aggressive suspect passive. When the police spray mace into the faces of passive persons, they clearly are abusing their responsibilities. My fear is that this is not the phenomenon of a rogue cop, out of control, doing what is unauthorized.

It becomes increasingly clear to me at this stage that what is going on is systematic, condoned, official policy. That is the danger; we are closing our eyes to the emergence in our society of a view that we can by policy brutalize people to the extent that they are seen to stand outside of the accepted core of opinion. If we allow that to happen, we're going to find out that those punishments are not reserved only for Operation Rescue. Operation Rescue is only the present victim. I am delighted that my colleagues on the Commission on Civil Rights, finally came to see that we needed to say something, as we did last Friday [September 15, 1989], when we did pass a resolution and called for a more active intervention by the Attorney General. We all hope that will be forthcoming.

But I am not satisfied that that is enough at this stage; for it seems to me that the issue is more urgent than that. And I speak not just to Operation Rescue. I speak to American blacks, for example. And I say to them, if you stand by, and, allow this to happen, you will one day find that you are again unpopular, just as Operation Rescue is today. And you will find that these permitted police practices will be used on your own children, the next time they decide to occupy a university president's office. For that is the same crime people in Operation Rescue are generally accused of. I say to Americans, no matter what the cause is, that if we cannot have an evenhanded justice, we cannot have an American justice. There is no American justice that is not even-handed.

Justice Brennan is trying to find a way to such a thing, dealing with the requirements of litigation over Title VII of the 1964 Civil Rights Act. I've been struck by how Justice Brennan in the 1987 case of *Johnson v. Santa Clara County Transportation Agency*, elaborated for the majority of the Court the rules of evidence and burdens of proof that apply to white male defendants. He very clearly set forth, in detail, the same rules and burdens that he turned around this spring and denied, in *Wards Cove v. Atonio*, where they were applied to minority defendants. In that case, he said, the standard should be nothing more than a "manifest imbalance," the burden of proof should shift. The same provisions of law; the only difference is that the plaintiff in the one case is white male, in the other, a minority.

This notion that you can have different laws for people based on their race, their gender, or their circumstances is not an American notion. It is not only incompatible with the greatest promises of this society, it is a great threat to the continued existence of this society. We celebrate law, because law wishes to be reason. Reason invokes notions of oneness, unity. The very word, "principle," invokes notions of oneness or unity. Justice, yes, as Cardinal O'Connor reminded us, is love; but justice is above all, in any given nation, one. I can ask that we do something about the victims of police abuse in Operation Rescue, in spite of the fact that I believe that we ought to do something further about the rights of the unborn. And I ask you, in whatever your stations are, to make your contributions to this continued effort to restore the health of this nation. In the late twentieth century, we cannot afford to do less.

I'm grateful you gave me the chance to visit with you. I'm unhappy that I will be visiting and running, as I shall have to do. I have a class tomorrow morning in California. I still teach full time, and therefore schedules will be demanding. But I will say this, in the many trips that I have made, and the many stops this weekend (I've been back and forth across the country before arriving here), I have never been so deeply moved as I have been by the spirit of commitment that I have seen among you. Therefore, though I never close a speech with thank you, it would be ungracious of me today, not to thank you.