Rethinking the moral foundation of the American Constitution

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The writer of the following guest commentary is a Henry R. Luce Scholar in Thailand and a graduate of Amherst College. We publish it as a contribution to debate on natural law as the Bicentennial of the United States Constitution approaches, and liberals of both "left" and "right" persuasion agitate, under the sponsorship of Pamela Churchill Harriman's "Project '87," to overthrow that document as the basis of the U.S. government.

The danger to the Constitution stems not only from overt efforts to abolish it, but more insidiously, from its erosion in the courts. Recently, on Nov. 20, 1984, EIR *published a writing by founder and contributing editor Lyndon H. LaRouche, Jr. reviewing the decision handed down in the first round of LaRouche's libel suit against NBC-TV, the Anti-Defamation League of B'nai B'rith, et al., in the court of Federal Judge James Cacheris. LaRouche showed that Cacheris in his conduct of the case had "nullified fundamental principles of law in force throughout almost the entirety of the existence of our constitutional republic." LaRouche noted that "the heart of the errors of Judge Cacheris lies within the scope of natural law," which is the highest authority in law and provides the basis for the design of a constitution of self-government of a republic.*

Natural law, LaRouche wrote, is found "written in the stars," in the way the universe is composed; and next, in the fundamental difference between mankind and the beasts, as expressed in the famous injunction of Genesis, that mankind shall be fruitful and multiply, and replenish and subdue the earth. To violate this principle is to gravely endanger the future of the republic.

Other contributions to this discussion are welcome.

It has become very fashionable nowadays to disparage the notion of natural law and to banish moral values from the legislative and judicial corridors. Broadsides appearing in the liberal press from such diverse legal pundits as Dean Benno Schmidt of Columbia Law School, Prof. Henry Steele Commager of Amherst College, and the ideologue Gov. Mario Cuomo of New York have assailed President Reagan for what they call his goal to "legislate morality"—an appealing catchphrase for legal civil libertarians who seek to undermine the philosophical bedrock of the Constitution. While, at one level, these angry bromides should be dismissed as campaign rhetoric, the truth is that this effort to divorce morality from the making and interpretation of the law actually represents part of an ongoing campaign to burke, or suffocate, the concept of natural law as understood by the Founding Fathers.

The peculiar excellence of the Founding Fathers' thought rested on their grasp of classical legal thought, which they understood philosophically and put to work by weaving it within the fabric of the Constitution. Essential to this classical, and particularly Socratic, understanding of the law was the faith that man, through the power of reason which distinguished him from other animals, possessed an innate sense of right and wrong. The ideal state, or polity, incarnates man's "specific difference"—his capacity for reason and making moral choices—and is marked by the presence of a system of law which serves to cultivate man's respect for the idea of justice.

The very word "justice" is textured with moral significance. The Founding Fathers recognized the difference between *jus natural*—rights inherent in nature—and man-created legal concepts, or *jus gentium*. The former, embracing the right reason of mankind, has a long and well-grounded justification and provides the keystone in the Constitution's architecture. The conviction in the natural rights of man involves a search for general principles by which men can lead decent and morally correct lives—principles which, independent of any past experience, were clear and certain in themselves. The Declaration of Independence therefore refers to truths which are "self-evident," categorical imperatives and moral truths antecedent to the actual writing of the Constitution—that is, *a priori* principles. The Founders held that a democratically constituted legal structure should cultivate man's rationality and respect for doing the *right* thing, rather than the prudential or expedient thing, and that this would stave off the importunate lawlessness predicted in the Hobbesian vision of a chaotic and degraded human rabble.

This notion of moral polity had links to the earliest ideals of the colonial generation, such as the vision of America as a

"city on a hill" as described in John Winthrop's Shipboard Sermon aboard the *Arabella*.

The French Declaration of the Rights of Man embraced a similar understanding of natural law. The French word for law is, not coincidentally, *droit,* meaning "right," which suggests resonances of morality and justice in addition to the practical nature of law. In the cases of both the American and French declarations, there is an appreciation of moral law which legislates *a priori* for all human action, past, present, and future. The moral basis of the law must be absolute.

To illustrate the point, consider how the world would work if the law were indifferent to moral first principles, or if it simply operated in the interest of experience and projected "good results." For instance, we avoid certain kinds of unethical behavior which, if adopted by all men, would render human interaction impossible. A useful and everyday example would be whether one wished to escape a predicament by telling a lie—doing the expedient albeit the morally wrong thing. Maybe I would choose to do it, but, as Immanuel Kant has written, "If I can will the lie, I can by no means will that lying should be a universal law. For with such a law there would be no promises at all." The law must at the onset be morally sound. For, if mere earthly utility were the criterion for virtue, no one would ever choose to do something merely because it was good.

The libertarians and the nihilists

Particularly with the advent of sociological jurisprudence, legal positivism or attempts to use the law as Roscoe Pound did for purposes of "social engineering," or civil libertarianism, there has been a relentless onslaught against the Fathers' abiding faith in natural law and its centrality to the nascent republic's high moral ideals. These legal wizards and tinkerers, who distinguish between the "public" law and what they call "private morality," maintain that there is nothing which we can unqualifiedly say is "right" or "wrong," and that the law has no legitimate function in instructing men to respect certain moral and ethical injunctions, except insofar as this coincides with the practical ends of the law. These skeptics, who might more accurately be described as nihilists, hold that the law should not impose "private morality" on the general public.

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This libertarian view, long espoused in the blustery pronunciamentos of Libertarian boss Ed Clark, and which rejects the idea of *jus natural* in favor of policy expedience, finds a predictable ally in the Soviets' instrumentalist legal system—a system which, to be generous, offends the very idea of doing justice itself. Soviet law, indifferent as it is to general principles of lawfulness, is subservient to the Communist Party agenda and is just another tool for the advancement of the party's objectives. Lenin's position, "Law is politics," is a fairly trenchant analysis of the philosophy underlying the entire Soviet legal system. Repudiating universal concepts of the law, the Soviets view the law as merely another arrow in their quiver—or better yet, another warhead in their arsenal—for achieving their ideological and national ambitions and the goal of world suzerainty.

The American facsimile for Lenin is, in the case of this legal amorality at least, the late Supreme Court Justice Oliver Wendell Holmes, Jr., who ranks as the jurist most responsible for the declension in respect for the concept of universal moral law which we witness today. Holmes, acting under the rubric of "a living Constitution," claimed that the Constitution must evolve and change in accordance with "the felt necessities of the time." That is, Holmes held that utilitarian policy objectives, rather than general principles of lawfulness, should dictate the "evolution" of the law. In this way, he deferred to the will of the legislature and rejected a moral appraisal of the laws:

> As the decisions now stand, I see hardly any limit but the sky to the invalidation of [the constitutional rights of the states] if they happen to strike a majority of the Court for any reason as undesirable. I cannot believe that the amendment was intended to give us *carte blanche* to embody our economic and moral beliefs in its prohibitions.

The key phrase in this opinion is "moral *beliefs,*" since it shows that for Holmes, morality is a matter of individual opinion rather than something which we can conclusively classify as "right" or "wrong." This can be filed with his statement (now a cliché) that "the life of the law has not been logic; it has been experience," and the unbelievable comment that "the best test of truth is the ability of the thought to get itself accepted in the competition of the market," as driving the Founders' concept of natural law from the temple of modern juristic thought in America.

Yet, is it really sound to say that whether or not a notion or policy is justifiable is ultimately reducible to a question of individual "opinion"—subject only to the imprimatur of majorities in the legislature for moral validation? *Is,* as Holmes says, the best test of truth the ability of the thought to win acceptance at the marketplace—or does truth embody some higher, less capricious principles? Certainly, there are some decisions which men can credibly call matters of opinion rather than questions open to moral appraisal. Whether

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one prefers Cantonese or Szechuan style cooking, or neither, is, needless to say, a matter of culinary taste to be contrasted with choices with moral implications. One would scarcely merit justification in seeking to outlaw one form of cooking (although Deng Xiaoping, so strong in his taste for Szechuan cooking, might conceivably pass such a law). Other human choices, however—such as the enslavement of other human beings, genocide, or the unjustified taking of another's life—could not tenably be considered a matter of personal "taste" or opinion, requiring consultation with the majority in the legislature for approval. Rather, these are practices which are wrong *in the first instance* and which should therefore be proscribed through the moral force of the law.

The natural rights of man

This sense of the law, in its full moral dimension, finds perhaps its most eloquent spokesman in the great American lawyer-turned-President, Abraham Lincoln. In the famous Lincoln-Douglas debates, Sen. Stephen Douglas spoke to the Kansas-Nebraska Acts in arguing that the decision on whether or not to extend the institution of slavery to the new frontier territories should be decided by majority vote of the state concerned. But Lincoln counterclaimed, in what is now a classic defense of the idea of natural law, that there are some matters the legitimacy and lawfulness of which do not turn on the approval or disapproval of majorities. Slavery constitutes such a categorical violation of human rights.

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Ironically, perhaps, if the Holmesian view of the law as subject to the majority "opinion" were taken seriously and put into practice, in lieu of a system of natural law, this could conceivably result in a divestiture of the protections covered under the Bill of Rights. For, according to a 1972 survey by CBS, 5 of the 10 rights enumerated in the Bill of Rights were not supported by a majority of Americans (the 5 which fell short of commanding a majority were peaceful assembly, free speech, free press, trial by jury, protection against unreasonable and unwarranted search and seizure, public trial, and confronting witnesses). Fortunately, however, today's Court has not gone so far in adopting Holmes's marketplace morality and indifference to *jus natural.*

Even its sometime enemies have made concessions to endorse the natural law concept. This was the case with Justice Felix Frankfurter's concurring opinion in *Adamson* v. *United States,* where Frankfurter held that natural law had a long and well-established justification. And even contemporary law-school academics, who seem by and large to flirt with Marxist, positivist, or other recondite legal doctrines, have sought to breathe new life into the embattled concept. As Prof. Thomas Grey of Stanford noted, the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") might be interpreted to mean that there remain "unwritten but still binding principles of higher law."

The actual articulation of such first principles of lawfulness has often generated dispute, but such controversy more often than not arises out of a lack of appreciation of the logic of doing justice under a system of natural law. For instance, the American Civil Liberties Union (ACLU), a body of questionable judgment, has made the persistent mistake of treating free speech as though it were a categorical right subject to blanket protection. This has led it to sanction the right of Larry Flynt, the publisher of *Hustler* magazine, Klansmen, and even Nazi stormtroopers to dragoon the streets and to proclaim their morally repugnant programs and ideas.

Perhaps the most poignant example, which the ACLU failed to stop, was a march by Nazis through the largely Jewish suburb of Skokie, Illinois—where thousands of residents are survivors of Nazi death camps—to celebrate *der Führer*'s birthday. The position taken by the ACLU and the courts, as promulgated in the 1957 *Yates* v. *United States* ruling, is that legal intervention would only be warranted if individuals were incited to an outbreak of violence or physical injury—as *Yates* held, that there is a difference between urging people to *believe* in something and inciting them to actually *do* it. This interpretation, routinely cited and upheld today, concerns itself with the *effects* of unrestrained free speech in the relevant cases, rather than whether or not the speech is *per se* morally objectionable. The classic statement of this morally neutral position was made by Holmes in 1919 through his "clear and present danger" test: "Even the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." The emphasis here is, once again, on the result: the panic, etc.

The tragic flaw in the Holmes-ACLU reasoning is that it fails to identify a *principle* which would render the speech of the stormtroopers morally and legally unacceptable, but instead relies on inferences about consequences. In failing to state the problem correctly in terms of natural law, the ACLU

and the late justice overlook the stark truth that the speech of the Nazis—advocating as it does genocide and a total abridgment of human rights and dignity—is *per se* offensive and should therefore be curtailed through the force of the law. The fact that the speech is intolerable—because its utterance offends the very idea of doing justice—is indifferent to whether or not it "incites violence" or even the fact that the forum in this case happens to be a Jewish neighborhood. If one takes seriously the United States as a moral and ethical enterprise, such unconditionally abhorrent speech or actions should be legally squelched, whether the forum is Skokie or Dachau, and without regard to "consequences."

The policies of Nazi Germany mandated the moral intervention of the Unites States, not because of the projected or actual consequences for neighboring countries alone, but because those practices and doctrines shocked and stirred to action the moral conscience of mankind. That intervention was, moreover, indifferent to the national boundary of Germany, precisely because that border had geographical but no moral relevance in this case.

The instances are rife of times when today's legal tinkerers' or positivists' disrespect for the *principle at stake* when a legal question arises has led them awry of an appreciation of natural law in its fullest sense. For instance, in the landmark *Brown* v. *Board of Education* decision (1954), which overturned the *Plessy* v. *Ferguson* (1896) "separate but equal" doctrine, the Court again misstated the problem in this desegregation litigation by describing it as one of "education," that separate schools were inherently unequal. Using the Brandeis-Goldmark style longitudinal data, brandishing statistical aggregates and empirical predictions about effects of racial segregation on black students, the Court determined that it has been statistically satisfied that desegregation would confer substantial benefits on the black students concerned.

Yet, in reality, regardless of statistical showmanship by counselors and expert witnesses, wasn't the central issue in *Brown* that there is something inherently morally offensive about deliberate efforts to maintain segregated schools? The problem, if framed in terms of natural law, was clearly one of the natural right against discrimination based on birthright or race, consistent whith the natural equality of men, rather than what the Warren Court held to be an "educational" defect. It would be morally, and I submit, legally incoherent to argue that if the statistics had yielded the opposite results—that blacks were better off in segregated schools, as in fact one study showed—that segregation would be any more acceptable under the law. The moral underpinnings of the law must be unconditional, independent of anything empirical.

The same is true about inferences made in the dreamy ivory tower of judicial speculation about benefits accruing from affirmative action policies. Regardless of projected benign results under schemes of racial assignment or quota systems, which, because they are predictions, should be subject to the greatest dubiety, no policy of racial preference—whether it helps blacks, whites, Asians, or whomever—could tenably receive legal sanction if one appreciates the natural equality of man. Despite today's perilous preoccupation with the good results of the law, a democratic people, as Lincoln said, never has a right to do a wrong.

Lincoln's words of warning have not stopped the courts, however. In *Baker* v. *Carr,* which concerned a question of legislative apportionment, the Supreme Court, led by the liberal, pro-quota Justice William Brennan, intervened only when it saw racially skewed results in state elections. Justice Brennan in particular had used his brethrenship to legislate effectively a catalogue of racial assignment schemes, even when to do so flies in the face of the very principles of lawfulness from which the Supreme Court derives it power and legitimacy.

The fraud of 'public' v. 'private' morality

In general, then, natural law commands us to respect in the first instance the universal sweep of rights in nature, without preoccupation with results, and without respect to distinctions beween "public" and "private" as are popular among today's legal sophists. These public/private distinctions are usually made by those who, like Lenin, seek to politicize the law rather than search for principles with which to justify the law.

For instance, in the case of *Roe* v. *Wade,* the court struck down anti-abortion laws in the 50 states by arguing that state laws restricting abortions in the early months of pregnancy were an "unconstitutional violation of a woman's privacy." This emphasis on privacy, fashioned by the tendentious Warren Court, served as a pretext to legislate, as it were, immorality. The taking of human life without justification—as in the case of abortion—is, like infanticide, not a matter of

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private opinion or choice, but rather an unacceptable practice for anyone, anywhere.

To put more of a point on it, the Supreme Court, while defending the right to "privacy" in this case, also, in an apparent and stunning contradiction, rules that states could block the destruction of dogs and the burning of draft cards and also impose punishment on marijuana smokers and those who perform consensual homosexual acts in their own homes. Moreover, the Court has reached into matters as intimate as the family—as with the Child in Need of Supervision, or CHINS warrant cases. So, in short, the "privacy issue"—and the claims of Schmidt, Commanger, and Cuomo of a distinction between public and private morality—is a ludicrous red herring bearing no connection to the Founders' conception of the law.

In a democratic society, all species of wrong fall within the sweep and moral force of the law—even in matters as intimate or "private" as the family.

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Their rejection of natural law has contributed to the decay of the vision of a moral polity—or "city on the hill"—and directly and indirectly precipitated the multiplication of totalitarian governments worldwide. Jimmy Carterish types, the ACLU, and the World Council of Churches (which has supported terrorists in Zaire and SWAPO guerrillas seeking to arrest the march of democracy in Namibia) are so neutral that they appear to have taken up the view that we live, not in a republican community which we are dedicated to upholding, but in some kind of "hotel," to use Prof. Hadley Arkes's metaphor, where there are services but no binding moral commitments which the Americans owe to the polity.

Each day we learn anew that a respect for republican government as the only legitimate system compatible with the idea of natural law is no longer viewed as relevant or fashionable in today's Marxist-influenced political context; rather, there is a (highly suspect) effort to create some kind of preposterous moral symmetry between the United States and the Soviet Union. Even worse is the effort on the part of left-liberals to assert that, since there is no form of government which we can legitimately say is "better" than another (because once again, that is a matter of "private opinion"), Americans are free to support communism; that is, they can use the republican system they enjoy to overthrow democratic rights of future generations. This left-wing relativism and moral neutrality is both contradictory and morally incoherent.

Hopefully, there is salvation for the renaissance of natural law in a more enlightened context of constitutional understanding.