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Judicial Law-Making, Abortion, and Constitutional Strategy

Rev. Edward J. Melvin, C.M.

There are two basic positions among orthodox Catholics on the question of the current degeneration of American politics and law into an amoral, positivistic secularism. Some argue that a return to the principles of the Founding Fathers is a potent remedy for what is largely a political problem. Others maintain that the founding principles were already Enlightenment and Protestant degenerations from the principles of Christendom, and are therefore insufficient to cut to the root of the current crisis. Both views can become ludicrous if carried to extremes: the former betraying cultural ignorance, the latter political naivete. At their best, the two analyses overlap in part, and F&R has maintained the intellectual respectability of both. Rev. Edward Melvin belongs perhaps more to the first school of thought than to the second, but in the essay below he makes a point valuable to both sides: that a better understanding of the judiciary is absolutely essential in seeking any long-range political solution to the problem.

ON MARCH 14, 1978 JUDGE LEONARD SUGERMAN IN A CASE HE DECIDED IN CHESTER County, Pennsylvania, revealed the ultimate absurdity and terrifying consequences of the Supreme Court pro-abortion decisions of January 22, 1973. He ruled that a nine months human fetus is not a human being. The mother had been murdered, the knife which killed her penetrated her nine months developed baby, but according to the judge's decision her little boy was not a murder victim because in the eyes of the law he was not a human being. Supreme Court Justice Harry O. Blackmun's *Roe v. Wade* decision declaring unconstitutional laws in all states which had hitherto protected unborn human lives-because Blackmun and his colleagues declared human unborn were not to be considered full persons-had reached its culmination. American law had become a travesty: the same baby might be human one week after birth but not one week before. It would be murder to kill him a week after birth, a non-act to destroy the little boy seven days before he could see the light of day.

It is not without reason that many recognize our courts as the most defective part of American government today. The problem is compounded by the fact that our system of education does not inform people of the function of the courts or the nature of our legal system. People sense something wrong when criminals seem to have more protection under the law than their victims, or when doctors can legally kill unborn babies, but they often fail to understand the governmental source of the problem. If it were realized that judges by nature not only administer law but make it, people would pay much more attention to the thought processes of judges and be in a better position to ultimately combat the heinous decisions which are changing the nature of American society.

The common view of the American government is that the congressmen in Washington and the members of state legislatures make the laws, and that the President and governors enforce them after the courts have decided

there has been a breaking of law. This idea stems from a misunderstanding of the so-called separation of powers into legislative, executive, and judicial branches of government. In reality many problems arise from the way the courts interpret or even change law. That courts make and change law is a fact every lawyer knows, a practical secret of the legal profession not deliberately withheld from the people, but one ignored in the basic education given to American citizens today. It was Supreme Court Justice Frankfurter, while yet a Harvard Law School professor, who said that the lawmaking power of judges, because not understood by the people, amounted to "one of the evil features" of our legal process:

> So the problem is not whether the judges make the law, but when and how and how much.... I used to say to my students that legislatures make law wholesale, judges retail.... One of the evil features, a very evil one, about all this assumption that judges only find the law and don't make it [is] the lack of candor. By covering up the lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do. (*Law in American Society*)

To understand the problem and point to a constitutional remedy one must investigate both the English background of American law (Judge Sugerman based his ruling on English precedents of the 17th century) and the principles on which the founding fathers placed our government. American tenets proclaimed in the Declaration of Independence and implemented in the Constitution and its bill of rights were grafted onto the English common law legal systems inherited originally by the American colonies.

Common law is the name given in England to the body of law which was common to the whole kingdom as distinct from the systems prevailing in the county and manorial courts of medieval England. It was also distinguished from the statutory law made by Parliament and the law used in courts of equity which came into being after common law became too rigid and in many cases not able to fulfill the demands of justice. Custom was one foundation of common law, but the growth of both common law and equity was judge produced, the judges being clerics (the only learned class in the middle ages) who based their decisions largely on rules of ethics drawn from natural law and moral theology. When England changed from Catholic to Protestant (thereby abandoning the papacy as arbiter of the natural law) the later Anglican and Puritan judges were still proud of the continuity of common law with the past. They generally adhered to a law based on reason, natural justice, and the morality of western and Judaeo-Christian civilization.

This common law, joined to the statutes passed by parliament which were in effect at the time of the establishment of the colonies, became the common law of the thirteen united states when America became independent. As times changed, American judges in meeting new problems framed decisions based on past practices through a study of precedents, but the new conditions had to result in new interpretations of law. Therefore, American common law is judge made law, and a legitimate growth from its English origins. In most court cases judges follow the opinions of other judges who have interpreted the law in similar previous cases.

Moreover, even statutes passed by legislatures must be applied and interpreted by courts. Our resultant law is necessarily in practice more judge-made than legislative. Yet citizens in general do not understand this, do not monitor judges as they do legislatures, and are only beginning to realize the incalculable evil which can result from bad judicial decisions which become rooted in law (as would be the case if Judge Sugerman's ruling, that a nine month fetus is not a human being under the law, becomes a precedent in other courts, and as already is the case with the Blackmun pro-abortion rulings of 1973, nullifying the statutes in all states which had hitherto protected unborn human lives).

When the American people accepted the common law tradition of judges making law the system was fundamentally sound. Common law was presumed to be based on natural law, on natural justice, on the laws of morality which were the law of a God and the ultimate guide for legislation and judge-made law. One of the greatest of the founding fathers, George Mason of Virginia, a lawyer who helped draft the Constitution, wrote:

> Now all acts of legislation apparently contrary to natural rights and justice are in our laws and must be in the nature of things, considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to Him from whose punishments they cannot protect us. All human constitutions which contradict His laws we are in conscience bound to disobey.

> Such has been the adjudication of our courts. (Jefferson's Va. Rep. 109, *Robin v. Hardaway*)

That American law was intended to be guided by the ethics of Western Civilization and the Judaeo-Christian code of morality is clear from the Declaration of Independence, and from the Constitution and its Bill of Rights, the first ten amendments. Jefferson wrote that the Declaration expressed the common sense of the matter, that it could be found in printed essays or in the elementary books of public right, including Aristotle or Cicero. This was so evident to the founding generation that on it they justified the Revolutionary War.

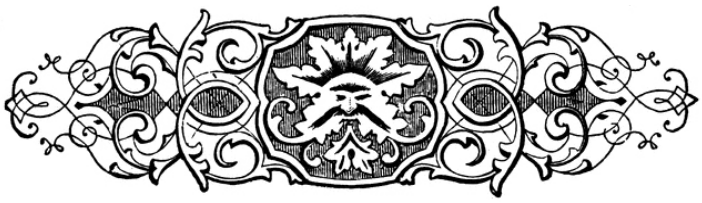
When the Fathers who drafted the Constitution did not include a bill of rights in the original document the people demanded one: the first ten amendments in general were legal implementations of the natural rights of the Declaration of Independence. Unlike the state constitutions the philosophy behind the first ten amendments was not put into words in the Constitution. It was already evident in the Declaration, was believed by all, had no need of repetition in a Constitution which from the beginning was a practical framework for people to implement a philosophy of government rather than to state it.

The interpretation of the Constitution in practice would be left to the courts, the judges. Hamilton, one of the framers, indicated this in Federalist paper #78, and his reasoning was accepted by the nation. But this is the basis of a major problem today: the Constitution as a source of law means what the courts, especially the Supreme Court, say it means-which was a famous saying of Chief Justice Hughes. In practice it means, and has meant, that the Justices by their interpretation not only explicate the Constitution but in some cases change its meaning. But when the American people accepted the tradition of judges making law they, the judges, were working within the framework of the Judaeo-Christian moral tradition and the ethics of Western civilization. It was to this type of judge made law that the people implicitly agreed, and there has never been a demonstrable consensus allowing judges to go outside this framework to solve new cases.

Chancellor Kent, Chief Justice of the New York State Supreme Court from 1799 to 1804, whose "Commentaries on American Law" was a legal text for generations, in a private letter, once indicated his method of reaching a decision. After making himself `master of the facts', he wrote:

> "I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities. ...I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case...." (cited by Friedman, 119)

But many present day judges, influenced by secularism and pluralism do not adhere to the standards of justice common to Western and Judaeo-Christian Civilization, and, without mandate-even often in advance of the erosion of values in society at large-they apply criteria for justice contrary to that tradition which is the foundation of our law.



The point may be made perhaps more clearly as follows. By American theory the Constitution belongs to the people, and therefore only they should have the right to change its meaning. "We the people of the United States do ordain and establish this Constitution...." The Supreme Court is but a creature of the Constitution, not above it. However, the Constitution, though the basic law of the land, is relatively brief, not always clear in its application and must be interpreted by the Supreme Court for ever changing problems. Constitutional law has become a vast body in the 190 years since the document was accepted by the American people; and, again, in practice the Constitution means what the Justices of the Supreme Court say it means. But there is legitimate development in law which comes from organic growth, from rules or principles of interpretation which are constant, in marked contrast to an illegitmate, sudden, violent change in direction when Justices apply their private philosophy to decision-making. It is no longer a secret that Supreme Court justices have on occasion read into the Constitution doctrines they wanted. During a period of fifty years (c. 1886-1936) the Court applied a *laissez-faire* economic theory not found in the Constitution or common law to strike down congressional and State laws meant to protect the working man. Justice Louis D. Brandeis said the Court had converted judicial review in these cases into the power of a "super-legislature". Justice Oliver Wendell

Holmes complained he could discover "hardly any limit but the sky" to the power claimed by the Court to disallow State acts "which may happen to strike a majority" of the justices "as for any reason undesirable" (*Law in American Society*).

The 1973 Blackmun pro-abortion decision, Roe v. Wade, falls into the same pattern. When the Fourteenth Amendment was ratified in 1868-the Amendment in which the Blackmun decision found a personal right to privacy which invalidated state laws forbidding abortion-36 States had anti-abortion statutes and none were attacked as against the new amendment. But one hundred and five years later the Court decided the Fourteenth Amendment invalidated these State anti-abortion laws. The Justices of the majority simply read into the Constitution a meaning not there, and disallowed State laws found by them to be undesirable. This brings into focus how Judge Sugerman reached the ruling that a nine months-old human fetus is not a human being. These decisions were purely personal and shallow. Justice Blackmun quoted parts of the Constitution which used the word "person" and indicated it was used only when born persons were considered. But he never referred to the common meaning of person as used by the founding generation, or the meaning given to "person" in Blackstone's Commentaries, the bible of the lawyers who drafted the Constitution. Scientific knowledge of the human fetus was lacking when the Constitution was written, for human embryology became scientific knowledge only in the nineteenth century. But once understood, the human fetus fits under the idea of "person" as understood by the founding fathers. In fact, Justice Blackmun (and Judge Sugerman who followed his lead) prescinded from the contextual traditions of American jurisprudence in favor of a novel and personal prejudice. The result has been a travesty of law which thwarts the purpose of both the Constitution as stated in the Fifth Amendment and government in general, which has as its chief purpose the protection of the innocent.

The upshot of this analysis is that more is necessary politically than a series of ad hoc amendments to the Constitution. While it is true that on the abortion issue, a Human Life amendment is essential to blocking the courts' departure from traditional norms of decision-making, it is also true that a failure to understand and deal head-on with the problem of judicial decision-making will result in the need to continue proposing amendments on a whole host of separate issues as time goes on. Politically, the long-term goal must be to press for the appointment of judges who will adjudicate within the traditional context provided by Judaeo-Christian civilization and the natural law-against the day when a new American consensus can be formed through the processes of evangelization itself.

FOR FURTHER READING

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