**The Confusion Between Law and Morality –**

**How it Spoils Our Understanding of Both**

Some of the most egregious errors of human thought and policy are based on the unfortunate confusion of law and morality. That people on account of this error throw themselves headlong and headstrong into the most counterproductive kinds of contention comes from the mirage such confusion projects that their polemic is a sacred mission definitive of virtue, and that those who decline to join them are cowards. This error is disguised by the moral mandate that we always ought to seek to promote goodness and truth and never its opposite. At the roots of the error is negligence of the fact that enacted law is by its very nature pragmatic, to be judged , therefore by its effects rather than by its witness to ideal truth; in other words, that the moral value of law itself is pragmatic, not ideal.

It is not that law is detached from morality, but that the moral obligation of law is to produce an overall salutary effect. With that in mind, it becomes visible that well-intentioned laws – laws that are based on witness to moral truth – can be bad laws, while laws that fail to witness against actions that we consider wrong may yet be good laws, if only as part of a legislative process leading to better things.

A necessary condition of the salutary effect of law is that it be conceived, enacted, monitored, and enforced according to democratic process. Law cannot be effective unless it is owned by the people. Regardless of whatever intrinsic merit it may have otherwise had, law imposed or maintained undemocratically invariably alienates the people, thus spoiling whatever chance it may have had of a salutary effect. For this reason, democratic law, as sloppy as it may be, is the only law that can be edifying. Not even philosopher kings can overcome the deficit of alienation that undemocratic legislation creates, no matter how sage their legislation may intrinsically be.

What counts as undemocratic law is not only law created by autocrats or oligarchs, whether *de iure or de facto*, but also any lapse whatever among the leadership in democratic intent. This includes strongarming and bullying tactics aiming not at rational persuasion but manipulation by trickery, brute force, or threats. We cannot afford to write any of this off as the inevitable way of politics, nor as means justified by just ends, for it is unilateralism, a process which on its own ruins the effectiveness and therefore virtuous quality of the law regardless of intrinsic content.

The recognition that law must be truly democratic in order to be salutary leads to a new definition of just law at any one time as perfectly democratic rather than as perfectly reflecting some intrinsic moral ideal. To be sure, if God exists, then the ultimate standard of justice is divine law. But on that assumption, our access to such a standard is as an ideal to be infinitely pursued by us all. Our pursuit of infinite standards is notoriously hampered by the fact that we can only progress toward them by finite steps, each of us encountering obstacles of bias and self-deception along the way, such that the only sure process of staying the course is a democratic one. This is because the democratic process, as sloppy as it may seem, is self-correcting. Whereas any individual truth-seeker or limited or fixed group of truth-seekers is liable to go off course because of biases unaccounted for, democracy as an unlimited or open group of truth-seekers overcomes this liability in the course of time simply by remaining open the input of all members of the community. Deception occurs by exploiting blind spots in our moral field of awareness. Blind spots, in turn, tend to be demographically predictable, such that any limited group of supposed truth-seekers is liable to fall prey to deception based on its limitedness, which is its demographic narrowness. Democracy, by definition, is not demographically limitedness, so it lacks this liability. This means that in a democratic process over the course of time, biases are not liable to go unnoticed, but will be exposed, treated, accounted for, and eventually overcome. In this manner, the democratic process is reliably self-correcting over time.

This does not mean that the democratic process at any one time or place is bias-free, but that it is the only process we can rely on collectively to pursue truth and goodness over time. Law is part of this pursuit.

The upshot is that at any one time or place a single person or limited group of persons is liable to sense a gap between the moral vision of that individual or group and the law as currently enacted. This is no indication of dysfunction or injustice per se, but a healthy basis for ongoing democratic engagement. Human law will never be perfect but can only be made worse by those who seek to amend it by non-democratic processes. Enacted law at any one time should not be mistaken for a moral norm according to which we are to adjust our moral vision. This would be putting the cart before the horse and would be ruinous to the democratic process, turning positive law into idolatry. Democracy can only thrive when the moral vision of everyone drives the discussion. To do so, it must avoid both extremes either of exalting the moral vision of one individual or limited group as the norm for enacted law or exalting enacted law itself as the norm for the moral vision of individuals and limited groups.

The old saw that we should never compromise on moral values reflects an attitude resistant to the vision sketched out here, so an examination of it is in order. Its admonition against compromise is at heart anti-democratic, leaving us with a plainly unilateral mandate to push by hook or crook for our own moral vision. Alas, this is nothing more than idiolatry in disguise, an exaltation of the moral vision of an individual or limited group as absolute standard. Assuming that God exists, this is an affront to God as well, since God’s perfect justice is not finitely comprehensible and therefore requires the most open and unlimited pursuit of truth we can muster in order to make faithful progress toward embracing it: the democratic process. The democratic process, then, necessarily is one of compromise, since non-compromise is unilateralism, which is the antithesis of democracy.

It takes courage to resist the social pressures to accept enacted law as a moral standard, but in the name of democracy and effective law, we must continue to resist that pressure. Similarly, it takes discipline and humility to refrain from foisting, outside of the democratic process, our own moral vision as the norm for enacted law. We must continue to maintain that discipline and humility. Of course, we must continue to cultivate and communicate our moral visions to one another, always in the context of democratic dialog, guided by a spirit of compromise, which is the only way we can assure we are following a self-corrective process. As displeased as I may be with the gap I perceive between my moral vision and enacted law, I must bear in mind that my only helpful contribution would be a genuinely democratic one, in the spirit of compromise. I must resist the temptation of being a “moral bully”.

What is presented here is not a capitulation to relativism, since it depends on the cultivation, diligent and autonomous, of moral vision by each of us as the basis of fruitful democratic dialog.

A critic might contend that the efficacy of law is not so much about salutary effects as witness to justice, that laws are to be enacted to educate as much as to achieve positive results. To this I respond that the enactment and enforcement of laws in a way that sidesteps or shortcuts the process of diligent democratic dialog achieves the opposite effect, engendering in a large portion of the masses an alienated disgust not just for the law, but even for the purpose, however reputable, the law was intended to address. The only way law can hope to witness to the truth is through a process that is rigorously democratic, which process alone allows enacted law to be owned by all.

One case in point of the trouble that comes from confusing law and morality is the question of the legality of abortion. There is a reasonable case to be morally opposed to abortion on the grounds that it is a form of homicide justifiable only under the same sort of circumstances that homicide is generally considered justified. On the other hand, the question of privacy is hard to ignore, which leads many to shudder at the prospects of how restrictive laws against abortion would be enforced. Would women be required to notify the government when they become pregnant? Would government have the right to obtain search warrants to ascertain the fact of pregnancy? Who would be entitled to make the decision whether a particular abortion was a case of justified homicide, e.g., to protect or save the life of the mother? How would punishments be meted out? Who would be punished? What kinds of surveillance over our private lives and visits to our health care providers would be considered justified law enforcement?

This causes further thorny questions of justice to arise. If abortion is to be considered a crime, then should we not consider blameworthy those who brought about the bulk demand for abortion in the first place, that is, men who abandon women with whom they have sired children? If abortion is to be illegal, then should it not also be illegal for pregnant women to be abandoned by men who made them pregnant, putting them under surveillance as well to monitor their sexual practices?

The answers to all these questions boggle the mind in terms of the logistics and efficacy of enforcement, forcing us to take more seriously the question of privacy. It is not that the life of a fetus should be considered private to the mother, but that the enforcement of laws against abortion would require routine invasion of privacy, even of those who are not considering aborting. For it will mar the confidentiality relationship between provider and patient on which our entire health care system depends.

Regarding the question of moral witness, even assuming correctness of cause, one cannot afford to alienate those one is seeking to enlighten or inspire to be persuaded of the truth and goodness of a claim. One ought to be wary of legislative activism for the sake of witness to the extent that it erodes the basis for conversation in good will and friendship, booby-trapping the issue and shutting off productive dialog.

To be sure, the legality of abortion is controversial because it deserves to be. The human race is genuinely split on the question, too divided by far to be amenable to sneaking across extreme measures one way or the other. Most of us, at any rate, have nuanced positions on the moral question and recognize reasonable cause on both sides. Progress in productive dialog needs to be made on the moral question first, and at length, to set the stage for any fruitful analysis of the legislative question that may come later. In the meantime, we need to back off the kind political hardball tactics that only cause both sides to retrench into artificially extreme positions, turning dialog into polemic and making progress impossible and causing the pendulum to swing dangerously in both directions.

In the meantime, our being mired in contention over the legal issue of abortion has drawn our attention tragically away from a common ground cause that is far more important than legal wranglings: to reduce the demand for abortion in the first place. Once again, we have picked the wrong fight. Just as with the infamous “war on drugs”, we have chosen here the losing strategy of seeking to cut off supply of something considered harmful or dangerous rather than working to reduce demand for it in the first place.

In closing, consider also the case of adultery. Most of us agree that it is an injustice to one’s spouse and a great harm to the human family and society. Yet, we have wisely steered away from the notion that adultery should be criminalized, something we see in only the most undemocratic and despotic of societies. It is not that adultery is not bad enough to be illegal, but that it is too messy to criminalize, since doing so would open the door to massive invasions of privacy in the name of law, marring the integrity of and respect for the law while doing nothing to treat the root causes or marital infidelity.