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FREEDOM, RESPONSIBILITY, AND THE LAW*

JOHN COURTNEY MURRAY, S.J.

WE ARE CONFRONTING TODAY in American life two phenomena which, in their combination, appear paradoxical.

First, there is today a remarkable upsurge of religion. The phenomenon is complex; it is also ambiguous, both in its content and in its origins. I shall not undertake to analyze it here. But I would point out one interesting fact. Today we Americans are affirming, perhaps more emphatically than ever before in our history, that we are a religious people; that we, as a people, believe in God, the Creator and Lord of all things. However, we seem to be making something more than this purely religious affirmation. We seem also to be affirming that the existence of God is the first premise of our organized national life; that the sovereignty of God is the first principle of American politics. We are therefore not only affirming that God is, and that He is the Lord; we are also affirming that this nation is under God and under His Lordship.

Now comes the paradox. At the moment when we are witnessing this upsurge of public religion in America we are notified that there has occurred a decadence of the public philosophy of America. At the moment when we are most firmly proclaiming the sovereignty of God over our nation, we are told that we have lost hold of the body of mediating principles in terms of which the sovereignty of God becomes operative as the dynamic basis of the freedom and the order of our constitutional commonwealth.

A resolution of the paradox would call for two converging efforts. First, there is the effort, to be exerted by both clergy and laity, to impart a properly intellectual dimension to the present religious reawakening; to give it theological and philosophical substance, lest it waste itself in the superficial vagaries of a sheer "mood." The second effort falls more strictly within the responsibilities of the men of the bar and bench. The corporate body of lawmen bears a special responsibility for the effective

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guardianship and for the periodic renewal of the public philosophy of the United States. This is my theme.

It was the providential good fortune of our American Republic that its constitutional structure was defined and its institutions established within the context of the liberal tradition of politics; that great confluence of Greek, Roman, Germanic, and Christian ideas about society, law, and government. This tradition reached our shores substantially intact. It had indeed already been secularized somewhat, but it had not yet been demoralized (the distinction is used by Lord Percy in his book, *The Heresy of Democracy*).¹ Protestantism had touched it and left upon it the taint of an excessive individualism and voluntarism. The Enlightenment too had laid its secularizing hand upon it; but the influence of Protestant faith in God and in the Lord Jesus had at least blunted the impact of the Enlightenment and preserved the tradition from the radical secularization that it underwent in Continental Europe. The political and legal climate of America during the Revolutionary, Constitutional, and Federalist periods was still substantially a Christian climate—the same climate within which the common law and the British heritage of constitutionalism and the concept of natural rights had been formed.

There was, therefore, in those days, a public philosophy—that is, a whole body of concepts, principles, and precepts bearing upon the political life of man; together with a certain general style of thinking about all the problems of politics and law. This public philosophy derived from the ancient tradition whose central assertion

¹ PERCY, *THE HERESY OF DEMOCRACY* (1954).

was the existence of a rational order of truth and justice, which man does not create,



ate, since it is the reflection of the Eternal Reason of God, but which man can discover, since he is himself made in the image of God. It was to this traditional assertion that the Declaration of Independence referred when it said: "We hold these truths to be self-evident. . . ." In those 18th century days men were perhaps too free in their use of the word "self-evident." But the substance of the affirmation holds good. We were then saying: "There are truths, and we know them." We were saying: "There is a public philosophy, and we hold it, and upon this philosophy, as a foundation, we shall build our independent Republic."

From this philosophy we drew the moral concept of freedom under law, both divine and human, and the concept of justice, and the concept of human equality. From it too, we derived the political ideas of representation and consent. This philosophy fashioned for us the conception of the legal order of society as subject to a higher law whence it derives its binding force upon the conscience. This philosophy therefore taught us that human law is neither simple fact nor sheer force, but a special form of moral direction brought to bear, coercively, upon the action of society in the interests of freedom and order. In this philosophy the state is a part of the moral universe, subject—as the individual man is—to the

objective canons of justice. Therefore the state is not omnipotent; it is limited in its power and action by rights that are inherent in the human person, and it is dedicated by its very nature to the service of the human person and to the furtherance of his innate destinies, both temporal and eternal.

These were in sum the truths we knew and held, as a people, during the fateful period when our constitutional commonwealth was founded. This philosophy was public and official. There was indeed a measure of dissent from it, but the dissent was marginal, whereas the consensus was massive. There was an American orthodoxy. It furnished the premise of our newly fashioned institutions; and it permeated them as their inner principle of life. It established the essential link of continuity between the new American experiment and the old Western tradition. At the same time it stood warrant for the innovations in the experiment, because it certified them as developments of the tradition and not its overthrow. This public philosophy, by making our concept of free government intelligible, also made it workable.

Only partially was this philosophy committed to paper, in the form of law. More important was the fact that it formed part of the general wisdom of the time. The essence of this general wisdom was perhaps distilled in the idea that more than any other idea launched our constitutional commonwealth—the idea of freedom. The idea in those days had an inner moral structure. Freedom was not conceived in terms of the sheer subjective autonomy of the will. Man's freedom, like man himself, stood within the moral universe. It meant the objective right to act; it meant what Acton

defined as "the right to do what one ought," a right therefore, that is rooted in reason and sanctioned by inviolable divine law.

What was no less important, freedom was also conceived in terms of social relations. It was a responsibility no less than a right—a right to claim what is due to oneself, and a responsibility to respect what is due to others. This responsibility is accepted when freedom in society is claimed. And both the claim to freedom and the acceptance of its responsibility entail the same thing—submission to the rule of law. "*Legum idcirco servi sumus, ut liberi esse possimus.*"² Freedom can exist only under the rule of law. And it is the rule of law which itself guarantees freedom; for it means that I need obey none but the law. "*Imperia legum potentiora quam hominum,*" said Livy. And ever afterward men of the liberal tradition have demanded a government of laws and not of men. We Americans call it "free government." It is the kind of government which establishes a limited order of rational law that is by the same token an order of full human freedom.

II

The question now is, whether this public philosophy has survived the impact of those two potentially destructive agencies—time, and the mutability of all human ideas and aspirations. There are those who say that it has not. A strong case can be made for this judgment, as expressed, for example, by Mr. Walter Lippmann:

In our time the institutions built upon the foundations of the public philosophy still stand. But they are used by a public who are not being taught, and no longer adhere to, the philosophy. Increasingly, the people are

² CICERO, PRO CLUENT. 146.

alienated from the inner principles of their institutions.³

Much evidence, I say, could be adduced in support of this view. There is, for instance, the widespread popular opinion that "democracy" consists in one thing alone—majority rule. And there is the sophisticated defense of this position, which consists in an appeal to a philosophical theory of the relativism of truth and moral values. This relativism, we are told, is the official philosophy of democracy; it is today the public philosophy. Perhaps it is, in point of fact. But if it is, the judgment of Mr. Lippmann and others is altogether right. There has taken place an alienation of the people from the inner principles of their institutions; for these inner principles, in the minds of the men who conceived the institutions, were certainly not the philosophical dogma that asserts all truths and values to be relative, or the political dogma that reduces the substance of democratic society to a single procedural technique, majoritarianism.

I should say here that I by no means deprecate the value of procedures. The legal rule of due process is, for instance, largely a matter of procedure; but the observance of this procedure is of the substance of justice. A democratic society necessarily places a high value on its methods of making decisions and reaching social judgments, whether these be expressed in law or in more informal ways. And I would so far agree with Mr. Erwin Griswold when he says:

A failure to appreciate the intimate relation between sound procedure and the preservation of liberty is implicit . . . in that saddest and most short-sighted remark of our times: "I don't like the methods, but. . ."

³ LIPPMANN, *THE PUBLIC PHILOSOPHY* 102 (1955).

For methods and procedures are of the essence of due process, and are of vital importance to liberty.⁴

This needed to be said. But it still remains true that to reduce the entire substance of democracy to a matter of the method of doing things, independently of any judgment on the rightness or value of what is done, is to abandon the public philosophy and the political tradition which launched our Republic.

I have neither the time nor the wish to draw up an indictment of certain contemporary theories of democracy; there is a more important task. I shall simply submit my own opinion, in two propositions. First, there has taken place a serious erosion of the public philosophy of America under the impact of intellectual forces which have been able to create a vacuum without at the same time having the resources with which to fill it. Second, this dangerous vacuum at the heart of American life has come vividly to the awareness of serious observers; and they are asking the questions: How shall this vacuum be filled? How shall the public philosophy of America be vigorously renewed? In Mr. Lippmann's words: "The poignant question is whether, and, if so, how, modern men could make vital contact with the lost traditions of civility."⁵ I believe that this question is put with particular sharpness to the legal profession.

III

However, before embarking on this topic one thing ought to be made clear. The renewal of our American public philosophy does not mean a return to the past. The

⁴ GRISWOLD, *THE FIFTH AMENDMENT TODAY* 38 (1955).

⁵ See note 3 *supra*.

movement cannot be launched under the slogan, "Back to the Founding Fathers!" Even if we were to execute this maneuver of a return to the past, we would find that the philosophy of the Founding Fathers, good as it was, is not good enough for the political and social needs of today, any more than their Deism would be good enough for our contemporary religious needs.

I have said that the Founding Fathers did their work within the context of an older tradition, the liberal tradition of the West. This was the basic strength of their thought—that it was traditional. But this too was its weakness; for they made contact with the older tradition at a moment when it had already been weakened from within and had begun its decline. We can see this today, both from the standpoint of our scholarship and also from the standpoint of our experience—political, social, and economic. Hence we can see what our problem is today. It is not to go back to the Founding Fathers; you would better say that it is to go forward from the Founding Fathers. Our problem is not to make vital contact with the traditions of civility as these traditions were possessed and restated by the great men of the 18th century. Our problem is to go back beyond the 18th century and to make vital contact with the traditions of civility in their purer form before they had been touched by the rationalism, voluntarism, secularism and individualism of 18th century England and America. It is only thus that traditions are renewed—first, by a return to their original sources, and then by a restatement of their original principles and inspirations in terms of a later and much altered social reality. This is a large subject. I shall pause only

long enough to make it somewhat concrete by an example.

—There was no doubt that early America was profoundly influenced by the theories of John Locke. However, to the American of 1955, who understands our society as it is, John Locke looks quite different than he did to the men of '79. Locke's theories of liberty and of civil government and of their relations were convincing in the 18th century—because it was the 18th century. But it is no good trying to resurrect Locke today; he is dead and buried.

Indeed there are those who are now saying that his grave is that of a villain, not of a hero. It can be argued—as it has been argued by Patrick Gordon-Walker in his book, *Restatement of Liberty*—that it was precisely John Locke who involved society in the dilemma from which it is today struggling to escape.⁶ The horns of the dilemma are an individualism that verges toward anarchy, and a collectivism that verges toward tyranny. From this dilemma, they say, there is no escape in terms of the Locke theories and their assumptions. They conclude that we need today a political, social, and economic philosophy as different from Locke's as the America of 1955 is different from the England of 1688. Locke may have been good enough for the Founding Fathers; he is not good enough for us.

Nor are the Founding Fathers themselves good enough, though we can still learn much from them. Our task is not the recapture of a particular moment in the history of the liberal tradition; it is the re-creation of the tradition itself through

⁶ GORDON-WALKER, *RESTATEMENT OF LIBERTY* 16-21, 33 (1951).

an understanding of its inner substance and through an adaptation of this substance to the society in which we live. This much, I think, needed to be said in order to measure the magnitude of the task that confronts us.

IV

To the doing of this task the corporate body of lawmen is held, I think, by most cogent reasons.

History itself has imposed this responsibility. It has often been pointed out that the political and constitutional tradition of America, in which so much of the public philosophy is enshrined, was fashioned in its origins largely by lawyers. The Constitutional period from 1785 onwards—and thereafter, up to the 1830s—is now looked upon as a sort of Golden Age. In those days the lawyer stood closest to the great public issues of the time. He instinctively took these issues at their highest level; and he brought to bear upon them not only an acuteness of practical legal judgment but also the rich resources of philosophy, history, jurisprudence, and the law of nations. There were statesmen of the law in those days, when lawyers were likewise men of state—men of whom it could not be said, as Disraeli said of Lord Brougham, “The lawyer has spoiled the statesman.” On the contrary, those men set their knowledge of the law in the service of statesmanship. And they established a tradition. The study of the law became, as Jefferson noted, “the most certain stepping stone in a political line.” This “political line” led, as he further noted in context, to public usefulness rather than merely to the honors and prerequisites of public office (which were few, then as now). The dynamism of the profession seems to have

been a sense of responsibility to the public, not only in regard of its framework of law but also in regard of the quality of its ideas, the content of its philosophy, and the whole ethos of the state.

One should not, of course, romanticize that Golden Age. There were men of base metal in it—ignorant and cynical men who merited the satire of Benjamin Franklin. But it can nonetheless be said that there was a general realization among the lawmen that their calling brought them close to the fountainhead of freedom and order in society; that the instrument with which they worked influenced the direction of society, for good or ill; that they were importantly the architects of free government. To use Mr. Justice Stone’s later but altogether traditional phrase, the bar in that generation understood that it was “the guardian of public interests committed to its care,” and that the law itself was the first of these public interests.

It is not therefore surprising that the men of the bar, as de Tocqueville observed, formed an accepted aristocracy within American society. He said:

The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy. . . . I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.⁷

De Tocqueville seems here to be pointing to perhaps the deepest source of the bar’s responsibility for the public philosophy—I mean the fact that the bar occupies a mediatorial position between government and the people.

What de Tocqueville feared, of course,

⁷ TOCQUEVILLE, *DEMOCRACY IN AMERICA* 173 (1947).

were the dangers inherent in popular government. There is the danger of tyranny on the part of the majority. There is also the danger that in a democracy the whole process of government may be denatured in a particular way. It is in the nature of government, as it is in the nature of law, that it should exert the pressure of reason upon the affairs of men in society. Government, and law too, are rational, or they are not government and law at all. But de Tocqueville feared that the essential rationality of the governmental and legal process would be perverted in consequence of popular pressures. Behind these pressures would lie, not reason and justice and concern for the common good, but unruly passion and narrow partisanship and exclusive concern for private or group interest. Therefore he looked for salvation to the aristocracy of the bar—to the men who understand the nature of law, and to that extent, the nature also of government.

V

I think that I am in the line of his argument when I say that the bar is the guardian of the public interest in free and rational government, in consequence of the ideal of the lawyer as the "officer of the court," in something more than a merely technical sense of the phrase. This ideal itself derives from the high tradition of the public philosophy. To understand the public philosophy is, I think, to understand that a lawyer is neither an employee nor a mere agent of his client. Neither is he in the status of an independent contractor. He is a fiduciary; or, more accurately, he stands at one end of a particular type of confidential relationship. The lawyer-client relationship is quite different from most of the relationships which arise when one man pays another man

money to accomplish for him a certain task. Within the traditions of the bar, which are part of the high traditions of civility, the peculiarities of the lawyer-client relationship are not the consequence of any private contract between client and lawyer. They are the consequence of the status of the bar itself within society—the consequence of the particular functions which society has committed to the legal profession.

Fidelity to his client is indeed the lawyer's duty; therefore vigorous advocacy is his right. But this fidelity is not his full duty; nor is its consequent right of advocacy unlimited—whatever men may have thought in the nineteenth century, when a pervasive individualism resulted in a stress on the lawyer-client contract to the detriment of the lawyer-client relationship. This relationship involves an element of social responsibility. Jeremiah S. Black showed his sense of this responsibility when in 1883 he refused a retainer to argue the railroad case against public regulation of railroads. He was, he said, pledged to the people on the issues at stake.

In America the lawyer's right of advocacy is recognized in fullest measure. The lawyer may justifiably seek to give his client the fullest advantage of existing laws—when dealing, for instance, with revenue or antitrust laws. But he has further responsibilities, owed to society. There is, for instance, his responsibility for the law itself and for its due observance, which requires him to instruct his client in the meaning and purposes of the law, and to tell him what it forbids as well as what it permits. The public philosophy had no hold on the man (whoever he was; the statement has been attributed to several) who said that a good lawyer was one who would tell his

client, not what he could not do, but how to do what he wanted to do. This piece of cynicism clashes with tradition. "*Nullius in locum supraleges.*" No one's power and no one's private interests stand above the law.

The true tradition appears in the story told in testimony when Louis D. Brandeis was up for confirmation as Associate Justice of the Supreme Court. Brandeis was once asked to represent the interests of a great investment banking group in a proxy fight involving the Illinois Central. He had a conflict of interests problem. But what was even more important to him was this: he required, said the banker testifying, "to be satisfied of the justness of our position." This requirement is in the high tradition of the public philosophy. Not all of Brandeis' contemporaries felt its urgency. A prominent lawyer, who was opposed to Brandeis, wrote to a friend: "The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients, instead of being his clients' lawyer, which is against the practices of the Bar." This statement bears ironic witness to the extent to which the public philosophy had at the time ceased to guide the practices of the bar. When partisanship comes to be considered as the sum of the professional obligation; when the judicial attitude—the habit of detached, disinterested, impartial appraisal of the merits—is deprecated, surely a decadence of the public philosophy has set in. The overriding professional obligation, which is higher than the contract of service, has been forgotten.

VI

There is another, perhaps more imme-

diately meaning of the phrase, "officer of the court," as it has been understood within the tradition. The phrase specifies the lawyer's oldest task and his most traditional function in the execution of the laws, that is, his duty to assist the court to a proper decision of litigated matter. From our standpoint here this function demands more than diligence in research and candor in the presentation of evidence. It also demands more than an effort at correct interpretation of the law and at a just application of it to the facts of the case. There is the further effort incumbent on the lawyer to bring his theory of the case within the tradition of American law, as this tradition is itself sustained by the broad tenets of the public philosophy.

The tremendous importance of this effort is seen today in certain types of cases that are coming to the fore—cases involving freedom of speech, freedom of religion, separation of church and state, the privilege against self-incrimination, and the whole range of problems involved in the concept of internal security. Such cases present a great challenge to technical skill. But they also present a challenge to the legal mind on a deeper level. They challenge the lawyer's philosophical grasp of the American tradition and its sustaining philosophy. They also challenge his philosophical understanding of the on-going world of affairs and its requirement that the tradition be adapted to the felt needs of the time.

It has been remarked how much the judge relies upon the lawyer for the concepts which will make intelligible to him the great churning world of affairs and ideas which parades through his courtroom. It has also been remarked that judicial

opinions are constantly incurring a great debt to the work of legal scholars and of counsellors. The indebtedness may not always be acknowledged; but it is there to be seen. Time and again the doctrinal bridges to judicial decisions have been erected by lawyers. This too is part of the lawyer's high function as officer of the court. The importance of its responsible discharge is strikingly seen, I think, in cases in which the issues go deep into the roots of our constitutional tradition of freedom and order, particularly in our own day when the substance of this tradition is menaced by forces at work both within our society and without it.

In this connection I might briefly make a concrete point. I do not myself believe that any solid bridge of legal doctrine has yet been built to a right decision—both legislative and judicial—on the vexing problem of reconciling the legal demands of separation of church and state with the rightful social and religious demands of a people that confesses itself to be religious and that also knows its socio-religious structure to be pluralist and tripartite. There is here a task for the legal profession, to be performed not only, or even mainly, in the courtroom, but also, and particularly, in the larger forum of public opinion.

Perhaps I have said enough to make, at least in outline, my major point—that within the scope of his own ideals as a man of state and an officer of the court the lawyer incurs a responsibility for the guardianship and renewal of the public philosophy and also finds the opportunities for the discharge of this responsibility. In conclusion I shall make two further points.

VII

If we are to accept the verdict of history, we may have to recognize that the legal profession failed, at least to some significant extent, before the moral challenge put to it in the nineteenth century by the rise of industrial capitalism. In the construction of the socio-economic edifice that then took shape the lawyer was called upon to play an increasingly important and many-sided role. Looking back now, the legal profession (some individuals excepted) may not feel that it played its role with a sufficient sense of moral and social responsibility.⁸ However, we can

⁸ "From the vantage point of 1950 — in a country newly conscious of how sensitively interrelated were men's interests and institutions — it might appear that for one hundred years past the bar had not fulfilled the constructive role open to it; it might appear that lawyers had been too pre-occupied with law as a game, or an instrument for private ends. If an observer were measurably justified in passing this judgment, he was not thereby entitled to any moral complacency. Lawyers had shared the going values and vision of their times. With other people in the United States, they had joined in economic and social growth that was daring and constructive, and also in growth that was ruthless and wasteful. With others they had — after the creative generation that produced the Constitution — been indifferent, hostile, or timid toward adapting their political institutions to the sweep of change. As a group or organized guild, lawyers had stood inert or antagonistic before some imperative needs to reform law and its administration. Nonetheless, individual lawyers were counted among the initiators, architects, and administrators of much of the constructive work in social control after the '70s. Many of the counts that might be leveled against the bar must in justice be directed equally at the society which it reflected. Given the avowed ideals of the legal profession, the most just criticism which could be made against it individually was that it asserted an independence and a leadership in the public interest which in practice it had abdicated during most of the years after 1870." HURST, *THE GROWTH OF AMERICAN LAW* 374-75 (1950).

leave the dead to bury the dead. Insofar as there was failure in the past, there is all the more reason for resolve in the present. Now is the time to resolve that there shall be no failure in the face of the more searching spiritual and intellectual challenge of our own midtwentieth-century moment.

If it be true, as I think it is, that the menace of erosion threatens that public philosophy which is the inspiration of American freedom and the fountainhead of American law, then this is no time for the legal profession to succumb to a complete absorption in the workaday world of client care-taking or to the naivete which would forsake the full ideal of the profession in order to pursue singly the minor goal of technical craftsmanship.

There is today a general challenge to all ranks and institutions of society, that they should rise to the height of the times, lest they be overtaken by a flood more disastrous than that from which Noah rescued civilization in a primitive wooden boat. As it reaches the legal profession this general challenge is an invitation to step across the threshold into a new age. Certainly the threshold itself is there; and beyond it lies an age that will surely be new. Whether its newness will be for good or ill is still undecided. The crucial question is what will be the tenets of the public philosophy in terms of which American society will chart its course?

Will they be the ancient principles of truth and justice, of freedom and order, of human rights and responsibilities, that were inherent in the tradition to which our Republic is tributary? Or will command of the new age be taken by some one of the new-found philosophies which are presently at war with the high liberal tradi-

tion? Surely I speak for you when I say that it is only in the old liberal tradition, newly made relevant to the problems of the day, that our Republic—and with it, all the world—can hope to find continually a new birth of freedom and a constant regeneration of the law. But if the central tradition of the West is to be renewed in a form more profound and vital than that which animated our Founding Fathers, the new age must see the legal profession assert in practice that moral independence and that intellectual leadership in the public interest which is its historical prerogative and its inherent duty. If this is strongly done, a new Golden Age will redeem the America which the first Golden Age created.

My concluding point concerns the manner in which the influence of the lawyer will be felt in the shaping of the new age according to the spirit of the old tradition. In the past, James Willard Hurst remarks:

The main force of lawyers was not felt through the work of a few men of creative genius. It did not come from a recognized professional guild. It came from the cumulative influence of many able men who were effective because they had a common body of learning, tradition, and techniques, and because together they concentrated on and developed special skills and feel for the process of adjustment in social relations.⁹

So, I expect, it will be in the future. The contribution of the bar to the renewal of the traditions of civility will have to be a corporate contribution.

Moreover, one special group will be looked to for a signal share in this corporate contribution. This group has come lately on the scene—within the last twenty

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⁹ *Id.* at 335.