

At the Heart of Liberty: Moral Anthropology in American Law

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From Outrageous Idea to Vocational Commitment:
Christian Scholarship in the Trenches²

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In *Planned Parenthood v. Casey*,³ the 1992 opinion upholding *Roe*'s core, the United States Supreme Court used the phrase, "at the heart of liberty." What is the heart of liberty? What is freedom? To begin to answer these questions, I think that it is necessary to ask the anthropological question: What is man? What is a human being? Law professor and Franciscan father, John Coughlin recently observed that "[e]very system of law reflects certain foundational assumptions about what it means to be human" – we can refer to these, he said, as "anthropological assumptions."⁴

To illustrate the importance of the anthropological question and to see why this question must precede the liberty question, I want to tell you a story. There once was a man named Dryland. Dryland's superiors liked his work and placed him in charge of a school of fish living in a very small and very crowded salt water fish tank. Our Mr. Dryland knows not fish, but he watches them day after day with a sense of awe and wonder. He thinks he has grown to love these fish and begins to mourn their life in what he perceives as a wretched prison. He begins to ponder whether they might be happier in

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³ 505 U.S. 833 (1992).

⁴ John Coughlin, *Law and Theology: Reflections on What it Means to be Human From a Franciscan Perspective*, 74 St. John's L. Rev. 609, 610 (2000).

a fresh water tank or perhaps no tank at all. This idea grows in him, and he becomes obsessed with the idea of freeing these fish that he loves from the confines of their salty existence.

From our vantage point, we can see that Mr. Dryland had an abstract understanding of freedom utterly divorced from reality. He had an inadequate understanding of what it meant to be a fish, which resulted in a deadly recipe for freedom.⁵

Freedom for the human person is no different! If those in power passionately think they love man but know him not, they may err in determining what or whom lies at the heart of liberty. They may have an inadequate anthropology. And, their errors may be deadly. Their misperception of reality coupled with their misguided compassion might cause them to remove the human from its life sustaining environment or, at the very least, pollute that environment to such a degree that it is extremely inhospitable to human flourishing.

What can the Christian scholar offer in the face of this possibility? For the purposes of this presentation, I'd like to suggest four ways in which the Christian scholar can contribute to our understanding of liberty and law, which often places restrictions on our liberty.

First, the Christian scholar makes an important contribution merely by asking the anthropological question. What is man that he has a claim to liberty? This may seem like an obvious question, but to many legal scholars today this is a radical departure. I think that this is so **a)** because of our pluralistic society with its many and varied private

⁵ The fish illustration is taken from Michael Scaperlanda, *Producing Trousered Apes in Dwyer's Totalitarian State: A Review of Vouchers Within Reason*, __ Texas Review of Law and Politics __ (2002)(forthcoming).

conceptions of man – these scholars are afraid to publicly privilege any “private” conception of the good and **b**) because we live in a fairly stable state with a large bundle of rights and freedoms – if we lived in Nazi Germany, Stalinist Soviet Union, or today’s Iraq, they might be forced to confront these questions.

[As I said, the question itself is not on the radar screen of the mainstream legal scholar. An anecdote serves to illustrate. Several years ago, I was having lunch with one of the leading constitutional law scholars in the country. This professor cares passionately about protecting the liberties of people (we usually disagree about what “liberties” ought to be protected). On the way back from lunch, I asked him where these rights came from. In other words, I wanted to know his view on the foundations of man’s claim to liberty. In response, he politely informed me that the question was of little or no interest to him. We had rights, and we didn’t need to get into the messiness involved in having a pluralistic society explore together the origins of these rights.]

[A second anecdote comes from this past Christmas. On the 26th, I was reviewing my e-mail from the previous day. On the constitutional law professor’s list serv, there had been quite an e-mail exchange about a specific claim of liberty. I thought it ironic that they were discussing great issues of liberty on the Birthday of Liberty Himself, and I responded by asking the list for their thoughts on the pre-constitutional origins – the foundations – of the claim of liberty. The moderator – another well respected and nationally known constitutional scholar – politely wrote back and said that this question was inappropriate for the list-serv because we are a group of law professors, not philosophers. I think that he was suggesting that we are highly trained legal technicians, applying, I guess, somebody else’s foundations norms. I should add, that he did allow

me to resubmit the question as long as I applied a doctrinal window dressing that would be appropriate for the lawyerly palette.]

So, one contribution that Christian scholarship can offer is simply the asking of the foundational questions.

Second, the Christian scholar can offer clarity. As I suggested earlier, one reason for not confronting the foundational questions is the skittishness -or more accurately, the inability – of secular liberalism to mediate between conflicting conceptions of the good. This thought process is often couched in terms of “neutrality” or “liberal neutrality.” As Ronald Dworkin succinctly says, “government does not treat [people] as equals if it prefers one conception [of the good] to another.”⁶ Jean Bethke Elshtain has commented that this supposedly “neutral” stance, which views the individual “as an autonomous and sovereign chooser is so deeply entrenched that ... it is simply part of the cultural air that we breathe.”⁷

Christian scholars can add clarity to the picture by clearly articulating the non-neutrality of this supposedly “neutral” position. The very claim that the state cannot privilege one conception of the good over any other is itself non-neutral. Those who challenge the public/private distinction and who believe that there is objective “good” and that the state and the larger culture ought to at least imperfectly reflect this objective good are disadvantaged in this supposedly “neutral” state. Despite Dworkin’s statement, the state **must** privilege some conception of the good, and the secular liberal state privileges a conception of the good shaped by the autonomous individual over competing

⁶ Ronald Dworkin, *A Matter of Principle* 191 (1985).

⁷ Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries*, 14 *J. L. & Religion* 53, 58 (1999-2000).

claims, such as the Catholic claim, which would privilege such things as human dignity, solidarity, complementarity, and subsidiarity.

[As Coughlin states, “[t]he concept of justice operative in the legal culture of the modern liberal state” manifests “the anthropological assumptions of the classical liberal political theory” with its emphasis on individual autonomy.”⁸ The non-neutral conception of the good embedded in secular liberalism has a tendency to undervalue the wisdom of past generations (history and tradition), the family unit in the development of the person, and the community from which the isolated individual feels alienated.⁹ Even the concept of personhood is compromised as the individual dis-integrates.]

Christian legal scholars can contribute to the culture by exposing supposed secular liberal neutrality for what it is – just one more competing ideology with its own conception of the good. Here, Christians are not alone. Increasingly, even some secular liberal scholars are underscoring the non-neutrality of the liberal banner. [For example, James Dwyer, in his book *Vouchers within Reason*, concedes that the “principle of state neutrality is not itself ideologically neutral” because as to “the higher order normative questions of whether the state *should* be strictly secular ..., it reflects a partisan liberal position.”¹⁰]

Third, Christian scholars can offer or propose a more complete picture of what it means to be human and, therefore, a better understanding of what it means to be free. In short, we can propose a more adequate – a more complete - anthropology. Many ideologies tend to isolate some human trait, magnify it into an all encompassing theory, and reduce what is human in us to fit the theory. In contrast, Christianity doesn’t begin

⁸ Scaperlanda, supra note 2 at ___, note 113. (quoting Coughlin, supra note 1, at 610).

⁹ Id.

¹⁰ Id. (quoting Dwyer).

with an idea-ology; it begins with a relationship. As John's Gospel so beautifully opens, "In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came to be through him, and without him nothing came to be. What came to be through him was life, [and this life was the light of the human race; the light shines in the darkness, and the darkness shall not overcome it.]" As Paragraph 22 of Gaudium et Spes says, "In reality it is only in the mystery of the Word made flesh that the mystery of humanity truly becomes clear. For Adam, the first man, was a type of him who was to come, Christ the Lord. Christ the new Adam, in the very revelation of the mystery of the Father and of his love, fully reveals humanity to itself and brings to light its very high calling."

If the Christian claim is true – as I assert – then the whole world and everyone in it is in relationship with Christ – the Logos. According to John, the Word brings into existence "life, and this life was the light of the human race; the light shines in the darkness, and the darkness shall not overcome it." What a profound understanding of our world. And, if this is true, then atheists, agnostics, Buddhists, Hindus, Muslims, Jews, and Christians are all in relationship with Christ, whether they recognize it or not. They cannot be otherwise. And, because they are in relationship with this Logos - even if it is a relationship of hostility, denial, or indifference – we have in common with them the same needs for truth, beauty, and justice that have been written on our hearts by the Word Himself.

Therefore, even when we make our anthropological assumptions explicit, we need not ask these neighbors of ours to agree with the Apostle John's account of reality in order to find common ground with them. Deep down, everyone knows, for example, that

radical autonomy does not comport with the most basic needs and desires of the human heart. Even if the secular liberal doesn't believe that we were born into a relationship – not just the relationship between mother and child but a relationship with the Word – he or she knows that we are made for communion and not isolation and alienation.

The popularity of Tolkien's *Lord of the Rings*, among Christians and non-Christians alike is testament to our commonality. This trilogy, with its deeply Catholic understanding of what it means to be human, resonates, at least with those of us who like the genre, to the core of our being. The problem is taking a truth that is accessible to the imagination through the use of myth and proposing it in an enticing way in the drier vein of academic discourse. In building a culture of life, Christian scholars can attempt this difficult work of taking that which speaks to us all in the heart and trying to articulate these truths in such a way that the mind can also grasp them.

[One such truth is that human beings don't flourish without community. Freeing the individual to live a life of radical autonomy is like Mr. Dryland freeing the fish from the confines of its fish tank. Articulating that truth and others like it can lead to a legal system that is based closer to reality because it is based on more accurate anthropological assumptions.]

Fourth, and finally, Christians can make contributions to legal scholarship by listening attentively and with respect to their secular peers. I suggest this for two reasons. First, the origin of our work might be relationship with the Logos and not ideology, but we are fallible and come to our own scholarship with intellectual limitations and cultural blinders. At some point, we are likely to develop an ideology bounded by these limitations and blinders. In humility, we should seek correctives not only from Christian

scholars but from all who do interesting and stimulating work. This leads to my second reason for listening. Since even our atheistic peers are in relationship with the Word, they will have insights that we might have missed or that might illuminate what we only dimly grasp.

[Freud, Marx, and Nietzsche, for example, all noticed man's alienation. Their error was not in the diagnosis but in the proposed cure. Msgr. Lorenzo Albacete, in his soon to be released book, *God at the Ritz*,¹¹ notes that these three people proposed as "the remedy for humankind's paralyzing alienation" the elimination of "the one all-encompassing experience that stood in the way of their all-encompassing theory: the religious sense."¹² These three "masters of suspicion," as Albacete calls them, have a key insight - we do sense deep alienation from each other and from our origins. Christians understand this as a product of original sin, but at times Christians have forgotten or undervalued this truth. Critically listening to the insights of people like Marx, Freud, and Nietzsche may help us to remember a central truth about the human condition even as we depart from them with respect to the cause of the alienation and the proposed remedy.]

Asking the anthropological question, providing clarity in the discussion, proposing alternative anthropological insights that resonate with the deepest needs of all human persons, and listening with respect and an attempt to understand to those who radically differ from us are four concrete contributions that Christian legal scholars can make.

¹¹ Crossroads 2002.

¹² Id. at 24.

Because all law is at core a human adventure these four contributions can be made in all sub-disciplines within law – Contract Law, Property, Torts, Tax, Family Law, Bankruptcy, Constitutional Law, Immigration Law, and Criminal Law to name just a few.

I had originally intended to focus this talk solely on the anthropological assumptions in much of the Supreme Court’s interpretation of the Constitution, but decided to focus on the contributions that a Christian scholar can make to legal scholarship more generally. If you are interested, we can get into some of those details during the question and answer period.

[I’ll close then with a brief glimpse of what that alternative paper might have looked like. In the 1971 case, *Cohen v. California*,¹³ the Supreme Court overturned the conviction of a man who had disturbed the peace by wearing a jacket with the words “F-- - the Draft” inscribed on the back. In concluding that his speech was protected by the First Amendment, the Court said that “one man’s vulgarity, is another man’s lyric.” The assumption here seems to be that beauty has no objective value but rests merely on the subjective tastes and preferences of the beholder. You might find beauty in the Rocky Mountains and I might find it in the trash dump of Port au Prince, Haiti, but there is not external objective standard that can be applied to judge whether one of us has a better handle on beauty.]

[In the 1965 case, *Griswold v. Connecticut*,¹⁴ the Supreme Court says that “[m]arriage is the coming together for better or for worse, ... intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” What

¹³ 403 U.S. 15, __ (1971).

¹⁴ 381 U.S. 479, __ (1965).

anthropological assumptions lie behind this opinion? Fast forward seven years to 1972. In *Eisenstadt v. Baird*,¹⁵ the Court opines that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.” Have the anthropological assumptions changed? If so, how?]

We will end where we began by returning to *Planned Parenthood v. Casey* and the “heart of liberty.” The full quote of this infamous mystery passage, says that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” This statement is freighted with anthropological assumptions. What are they? And, do they comport with the human experience?

In the end, a proper understanding of the “heart of liberty” depends on a proper understanding of the heart of the human person.

Thank you.

¹⁵ 405 U.S. 438, __ (1972).