

T E A C H I N G A B O U T T H E L A W



B Y J U S T I C E A N T O N I N S C A L I A

The United States Senate unanimously confirmed Antonin Scalia as an associate justice of the Supreme Court last year. During his first term on the High Court, Justice Scalia earned a reputation for shaping oral arguments through tough, informed questioning of counsel. He also displayed a willingness to listen to the answers of his questions and openmindedly weigh the arguments on both sides.

At age 51, Scalia is the youngest member of the Supreme Court, as well as its newest member. Nevertheless, he brought a wealth of experience to his appointment, including extensive service as a federal appellate court judge, as a law professor at the University of Virginia and the University of Chicago, as a senior government administrator in the Justice Department and the White House and as a practicing attorney in Cleveland. Justice Scalia married Maureen McCarthy shortly after graduating from Harvard Law School in 1960; they have nine children. Last December, Justice Scalia delivered the Seton-Nuemann Lecture at the Catholic University of America, fulfilling a speaking commitment made prior

to his appointment to the Supreme Court. The result was a timely and significant message on conciliation and justice. As an unpublished college lecture, however, it has not reached a vast audience. The Christian Legal Society is delighted to have the opportunity to publish this lecture by one of America's premier jurists.

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Justice Antonin Scalia

COLLECTION OF THE SUPREME COURT
OF THE UNITED STATES

At first glance, lawyers would appear to rank a good deal below taxgatherers as heroes of the New Testament. Indeed, they are the villains. "Woe to you lawyers," Jesus says, "because you have taken away the key of knowledge; you have not entered yourselves and those who were entering in you hindered" (Luke 11:52) NASV. This text is a good gambit for lively conversation at a Bar Association meeting, but of course it has little to do with lawyers in the modern sense. The lawyers Jesus was addressing—the lawyers who often laid traps for him—were lawyers of a theocratic state, and the law they expounded was a religious law. They were, in other words, not what we today would call lawyers, but closer to theologians. I will leave it to others to explain why, if at all, Jesus' condemnation no longer applies to that profession; but it clearly was not meant to apply to mine.

The root word, "law," is most often used in the New Testament in this theological sense. Recall the Pharisee's entrapping question in Mark 12:14:

They came to Him and said, "Teacher, we know you are a man of integrity. You aren't swayed by men, because you pay no attention to who they are; but you teach the way of God in accordance with the truth. Is it *right* to pay taxes to Caesar or not? [emphasis added]

As far as the ordinances of man were concerned, how could it possibly have been *unlawful* to obey the tax laws?

The New Testament contains some important passages that address the attitude Christians should have towards the law in the modern secular sense of the word. The most significant and the best known is the passage from St. Paul's letter to the Romans, which, one might say, reconciles the regime of Christian love with the criminal justice system. It begins:

Do not take revenge, my friends, but leave room for God's wrath, for it is written: "It is mine to avenge; I will repay," says the Lord. On the contrary: "If your enemy is hungry, feed him; if he

is thirsty give him something to drink. In doing this, you will heap burning coals on his head." Do not be overcome by evil, but overcome evil with good. (Romans 12:19-21)

That portion is often quoted. But not what follows, which is essential to the whole picture. Paul continues:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from the fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give everyone what you owe him: If you owe tax, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor. (Romans 13:1-7)

The above passage must be read to refer to lawful authority, although there is plenty of room to argue that some authorities are not lawful ones, either because of how they got there, or because of what they did when they arrived. It is not those details to which I wish to direct your attention. Rather, I wish to address the

central proposition that, for Christians, lawful civil authority must be obeyed not merely out of fear but, as St. Paul says, for conscience's sake. That proposition was once widely accepted. I recall reading one of C.S. Lewis' essays that simply assumed, without significant discussion, that a good Christian who had been guilty of a serious criminal offense would "pay his just debt to society." That attitude is long gone—mostly, I think, because we have lost the perception, expressed in that passage from St. Paul, that the laws have a moral claim to our obedience.

That, I suggest, is the first and most important Christian truth to be taught about the law, because it is truth greatly obscured in an age of democratic government. It was once easy, perhaps, to regard God as the ultimate source of the authority of a hereditary king, whose blood line reached back to the mists of history—where, for all one knew, God did anoint his forebear. It is even easy to see the hand of God in the accession of a new ruler through the fury of battle, whose awesomeness and unpredictability seem to display the working of the Lord of Hosts. It is more difficult to regard God as making His will known through PACs, 30-second spots, Gallup polls and voting machines. Even apart from our less-than-Jehovan election process, the fundamental principle of *vox populi, vox dei* has never been a very persuasive proposition. How hard it is to accept the notion that those knaves and fools whom we voted against, but who succeeded in hoodwinking a majority of the electorate, will enact and promulgate laws and directives which, unless they contravene moral precepts, divine law enjoins us to obey.

As Americans, it is particularly hard for us to have the proper Christian attitude toward lawful civil authority. We are a nation largely settled by those fleeing from oppres-

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sive regimes, and our political tradition carries a deep strain of the notion that government is, at best, a necessary evil. But no society, least of all a democracy, can long survive on that philosophy. It is fine to believe that good government is limited government, but it is disabling—and, I suggest, contrary to long and sound Christian teaching—to believe that all government is bad. As teachers, I hope, then, you can teach your students that those who hold high office are, in their human nature and dignity, no better than the least of those whom they govern; that government by men and women is, of necessity, an imperfect enterprise; that power tends to corrupt; that a free society must be ever vigilant against abuse of governmental authority; and that institutional checks and balances against unbridled power are essential to preserve democracy. In addition to these secular truths, I hope that you will teach that just government has a *moral* claim, that is, a divinely prescribed claim, to our obedience. It is not an easy truth, because as Eden showed, obedience is not an easy virtue.

Thus far I have been talking about the law as establishing a citizen's obligation toward society, and as justifying, when those obligations are violated, punishment by the government pursuant to authority ultimately derived from God. In addition, however, the law establishes certain civil obligations between citizens themselves, such as the duty to abide by contract and the duty to avoid intentionally or negligently injuring others. Those obligations are enforced, not by the government itself, but by the injured private parties, through the mechanism known as the civil lawsuit. We all know that civil litigation has increased at an astounding rate over the past few decades. This phenomenon has many causes, but I wonder whether one of them is not, again, the decay of certain Christian attitudes. Here are St. Paul's comments on this subject:

If any of you has a dispute with another, dare he take it before the ungodly for judgment



instead of before the saints? Do you not know that the saints will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels? How much more the things of this life! Therefore, if you have disputes about such matters, appoint as judges even men of little account in the church! I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute among believers? But instead, one brother goes to law against another—and this in front of unbelievers! The very fact that you have lawsuits among you means you have been completely defeated already. Why not rather be wronged? Why not rather be cheated? (I Corinthians 6:1-7)

I suspect that some trial lawyers may not be inordinately fond of this passage. Come to think of it, I have no reason to be inordinately fond of it myself; when Paul speaks of being

judged "before the ungodly" (that is, in civil courts) he is referring to me.

Without pressing the point too far, I think this passage has something to say about the proper Christian attitude toward civil litigation. Paul is making two points: first, he says that the mediation of a mutual friend, such as the parish priest, should be sought before parties run off to the law courts. I'm sure that part of the reason such mediation used to occur much more than it does today is that in our commercial and highly mobile society, grievances no longer typically arise between two people in the same community who have common friends, much less a common clergyman. Beyond that, I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation. In small towns, at least, it used to be considered mean-spirited to bring a lawsuit, but not any more. When you discuss civil law with your students, I hope you can convey to your students that a lawsuit represents the breakdown of amity and accommodation, that it should be undertaken only as a last resort—and even then in sorrow. That advice, by the way, may well do their pocketbooks as much good as their souls.

St. Paul's second point in I Corinthians, that we should suffer wrong rather than file a lawsuit, would truly bankrupt the trial bar. Yet why, indeed, is it not a sign of being "completely defeated" that we have *any* lawsuits? Why indeed, should we not "rather be wronged?" Christ Himself, in fact, went a bit further:

You have heard that it was said, "Eye for eye," and "tooth for tooth." But I tell you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you and take your tunic, let him have

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your cloak as well. If someone forces you to go one mile, go with him two miles.

(Matthew 5:38-41) [emphasis added]

These are hard words to apply. We must regard them as a counsel of perfection, like the encouragement to absolute poverty or chastity—a degree of virtue that is known to be beyond most of us for otherwise the world would end. Nevertheless, unachievable ideals give us some indication of what ought to be the feasible reality. I suggest that part of this reality is that good Christians, just as they are slow to anger, should be slow to sue. Unless one is careful, litigation can affect the soul as well as the purse, and it is not worth it. Any judge can tell you of embittered litigants who over the years have sued repeatedly over the same matter or against the same defendant—

people whose obsession with “getting” the adversary has destroyed all perspective and consumed all human kindness. Judges can also tell you of brothers and sisters permanently estranged by litigation over a will, or of once-friendly neighbors living in undying indemnity because of a boundary dispute that is, in financial terms, inconsequential. Whatever the legal rights and wrongs of such matters, these results are not worth it. Tell your students that it is often best to let the tunic go.

This last point suggests an even more fundamental perception about the law that I hope you are conveying to your students: what is lawful is not always right. Confusing the two concepts is particularly easy for the English-speaking because we use the word “right” to refer both to legality and to moral appropriateness. “Let us give thanks to the

Lord,” the priest says, and we respond “It is *right* and just.” We also say “I have a *right* to plead the Fifth Amendment and refuse to answer questions about possibly criminal activity”—even when the consequences of exercising that “right” may cause an innocent person to be convicted. Exercising such a “right” is certainly wrong.

The tendency to think that what is wrong is right is aggravated by the fact that as Americans we are very proud of our “rights” in the “legally permitted” sense. Indeed, these “rights” are a manifestation of our freedom, but the moral confusion that exaltation of our “rights” can produce is demonstrated by the response that children sometimes give to adults who try to correct their irresponsible behavior. Chide a young person for spitting his gum on the sidewalk, and you run a fair risk of being told, “It’s a free country.” Of course it is true that the young man is “free,” that he has a “right,” to make the sidewalks incommodious for others, unless there is some ordinance against what he did, but that says *nothing* about whether he *ought* to do it.

The fallacy of equating legal right with moral propriety also displays itself in more adult and more significant contexts. Our society is appropriately fond of the aphorism attributed to Voltaire, “I disagree with what you say, but I will fight to the death for your right to say it.” It is natural enough to assume that what one is willing to fight to the death for is a good thing; therefore, it must be “good” to exercise our First Amendment rights. Often, in fact, it is *not* good. What Voltaire and the rest of us are willing to fight and die for is not the desirability of saying some irresponsible and socially harmful thing, such as a wrongful destruction of someone’s reputation that is constitutionally protected because *only* irresponsibility and not “actual malice” can be shown. Rather, we are willing to fight and die *for freedom to be irresponsible and even socially harmful in what we say*, because the alternative would sweep away too much good speech along with the bad. But let



us not celebrate libel. To the contrary, we should criticize and abhor it, even when celebrating the fact that we are free to engage in it.

I hope, then, that in teaching students their legal rights, you also teach them that it is not always moral to exercise them. Indeed, I hope you give them this even more profound insight: Ultimately, the very precondition of their freedom is the self-restraint to use it responsibly. Lord Acton was correct when he observed that the society that is the freest is the most responsible. The reason is quite simple and quite inexorable. Legal constraint—the opposite of freedom—is in most of its manifestations a cure for human vice or folly. As James Madison observed in No. 51 of the *Federalist Papers*: “[W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.” Law steps in, and will inevitably step in, when the virtue or prudence of the society itself is inadequate to produce the needed result. The young man I referred to earlier, who spat his gum on the sidewalk, only has the freedom to do that because not many people are so inconsiderate as to engage in such conduct. If the practice becomes widespread, you can be certain that a law will be passed, and the freedom will disappear.

Precisely the same is true of our more consequential freedoms; we have seen the phenomenon at work in our times. Surely pretrial detention—holding an accused individual in jail *before* he is convicted of the crime of which he is charged, because of the prediction that he will commit another crime if released—is not a particularly appealing practice. But in a society where violent crimes by repeat-offenders awaiting trial are commonplace, it looks better to a legislature than the alternative. Indeed, the principle I am describing—that lack of social virtue entails the lack of social freedom—even applies to what many think the greatest of our



constitutionally guaranteed rights: the right to the Great Writ, the writ of *habeas corpus*. The Constitution provides “The Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the public Safety may require it.*” When virtually all social responsibility has dissolved, even that great right must yield.

I suggest, in other words, that it is by teaching your students virtue and responsibility—much more than by teaching them the contents of their legal “rights”—you preserve the foundations of our freedoms.

The last thing I hope you teach about the law is that, in the last analysis, law is second best. The phrase enshrined in the Massachusetts Constitution, “a government of laws, not of man,” sets forth the most realistic of aspirations for a world that is not populated by angels. In the best of all possible worlds, the Holy City envisioned by St. John, or, even the utopias envisioned by any of the world’s religions, *there are no laws*. Ancient Judaism, for all its veneration of the Mosaic law, looked for

the day when the burden of the law would be lifted. Roman and Eastern religions did the same by sometimes anticipating the coming of the New Order by orgiastic displays of freedom from the law. Even that atheistic theologian-posing-as-economist, Karl Marx, had as his ultimate vision the withering away of the state and a society in which all men arrange their affairs on the basis of instinctive righteousness.

Even while we realize that these delights are for another world, we should not disregard the insight that the law is a concession to our frailty. To the extent we have fewer laws, we are happier. Some years ago the legal philosopher Lon Fuller delivered a paper to the Society for Political and Legal Philosophy entitled “Two Principles of Human Association.” His thesis was that all human associations—nations, corporations, churches, universities, families—are governed by two fundamental principles. One he called the *legal principle*, referring to the situation in which an association “is held together and enabled to function by formal rules of duty and entitlement.” The other he called the principle of *shared commitment*, which is self-explanatory. “In all human associations,” he observed, “both principles are in some degree present.” The institutions in which the legal principle is *least* present, however, are those institutions that men and women treasure most: the family and the church. That is why the law courts are of such little use when something goes wrong in these areas. To bring in the law to any significant degree is to alter the institution itself. Another American lawyer and legal philosopher, Grant Gilmore, put it this way:

In Heaven, there will be no law, and the lion will lie down with the lamb. . . In Hell there will be nothing but law, and due process will be meticulously observed. □

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