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The Private and the Public Domains

Rousas J. Rushdoony*

Some years ago, I spoke at the University of Notre Dame Law School on *The State as an Establishment of Religion*, subsequently published in *Freedom and Education: Pierce v. Society of Sisters Reconsidered*.¹ At that conference, I met Edward J. Murphy, at that time dean of the law school. We at once found it eminently easy to converse because we both shared a belief in the necessity for a theological perspective in every area of life and thought. We both believed that theology must always be, as it has been, Queen of the Sciences. Because God is the Creator and Governor over all things, it necessarily follows that all things are of necessity under His ordination and to be understood only in terms of Him.

Thus, despite my thoroughly Calvinistic world and life faith, and Edward Murphy's equally strong Roman Catholic faith, we quickly found that we had much in common. Subsequently, Edward Murphy wrote for the Chalcedon Foundation's Ross House books his study of *In Your Justice*,² which is still happily carried by us. He expressed interest in writing a study of theology, and he shared with me several writings, including one on the atonement. I urged him to continue his work by developing the implications of Biblical doctrine for law, but he did not find time to do so. Harold J. Berman, in *Law and Revolution*, had done this brilliantly for the atonement.³ Anselm's work had led to the application to law of Christ's atonement, namely, that Christ's atoning death, a restitution to God for our sins, required the premise of restitution civilly and religiously. The result was a revolution in law which superbly reshaped Christendom. Only now are we seeing an anti-Christian legal revolution which is undermining that Christian triumph. One can add that it is undermining Justinian's legal work and also that of Theodora, whose Christian premises have governed family law until our time.

The theological premises of all laws are more than a medieval, or a Calvinist, matter: they are basic to the concept of Christendom. More, they are basic to the idea of law. One of the unhappy facts about our present era is its disregard for the past, and its impatience with definitions. The *past* is seen as an era of religious bigotry (we live in a very bigoted time), of religious persecution and murders (although our century has seen the highest percentage of mankind perish from mass murders, death marches, death camps, slavery, starvation, epidemics and political oppres-

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1 Rousas J. Rushdoony, *The State as an Establishment of Religion*, in *FREEDOM AND EDUCATION: PIERCE V. SOCIETY OF SISTERS RECONSIDERED* 37 (Donald P. Kommers & Michael J. Wahoski eds., 1978).

2 EDWARD J. MURPHY, *IN YOUR JUSTICE* (1982).

3 HAROLD J. BERMAN, *LAW AND REVOLUTION* (1983).

sion, all without the help of the church),⁴ of race hatred and conflict, political hostilities, wars of unprecedented destructive power and hatred, and so on. Our age's self-congratulations are not in order, but our humanistic overlords are convinced that, once Christianity was shoved into the closet, the age of peace and innocence was surely dawning. By definition, we are the age of light. One is reminded of St. Paul's comment that, in a time of falsity and deceit, "Satan himself is transformed into an angel of light."⁵

Law has been redefined to mean what the state decrees. The *Encyclopaedia Britannica*, in its first edition, 1771, began its study of law with a brief definition: "Law may be defined, 'The command of the sovereign power, containing a common rule of life for the subjects.'"⁶ For us, the sovereign power is not the state but God. We have forgotten that; for the Puritan mind, in terms of a centuries old tradition, *sovereign* meant Lord or God, and *sovereignty* was an attribute of God alone. On the Jubilee of the Constitution in New York City on April 30, 1839, former President John Quincy Adams spoke at length on the meaning of sovereignty by the state as against freedom. The English lawyers held Parliament to be omnipotent because sovereign. As against the omnipotence of Parliament, the colonists appealed to the omnipotence of God.

The revolution under which they were gasping for life, the war which was carrying desolation into all their dwellings, and mourning into every family, had been kindled by the abuse of power—the power of government. An invincible repugnance to the delegation of power, had thus been generated, by the very course of events which had rendered it necessary; and the more indispensable it became, the more awakened was the jealousy and the more intense was the distrust by which it was to be circumscribed.⁷

Adams, as a Unitarian, was at times fuzzy in his theology, but enough of his puritan heritage remained with him for him to conclude,

There is the Declaration of Independence, and there is the Constitution of the United States—let them speak for themselves. The grossly immoral and dishonest doctrine of despotic state sovereignty, the exclusive judge of its own obligations, and responsible to no power on earth or in heaven, for the violation of them, is not there. The Declaration says it is not in me. The Constitution says it is not in me.⁸

A like speech today would not be understood. We have returned to the pagan doctrine of the state as sovereign which contains and comprehends all spheres and areas of life within itself. This doctrine will in time hold the church to be no more than an aspect of the life of the state if it is at all tolerated. We must remember that the word *liturgy* in its origin

4 See GIL ELIOT, *TWENTIETH CENTURY BOOK OF THE DEAD* (1972).

5 2 *Cor.* 11:14.

6 2 *ENCYCLOPAEDIA BRITANNICA* 882 (1771).

7 John Quincy Adams, *The Jubilee of the Constitution* (April 30, 1839), in *AMERICAN PATRIOTISM* at 313-14 (Selmin H. Peabody ed., 1880).

8 *Id.* at 321.

meant a *public work* because religion was simply a department of state and public morale.

The pagan state saw religion as a *private* matter, hence the multiplicity of religions recognized and controlled by such a state as Rome. The public arena was the state. The great revolution wrought by Christianity through the medieval church, Calvinism, and the Counter-Reformation, was to insist that the supremely *public* domain is that of Christianity and the church. The faith cannot become a private matter without a denial of Christianity, or a reduction of it to one of the ancient mystery religions—another way of destroying the church and the faith.

But a revolution has occurred. We see it most obviously in certain areas, such as sexual morality, now held to be simply a private matter and of no concern to society or to the state. In fact, many object to efforts to further chastity or to condemn homosexuality because it is held that one's decisions here are purely private matters and to insist on a Christian stand is to attempt to force on to the public arena a private concern. The same is true of abortion: Pro-abortion women are often uncomprehending, and they see it as radically wrong to legislate with regard to their bodies. "Our bodies" are held to be a purely private domain, and therefore they are immune to legislation in any just social order.

The erosion of the belief that Christianity, not the state, defines the public domain is so severe that churchmen and church members all too often act on the premise that the state is the true public domain and the sole governor thereof. We no longer have a theology of the state, only political philosophies which are essentially humanistic.

But if the *triume* God is indeed the Creator of heaven and earth and all things therein, then the state is not *our* rule-maker, nor the church's, *nor its own*. The state is a derivative institution, an aspect of God's world and order, not its own determiner. No more than any man or woman can choose to create his or her own sexual values is the state able to determine its own values, laws, and modes of conduct. Of course, we now teach children in our state schools to choose their own values, so the collapse of religion and ethics into the private domain is far gone.

But God alone is the true law-giver because He alone is sovereign. The temptation in *Genesis 3:5* has been rightly called man's original sin: his desire to be his own god, determining, or knowing for himself, what constitutes good and evil, law and morality. Our culture today wallows in original sin. Instead of the Biblical "thus saith the Lord," people say, "Well, I think," or "I feel," or, "I don't care what the Bible or the church say, I think . . ." We have every man functioning as his own god and law. If a man tells you that he is a *good* Catholic, or a *good* Protestant, it is likely that he has in too many cases redefined the *good* church to suit himself.

Now to insist that Christianity defines the public domain in terms of the Trinity and Scripture means that man is under *authority*. It is important to examine that word as it is used in The New Testament. *Dynamis* in Greek is translated as authority, also as power, capability, force, ability, and so on. Otto Betz said, "Originally it meant the seat of government, and then, equally, someone who was in such a position of authority or

strength."⁹ The Gospel is the power of God unto salvation, and the cross and resurrection supremely manifest the power of God.

Another word for authority (also for right and power) is *exousia* in Greek. It refers to the exercise of authority by a ruler, father, or some delegated person. Both *dynamis* and *exousia* are "related to the work of Christ, the consequent new ordering of cosmic power-structures and the empowering of believers."¹⁰ The implication is that all non-Christian authority is ultimately illegitimate. This does not mean that we have the freedom to be lawless in relation to them. St. Paul, for example, counsels believers who are slaves to avoid insurrection. Having "been bought with a price, be not ye the slaves of men."¹¹ However, "if thou mayest be made free, use it rather."¹² Freedom is to be desired, but it is not the only moral concern.

But the insistence throughout history on some sole moral concern has led to serious social disruptions. The Throne of authority is not man's conscience but the sovereign and triune God. It has been Christianity which has most insisted on the necessity for a clean conscience before God. The whole concept of confession, in its Roman Catholic and Protestant histories, has been a history of the examination and the cleansing of the conscience. This is a radically different concept from that of humanistic individualism which absolves the conscience of accountability to God or to man. Since World War II especially, conscience in the Western world has claimed absolution from all accountability to God. This has been possible because God and Christianity are now part of the private domain. This is a tacit assumption that God does not exist and that He is at best a conjectural idea and of no concern to the functioning of the public domain. The relegation of God to the private domain is seen by some as a charitable and tolerant act because God is an idea whose influence is not for the best welfare of society.

Because the state is now the heart and soul of the public domain, it has replaced God, the church, and Christianity in the minds of men. It is the state now in whom we live, and move, and have our being. It is the state which, with its planning and controls, has so replaced God's predestination that most men wince at the thought of God's plan of predestination, but live more or less comfortably with the state's plan. After all, the public domain requires governance and power, whereas the private domain to which God and Christianity have been reduced must remain as ideas only—and be grateful for that.

Since Hegel at least, the state has been god walking on earth, the ultimate power and mind in being. This is an old battle which the church has repeatedly fought, lost, and won. For example, the Council of Constance ended the Great Schism by imperial power. The three rival popes were reduced to one, but the price was losing control of the church to the em-

⁹ Otto Betz, *Might, Authority, Throne*, in 2 THE NEW INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY 609 (Colin Brown ed. 1976).

¹⁰ Betz, *Exousia*, in 2 THE NEW INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY, *supra* note 9, at 609.

¹¹ 1 Cor. 7:23.

¹² 1 Cor. 7:21.

peror and some monarchs, notably the French, and later, the Spanish. The church was pressured to avoid offense and so turned its attention to the arts, leading to the Renaissance, and then, by reaction, to the Reformation and the Counter-Reformation, which, until circa 1660, sought to again make the church the heart of the public domain. The Enlightenment, with its priority of Reason, saw the state as the epitome of the rational order and the legitimate heir of the public domain. With the Enlightenment, the church, as the private domain, was seen as the anti-Reason realm. Men less and less concerned themselves with the faith, and they saw the church as the domain of unreason and emotionalism and hence primarily for women and children. Since then, the church has become more and more outside the concerns of men. Now, with the rise of feminism, women seek to take over the leadership of the church as "rightfully" theirs.

In the 1960s, a rising protest targeted moral judgments by Christians premised on any moral character or standard. Morality was a matter for the private domain and a purely personal concern. To object to abortion, homosexuality, or euthanasia, or to insist that chastity should be promoted or at least mentioned in sex education courses of study, was held to be an unwarranted confusion of church and state.

The nature of the rationale behind this has been apparent in numerous works. Alisdair Palmer, in a review of one such book in the *English Spectator*, observed,

For the last 2,000 years, the central assumption of Western philosophical thought has been that the path of wisdom leads to righteousness. Almost all moral philosophy has been dedicated to trying to prove that no one who is fully rational can fail to be good, because truth, goodness and rationality are one.¹³

Previously, challenges to this assumption came from men who could be dismissed as mad, such as the Marquis de Sade, Friedrich Nietzsche, and the like. Now such ideas are promoted routinely by academicians, members of the media, artists, and routine citizens of commonplace backgrounds. Palmer cites the fact that Nietzsche held that "power-worship" must replace morality, and Bernard Williams denies that power must of necessity do so. Palmer is not so sure. What neither Palmer nor Williams fail to consider is why morality should, like religion, be excluded from the public domain. After all, how people behave very much affects the public realm, and the consequences of a Hitler or a Stalin commanding that sphere are very different from the results of King Alfred's rule.

The citation of King Alfred, now a somewhat forgotten figure, is deliberate. King Alfred was concerned with two causes. First, he sought to free his realm from the depredations of Danish invaders. Second, to strengthen his realm, he insisted that God's law, as given in the Bible, govern his realm. Dominion or rule was for him a religious fact, and it necessarily meant that the premises of a particular faith prevail.

13 Alisdair Palmer, *The Return of the Antichrist*, THE SPECTATOR, Sept. 30, 1995, at 45 (reviewing BERNARD WILLIAMS, *MAKING SENSE OF HUMANITY* (1995)).

Religion is the "ultimate concern," as Paul Tillich held, and the U.S. Supreme Court has used his definition. The man-ward aspect of religion is morality and law, the application of the nature of ultimate Being to life in all its spheres. In terms of this, men have rightly held that all systems of law are establishments of religion. The current insistence on "the separation of church and state" is really the effort to disestablish Christianity as the religion behind our concepts of law and government and to replace it with a statist humanism. The new, established and catholic church is the state. The religious institution in any society is salvific, i.e., it has either the intent or the power to redeem. This the modern state sees itself as called to do, to save men and society from all their ills. The church is less and less seen as the necessary instrument for man's salvation, whereas the state sees itself, and is seen by many people, as man's hope. It offers man cradle to grave care, or, as the English state it, from womb to tomb.

Clearly, in this long process of re-paganization whereby religion, Christianity in particular, has been relegated to the private and therefore non-essential sphere, law has been separated from Christianity and assigned to the state by common opinion.

Christianity has thus been limited to mainly pietistic exercises, personal devotion and private faith. Because it is a private matter, loyalty to the church, its creeds and confessions, its hierarchy and its worship, is now seen by many as a *private option*. Too many Roman Catholic, Eastern Orthodox, and Protestant believers have major differences with their churches' stands and yet will maintain that they are faithful members by their own definition.

The two key areas which manifest the religion of a culture are *education* and *law*. If these are not governed by the *faith* of the people, then the professions of faith, Orthodox, Catholic, or Protestant, are nominal and the actual functioning faith is something else, at present, humanism. In the sphere of education, Catholic and main-line Protestant parochial schools have retreated significantly. However, a major explosion of Christian schools and home schooling has taken place.

In the sphere of law, a few starts have been made to think through and provide a philosophy of the idea of law. The major effort in this area, by a professor of law in the Netherlands, was the work of the late Herman Dooyeweerd, most notably in his *De Wijsbegeerte der Wetsidee*, translated into English as *A New Critique of Theoretical Thought*¹⁴ in four volumes. In the main, positivism, as first set forth by Auguste Comte, has been hostile to the idea of law. Marxist theory has gone beyond the idea of law to affirm an ever-changing will of the people via the dictatorship of the proletariat. The basic question of those concerned with this area of thought is whether or not the starting point should be a philosophy of law, or a theology of law. My approach is theological.

There is another aspect to this question. If we see the source of law as the triune God and His enscriptured word, we logically identify law with the being of God. God's law expresses His nature, and the all-perfect na-

14 HERMAN DOOYEWEERD, *A NEW CRITIQUE OF THEORETICAL THOUGHT* (David H. Freeman & William S. Young trans., 1969). In some of my works, I have also dealt with the idea of law.

ture of God makes it inevitable that His law is unchanging, and it never contradicts His being. Statist law has no such consistency; its changing and variable nature witnesses to the changing and unstable nature of the state. It was Henry VIII who told the Irish, "of our absolute power we be above the law."¹⁵ Because Henry VIII was a changing and very fallible man, his law was equally fallible and unstable. His law expressed his nature, even as contemporary statist laws express too often the fallen and sinful views of men. About 1970, a lawyer remarked to me that law was being replaced by the will of judges; he added that he never knew what the law would be when he walked into a court. In 1974, Paul Hoffman wrote a study of a criminal lawyer and gave that man's comment prominence as the book's title: *What the Hell is Justice?*¹⁶ The law is too often regarded with cynicism in our time because it lacks any Christian foundation.

Some years ago, J.M. Spier observed that "[t]he Christian philosopher must start with the revealed truth that the Sovereign Creator has placed his entire creation under law. The term *cosmic law order* expresses the fact that everything created is subject to the laws of God."¹⁷ God's laws are, like God, unchangeable. Man, because he is a creature, is under law, his Maker's law. Spier further relates that "[n]ot to be under law would be to be as God. Recall the lying words of the serpent in paradise: 'Do not be troubled by God's law, elevate yourself above it, and you will be as God.' But to be like God is unattainable to a creature."¹⁸

If man is *under God*, then his every area of life and thought will be under God. If man is the product of biological and social evolution, as Henry Jones Ford, then a professor of politics at Princeton in 1915, maintained, it logically follows that "[t]he State is the permanent and universal frame of human existence."¹⁹ Moreover, "Man did not make the State; the State made Man. Man is born a political being. His Nature was formed by government, requires government and seeks government."²⁰ Again, Ford held that "[t]he State is absolute and unconditioned in its relation to its unit life."²¹ For Ford, the state had replaced God as man's maker. Such thinking as Ford represented was prevalent and powerful in the United States for a generation and more prior to World War I. Given this background, it is not surprising that in a few decades Robert C. Harvey could write that "grouphood" was replacing "personhood," and that "[w]e are becoming a culture of un-persons."²² It is no wonder that, in the 1960s, when rebellious youth sought their "identity," they did so in a radically conformist way, with a uniformity of hair and dress styles that depersonalized them. By denying their faith-heritage, they denied their personhood. We must remember that, in the medieval era, one Northern European people

15 LAWRENCE STONE, *THE CAUSES OF THE ENGLISH REVOLUTION 1529-1642*, at 58 (1972).

16 PAUL HOFFMAN, *WHAT THE HELL IS JUSTICE* (1974).

17 J.M. SPIER, *AN INTRODUCTION TO CHRISTIAN PHILOSOPHY* 35 (David H. Freeman trans., 1954).

18 *Id.* at 41.

19 HENRY JONES FORD, *THE NATURAL HISTORY OF THE STATE* 174 (1915).

20 *Id.* at 175.

21 *Id.* at 175-76.

22 ROBERT C. HARVEY, *THE RESTLESS HEART, BREAKING THE CYCLE OF SOCIAL IDENTITY* 13 (1973).

declared, "We are men and must have laws."²³ Personhood has a religious foundation in the triune Persons of the Godhead. By trying to ban God and Christianity, the church and morality and God's law, from the public domain, the twentieth century has dehumanized man and it has replaced society with the state.

The Bible and the historic creeds of Christendom have an essential bearing on law. They witness to the fact of an unchanging order as basic to law and society.

We have forgotten that in colonial and early American history such bodies as the Massachusetts General Court and the Virginia House of Burgesses were not legislative bodies but citizens' assemblies to protect and ensure sound and lawful administration. They did not make laws so much as to protect law. It would not have occurred to them that Christianity should occupy the private domain and quietly surrender the world to the state. For them, the state had as much a duty to be Christian as did the church, and, for that matter, the family, the school, the arts and sciences, and all things else. This was the ancient stand of Christendom. A return to this perspective is a necessary step towards the establishment of a viable order.