THE JUDGE'S ROLE IN LAW AND CULTURE

Robert H. Bork[†]

The Ave Maria School of Law is very fortunate to have Francis Cardinal George offer his thoughts concerning the interactions of law, culture, and morality upon the occasion of the dedication of the school's new building.[1] As he observes, "Law contributes massively to the formation of culture; culture influences and shapes law. Inescapably, inevitably, law and culture stand in a mutually informing, formative, and reinforcing relationship."[2] It is of particular concern, then, that law, particularly in its upper reaches, is today in a state of moral chaos.

One source of law's disorder lies in our failure to respect the crucial difference between elected representatives and unelected judges. That failure leads not only to illegitimate constitutional decisions but to a sharp difference in the trend of our culture. The reason is that judges and legislators respond to different constituencies with different cultural values. Activist courts—courts that announce principles and reach decisions not plausibly derived from the Constitution—tend to enact the values of the dominant social class. Today, that class is the intelligentsia, and its values are frequently opposed to the moral assumptions of much of the rest of the electorate. Hence elections and elected representatives do not produce results entirely satisfactory, or satisfactory at all, to the intelligentsia. Their agenda is forwarded more fully and rapidly by activist courts. The result is that legislation that does not violate the actual Constitution is nevertheless declared unconstitutional. This conflict between the courts and the legislatures is one aspect of what has come to be known as the culture war.

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† Robert H. Bork, a former federal appeals court judge, is a Senior Fellow at the American Enterprise Institute for Public Policy Research, the Tad and Dianne Taube Distinguished Visiting Fellow at the Hoover Institution, and a Professor of Law at Ave Maria School of Law.

1. Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003).
2. *Id.* at 9.

The effects of judicial activism go well beyond changes in law, however. Law, as Cardinal George says, teaches lessons.[3] The Constitution is the most revered document in our society. When the Supreme Court, rightly or wrongly, enunciates a principle as constitutional law, people assume that the principle is in fact of constitutional stature, that it is, therefore, basic to our freedoms. In that way, the morality of the cultural "elites" are spread to the rest of society.

There is, moreover, an unfortunate tendency to confuse legal permission with moral rectitude. When an act or utterance is criticized, the rejoinder often is, "He has a right." The false equation of a legal right with moral propriety weakens the force of stigma and lowers the moral tone of the culture. Constitutional law sets limits to government compulsion by statutory law, but what may not be compelled by law must remain subject to moral scrutiny and moral condemnation. Otherwise, the entire weight of preserving social order and decency would fall upon law. That is a weight law cannot bear and, in its current state, hardly attempts to bear.

I am in complete agreement with Cardinal George that the constitutional decisions he deplores are morally abhorrent, but I do not think that their odiousness is sufficient reason to condemn them *as law*. They stand condemned because they are not law in any sense other than the fact that the Supreme Court decided them. But the Supreme Court is not supposed to invent law but to apply it, and there is no law that underlies those decisions; they are merely expressions of the judges' will, judicial invasions of territory that belongs to the moral choice of the American people and their elected representatives. The fact that the courts, and most particularly the Supreme Court, acting in accordance with the values of the intelligentsia, are steadily moving American society to the cultural left is, in my view, to be regretted. If, however, the Constitution properly interpreted required those results, I could not fault the courts. That, if I understand the Cardinal correctly, is the essential difference between his position and my own.

The lessons taught by activist courts are often not true ones. They are false not only in the sense the Cardinal means—that they are contrary to transcendent principles of right and wrong[4]—they are also contrary to the rules judges are sworn to uphold. The reciprocal influences of law and culture can have harmful as well as beneficial results. Few would deny that the end of legally required racial

3. *Id.*
4. *Id.*

segregation ordered in 1954 by *Brown v. Board of Education*[5] was correct both legally and morally. What can one say, however, of the Court's reckless expansion of the "speech" protected by the First Amendment to encompass computer-simulated child pornography,[6] as well as a sickening variety of obscenities;[7] the condemnation of any involvement of the state with religion,[8] contrary to the text and history of the Establishment Clause of the same amendment; the invention, without any constitutional justification, of a "constitutional" right to abortion,[9] a right so expansive as to protect partial-birth abortions[10] (patently indistinguishable from infanticide); and the incipient right to same-sex marriage in the name of the equal protection of the laws. These are all results congenial to that part of the upper middle class, the university-educated, who dominate institutions involved in opinion formation: universities and law schools, the print and electronic media, Hollywood, foundation staffs, and many of the clergy and staffs of churches.

Lochner v. New York[11] was an abomination not because it "struck down a law preventing the exploitation of laborers" or because it failed to "tailor the law to contemporary social developments" and not even because "the *laissez-faire* philosophy it stands for provided a mask for economic oppression."[12] None of these would be a valid criticism of *Lochner* if it had been based on a reasonable interpretation of the Constitution. But it was not. The Court invented a right to make contracts, a right found nowhere in the Constitution, and held that bakery workers and employers had a right to contract to work more than sixty hours a week and ten hours a day.[13] Since there is no right to

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5. 347 U.S. 483 (1954).

6. *See* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).

7. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding unconstitutional a federal law that restricted access to "dial-a-porn" telephone messages); Butler v. Michigan, 352 U.S. 380 (1957) (holding unconstitutional a ban on the sale to adults of books deemed harmful to children); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (holding unconstitutional a ban on the mailing of offensive, unsolicited advertisements for contraceptives).

8. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989).

9. *See* Roe v. Wade, 410 U.S. 113 (1973).

10. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

11. 198 U.S. 45 (1905) (holding unconstitutional a New York law that restricted the number of hours a baker could work, determining freedom of contract was a basic right protected by the Fourteenth Amendment).

12. Cardinal George, *supra* note 1, at 12.

13. *Lochner*, 198 U.S. at 64.

contract, the statute limiting the hours of work should have been upheld. I do not think the policy grounds advanced by Cardinal George are adequate to condemn the decision. There is a counter-argument that *Lochner* expressed desirable, or at least understandable, social policy. The bakery workers were willing to work under the conditions the statute proscribed. Shortening their hours by statute would raise the cost of employing them, resulting in fewer bakers at work. The effect would be much the same as a minimum wage law or enforcement of the idea of a "living wage." One can call those measures the alleviation of "exploitation," but they inevitably increase the welfare of some workers at the expense of others.

Judges are no better qualified than any of the rest of us to identify transcendent principles of right and wrong. It may be granted that legislators and electorates are not particularly qualified for that assignment either, but in our governmental arrangements they, not judges, are legitimately authorized to attempt the task. Given the reality of human nature, the result will often be a mess precisely because it is impossible to eliminate politics from human affairs. That is what we must live with in a democratic polity, or, indeed, in any other form of government.

Given my views of the proper relationship between courts and the culture, I must disagree about the correct basis for praising or criticizing the decisions Cardinal George discusses. The 1954 decision in *Brown v. Board of Education*[14] was correct because it can be supported by the Constitution (though the Supreme Court's opinion signally failed to demonstrate that). The ratifiers of the Fourteenth Amendment's Equal Protection Clause must be taken to have assumed that the clause was compatible with segregated schools. *Plessy v. Ferguson*'s separate-but-equal doctrine, announced in 1896, accepted that assumption,[15] but subsequent history rebutted it. By 1954, the Court could have said that it was apparent in everything from colleges to drinking fountains that separate was not equal. The Court was forced to choose, the argument would have run, between equality and separation. Since equality was the theme of the Equal Protection Clause, the choice had to be against

14. 347 U.S. 483 (1954) (holding unconstitutional "separate but equal" doctrine, determining that separate educational facilities for minorities were inherently unequal, thus violating the guarantee of equal protection of the laws provided for in the Fourteenth Amendment).

15. 163 U.S. 537 (1896).

government-sponsored segregation. That argument seems to me sound. Those who think it is not should regret the *Brown* decision.

In contrast, no argument can be made that *Roe v. Wade*[16] has any constitutional foundation whatever. The opinion by Justice Harry Blackmun does not trouble in just over fifty-one pages to make even the semblance of a legal argument. After being subjected to a lengthy and irrelevant survey of past and present attitudes and practices about abortion in various nations and historical eras, the reader is simply told that there is a constitutional right of privacy, whose rationale and limits are not even sketchily outlined, and then informed that this right covers a woman's right to abort. The pro-abortion forces, largely centered in the intelligentsia, of course care nothing about constitutional disingenuity, much less the legitimacy of process; they want abortion and they do not care how they get it.

I am, however, unable to agree with Cardinal George that "*if* the unborn are 'persons,' their right to life is guaranteed by the Constitution."[17] The unborn are certainly humans and in that sense persons, but they are not "persons" within the meaning of either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. The framers and ratifiers of that Amendment were concerned to protect the newly-freed slaves; the subject of the unborn and abortion was no part of their understanding of what they were doing. Not only is the record bare of any discussion of the topic, and there certainly would have been discussions if abortion was to be wholly banned, but the text of the Amendment will not bear such a construction. It begins in Section 1 by stating that "All persons born or naturalized in the United States" are citizens of the United States and of the states in which they reside. The unborn can hardly be said to be either "born or naturalized." In the next sentence "persons" are guaranteed due process and equal protection of the laws. The natural reading is that the same people are "persons" in the first and second sentences. Section 2 apportions representatives in Congress according to "the whole number of persons in each State." It cannot be supposed that the census either then or now must count the number of the unborn in each state in order to fix the number of representatives to which each state is entitled.[18]

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16. 410 U.S. 113 (1973).

17. Cardinal George, *supra* note 1, at 8.

18. *See* Nathan Schlueter, Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS, Jan. 2003, at 28-36.

The conclusion must be that the Constitution is indeed silent on the subject of abortion, being left, as most issues are, to the moral choice of the American people expressed in the laws of their various states. The Constitution is also morally neutral on the subjects of armed robbery, arson, rape, injury caused by negligence, and so on. That is no indictment of the Constitution. It is a framework within which moral choices are to be made democratically. It was never intended to take positions on every topic that is the subject of contention. That does not mean that all law is "morally neutral" on abortion. The Constitution has nothing to say on the subject, but the states can address abortion. The states' failure to ban it is not neutrality any more than, as the Cardinal says, the laws of South Carolina in 1859 were neutral on slavery by not requiring anybody to own slaves, but permitting individuals to do so if they wished.[19] The Cardinal is also quite right in saying that religion has been "given over, by law, to the vicissitudes of culture."[20] A deep and bitter antagonism to religion is manifest in almost every Supreme Court opinion construing the First Amendment's admonition that "Congress shall make no law respecting an establishment of religion."[21] That text, quite obviously, bars only a federal establishment of religion. The founders knew what an established religion was: one favored by government, as was common in Europe and in some American states at the time.[22] In fact, the curious phrase "respecting an establishment of religion" when one would have expected a more direct statement, such as "Congress shall not establish a religion," perhaps reflected a desire to keep Congress not only from establishing a national church but also from interfering with the establishments existing by law in certain states.

Our modern jurisprudence, which finds a forbidden "establishment" in such matters as a crèche on public property,[23] public school prayer before a football game that nobody be hurt,[24] or the posting of the Ten Commandments on a high school wall,[25] derives almost entirely from Thomas Jefferson's 1802 letter to the Danbury Baptist Association stating that the religion clauses of the First

19. Cardinal George, *supra* note 1, at 9.

20. *Id.* at 10.

21. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); Edwards v. Aguillard, 482 U.S. 578 (1987); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

22. *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 55 (2002).

23. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

24. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

25. Stone v. Graham, 449 U.S. 39 (1980).

Amendment had the effect of "building a wall of separation between church and State."[26] We have long known from the historical evidence that Jefferson's view was idiosyncratic, not reflective of the views of those who sought, wrote, proposed, and ratified the amendment. A recent definitive historical study, *Separation of Church and State* by Philip Hamburger, professor of law at the University of Chicago, demolishes forever the "wall" metaphor as a basis for constitutional doctrine.[27] The Danbury Baptists, who had sought a letter from Jefferson about religious freedom, were so displeased with what they received that they did not make it public.[28] While opposing establishment, they regarded Christianity as too important to government to agree that religion and the state should be strictly separate.[29] There is a good deal of anti-Catholicism and the influence of the Ku Klux Klan in the subsequent conversion of the clause into what the Court makes of it today. Justice Hugo Black, who was far more important in the Klan than he subsequently admitted, played a leading and somewhat devious role in that conversion.[30]

The future course of the Establishment Clause will provide an interesting case study of the Court's willingness to correct a line of decisions that is now incontestably a major perversion of the Constitution. If the various Justices take the original understanding of the clause more seriously than their own precedents, the "wall" will crumble and be replaced by some degree of allowable interaction between religion and government. In our current moral chaos, that can be seen only as a beneficial development. On the other hand, we can expect a Court majority to continue in what is now plainly an illegitimate course if the Court remains firmly in the grip of the values of the intelligentsia, a major component of which is a secularism that ranges from indifference to hostility toward religion.

Finally, in regard to the subject of same-sex marriages, Cardinal George is, of course, correct in saying that judicial rulings that states must accept such unions effectively abolish the traditional conception of marriage by "remov[ing] any logical basis for insisting on

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26. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *in* THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984).

27. HAMBURGER, *supra* note 22, at 144-90.

28. *Id.* at 163.

29. *Id.*

30. *See, e.g.*, ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 349-60 (1994) (describing Justice Black's analysis of the Fourteenth Amendment and the Bill of Rights).

monogamy, fidelity, or permanence of marital commitment."[31] This suggests, however, that the Cardinal is treading on dangerous ground when he says earlier in his address that "Equal protection of the laws is a basic human right, rooted in the equal dignity of all human persons."[32] All laws make distinctions and thus, in some respects, may be said to deny equality. A generalized version of equal protection without regard to historical context cedes to judges the power to invalidate any law they happen not to like. The proscription of women in combat, the difference in sentences for those convicted of larceny and those convicted of armed robbery, the provision of capital punishment for murder but not for manslaughter, and the distinction between the negligent driver and the careful one, though both are involved in accidents, are among the thousands of instances where the law denies equality without running afoul of the Equal Protection Clause.

It is impossible that all persons be treated by the law in the same way. The question is whether the created inequality violates the intentions of the Fourteenth Amendment. We know that the Equal Protection Clause of the Fourteenth Amendment had as its core idea that the newly-freed slaves not be disadvantaged at law simply because of their race. Once we go much beyond that, we cede to the judges the right to rule upon which inequalities to accept and which not to accept: a complete power to invalidate any law they happen not to like.

The argument for a federal right to same-sex marriage will probably rely upon the Equal Protection Clause and will analogize the status of homosexuals to that of blacks prior to *Brown v. Board of Education*[33] or, more pertinently, to *Loving v. Virginia*,[34] the 1967 decision that found a denial of equal protection in laws prohibiting interracial marriage. If Sally is free to marry John under the laws of their state, is it not a denial of equal protection to deny Henry the right to marry John? The notion is preposterous, which does not mean that some courts will not adopt it. The high courts of Hawaii and Vermont already have adopted this notion by fantastical interpretations of their state constitutions.[35] There

31. Cardinal George, *supra* note 1, at 15-16.

32. *Id.* at 6-7.

33. 347 U.S. 483 (1954).

34. 388 U.S. 1 (1967).

35. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding, on equal protection grounds, that the state of Hawaii's refusal to grant marriage licenses to same-sex couples must meet the burden of "strict scrutiny"); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that, under the

are signs that the Supreme Court of the United States may not be far behind. I agree with the Cardinal that we need a constitutional amendment of the sort now being proposed to protect marriage from judicial redefinition or destruction.

If it is true that the problem with all of the cases discussed is not that the courts made the wrong cultural choices, but that they rejected their duty to interpret the Constitution as it was originally understood, then it would be equally improper for the courts to respond to a different culture, one more congenial to the Cardinal and to me. Their duty is to the law and nothing else.

I do not often rise to the defense of Justice Oliver Wendell Holmes, but it does seem to me he has been undeservedly criticized for some of his dicta in *The Path of the Law*.[36] He did say that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[37] In articulating his "bad man" theory of the law, Holmes did not mean that there is not a universe of moral understandings to which good men will adhere without legal compulsion. It is sometimes said, rather unperceptively, that his admonition is of no help to a judge who can hardly decide a case by prophesying what he himself will in fact do. Holmes was talking to law students, urging them not to confuse law with what they would prefer on moral grounds but to understand that, for practical purposes, the law is what judges say it is. To make his point, Holmes may have overstated the certainty with which one may prophesy. The law's silences, ambiguities, contradictions, and anticipated evolution often offer opportunities for lawyers and judges alike to maneuver. They also offer ample opportunity for making mistaken prophecies about what courts will do. That said, it must also be recognized that however much leeway a particular statement of law may afford courts and practitioners, there are limits that should not be transgressed. If those limits are respected, some reasonably accurate prophecies are possible.

I am fond of quoting Justice Holmes on the subject of judicial adherence to the law. He and Judge Learned Hand lunched together one day. Afterward, as Holmes departed, Hand called after him "Do justice, sir, do justice." Holmes stopped and replied, "That is not my

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common benefits clause of the state constitution, same-sex couples may not be excluded from the benefits and protections of marriage).

36. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Reprinted in 110 HARV. L. REV. 991 (1997).

37. *Id.* at 461.

job. It is my job to apply the law."[38] I meant much the same thing when I dissented from a decision that seemed to proceed from sympathy rather than from law: "[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law."[39] That remains my view of the very different functions of judges and legislators, and it is rooted in the Constitution's separation of powers.

Morality comes into play in assessing law and, perhaps, reforming it, but that is not the business of the judge. I once attempted to state what I regard as the judge's role:

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.[40]

That is a hard saying and a hard task, but there is after all a morality of process as well as a morality of substantive outcomes. Perhaps we will never see a majority of the Supreme Court willing to abide by the discipline proper to their role. But if the morality of process, the view of the judicial function I have outlined, had been observed by a Court majority, each of the cases Cardinal George and I find thoroughly objectionable would have come out the other way.

The legislature and the executive, unlike the judiciary, have an obligation to take morality into account in making their decisions. The difference is at bottom what we mean in speaking of the Constitution's separation of powers. The relationship of morality to law in different institutional contexts is a subject that will never be

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38. ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990); *cf.* Elizabeth Shepley Sergeant, *Justice Touched With Fire, in* MR. JUSTICE HOLMES 187, 206 (Felix Frankurter ed., 1931) (recounting different words used in the same exchange).

39. Hohri v. United States, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., dissenting from denial of reh. en banc).

40. Robert H. Bork, *Tradition and Morality in Constitutional Law*, Francis Boyer Lecture at the American Enterprise Institute for Public Policy Research (December 6, 1984), *available at* http://www.aei.org/news/newsID.449/news_detail.asp (on file with the Ave Maria Law Review).

exhausted. Whether the graduates of Ave Maria School of Law spend their careers as practicing lawyers, legislators, executives, or judges, their time at this school should start them on a lifelong pursuit of a better and deeper understanding of the moral foundations of the law.