

# THE COST OF CIVILITY—A POLITICO-THEOLOGICAL MEDITATION FOLLOWING THE JUDGEMENT HAND-DOWN AT THE SUPREME COURT THIS WEEK

*Posted on September 29, 2019 by Andrew Brown*

## READINGS



### **Exodus 19:16-25, 20:1 (NRSV) The moments before God gives the Ten Commandments and other laws to the people**

On the morning of the third day there was thunder and lightning, as well as a thick cloud on the mountain, and a blast of a trumpet so loud that all the people who were in the camp trembled. Moses brought the people out of the camp to meet God. They took their stand at the foot of the mountain. Now Mount Sinai was wrapped in smoke, because the Lord had descended upon it in fire; the smoke went up like the smoke of a kiln, while the whole mountain shook violently. As the blast of the trumpet grew louder and louder, Moses would speak and God would answer him in thunder. When the Lord descended upon Mount Sinai, to the top of the mountain, the Lord summoned Moses to the top of the mountain, and Moses went up. Then the Lord said to Moses,

‘Go down and warn the people not to break through to the Lord to look; otherwise many of them will perish. Even the priests who approach the Lord must consecrate themselves or the Lord will break out against them.’ Moses said to the Lord, ‘The people are not permitted to come up to Mount Sinai; for you yourself warned us, saying, “Set limits around the mountain and keep it holy.”’ The Lord said to him, ‘Go down, and come up bringing Aaron with you; but do not let either the priests or the people break through to come up to the Lord; otherwise he will break out against them.’ So Moses went down to the people and told them.

Then God spoke all these words . . .

**From Carl Schmitt (1888-1985), *Political Theology: Four Chapters on Sovereignty* (1922/34), MIT Press, 1985, p. 36)**

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development — in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver — but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.

**From “*The Faith of the Faithless: Experiments in Political Theology*” by Simon Critchley (Verso Books, London, 2012, pp. 62-63)**

The paradox of sovereignty . . . On the one hand, the law is and has to be the free expression of the general will, the perfect interiority of a people to itself, but on the other hand, there has to be a lawgiver, someone who stands outside society and by virtue of which law has authority beyond the self-authorizing acts of the general will. The only legitimate law is the one that we give ourselves, yet the law has to be given to us.

[. . .]

As Groucho Marx might have said, don’t let appearances deceive you: these “two things” do not just look contradictory, they *are* contradictory. . . . The authority of the law whose essence is the general will requires the fiction of a lawgiver who overrides the will of the people. The people cannot give the law to itself without the fiction of the law being given to them by an outside agency. Political self-authorship has to be underwritten by a ghost author, a quasi-divine legislator.

The vast question that this raises is the relation of politics, law, and legal authority to religion and religious authority. This is the problem that Rousseau tackles in the final pages of *The Social Contract*, which deal with civil religion. To say that this is a contemporary political social problem is to risk considerable understatement. If it is the fiction of the legislator that provides

the necessary authority for a people to self-authorize itself through the general will, then can we have such authority without religion? That is, can we have law without religion, without some moment of sacrilization? Rousseau puts the problem much more sharply: in order to establish a legitimate political order, there would need to exist a “superior intelligence who saw all of man’s passions and experienced none of them, who had no relation to our nature yet knew it thoroughly.” In short, “It would require gods to give men laws.”

In an intriguing footnote, Rousseau turns to Machiavelli (not the evil “Machiavel” of Shakespeare, but “an honest man and a good citizen”) when he writes: “The truth is that there has never been in any country a lawgiver who has not invoked the deity; for otherwise his laws would not have been accepted. A wise man knows many useful truths which cannot be demonstrated in a way that will convince other people.” Every legislator has to authorize the law with reference to the beautiful fiction of a divinity.

—o0o—

## ADDRESS

### **The cost of civility—A politico-theological meditation following the judgement hand-down at the Supreme Court this week**

I’d like to return this morning to three thoughts that, from time to time, I bring before you and then to interweave them around a fourth so as to be able to finish with an admittedly challenging thought relevant to the situation in which our society finds itself.

The first idea is that articulated by [Carl Schmitt \(1888-1985\)](#) in 1922: ‘All significant concepts of the modern theory of the state are secularized theological concepts’. As some of you know I think there is good evidence to suggest that theological ghosts, especially the ghost of a supernatural God, continue to haunt our secular ideas about how we are best to govern and be governed.

The second idea follows on from this. Despite not believing in them as actual, existing entities, I remain fascinated by ghosts (including the ghost of God) because there is good evidence that an anthropological and sociological study of a society’s belief in, and depiction or rejection of, ghosts can tell us a great deal about some of the hidden fears and worries which are driving and/or disabling that same society. If you can understand these fears and worries properly then there is some real chance of properly addressing them and so freeing that society to live in better, more confident and creative ways.

The third idea is that our modern, sceptical and secular society will continue to be unable to live well and as fully as it might without having in play what the poet [Wallace Stevens called a ‘supreme fiction’](#), namely, an idea that serves ‘as a fictive replacement for the idea of God, known

to be fictive but willfully believed' ([Brazeal, Gregory. 'The Supreme Fiction: Fiction or Fact?' \*Journal of Modern Literature\* 31, no. 1 \(2007\): 80-100.](#))

This morning, with the help of the philosopher [Simon Critchley](#), I want to begin by weaving these three ideas around a fourth, namely how we believed we got our laws in the first place and why we have continued to feel that by living in accordance with them, i.e., under the rule of law, rather than under the completely arbitrary rule of powerful individuals and interest groups, is the best and most civilized way we can structure our society. As Aristotle memorably and influentially wrote in the 4th century before the Common Era this is to explore our society's once strong intuition that 'It is more proper that law should govern than any one of the citizens' (Politics 3.16).

To get going we'll begin with the paradox of sovereignty to which Critchley points, namely that the 'only legitimate law is the one that we give ourselves, yet the law has to be given to us.'

We all, I think and hope, experience the very strong, intuitive feeling that unless the law is somehow genuinely believed by us to be a free expression not only of our own will but also the wider, general will of the people, then the law really wouldn't, couldn't have much effect upon any of us.

But on the other hand, as Critchley notes, 'there has to be a lawgiver, someone who stands outside society and by virtue of which law has authority beyond the self-authorizing acts of the general will.'

Here we come face to face with the equally strong, intuitive feeling that for the law to be truly authoritative it must be based upon firm, first principles that stand outside of us. At this point we find ourselves before the first principle above all first principles, namely, 'God' or, in our secular age, the ghost of God, the God who is (or can be) still somehow present in his or her very absence.

At this point Critchley quips, but in a very serious, non-facetious way that: 'As Groucho Marx might have said, don't let appearances deceive you: these "two things" do not just look contradictory, they *are* contradictory.'

This is a somewhat discombobulating thought and, not surprisingly, this has served to make us, rather too eagerly in my opinion, keen to find easy, rationalist ways to resolve this contradiction into some higher synthetic form or, when that cannot immediately be done, simply to set it aside as being a mere appearance of some higher unified reality that we will, eventually, be able to uncover. At these moments the ghost of [Hegel](#) spookily appears from out of the gloom to whisper in our ears that 'the rational alone is real' ([Elements of the Philosophy of Right](#)). Indeed, it's worth noting that Hegel's '[Absolute](#)' may be thought of as being a ghostly form of God.

This desire to overcome contradictions in some rational higher unity becomes particularly pressing when it comes to the rule of law because the thought that its authority rests upon a genuine and unresolvable contradiction is for many (most?) people too frightening to contemplate.

And I do understand this fear because I almost cannot bear to contemplate the possibility of living in a society which is without the rule of law. Without it how, in a civilized fashion, would we be able effectively to censure and stop self-serving people and groups who are desirous of killing, stealing, defrauding, lying, dissembling and so on?

Although the paradox of sovereignty has become particularly visible at this juncture in our history we need to recall that for millennia it was hidden from most people because they lived in a society which took as axiomatic the existence of a supernatural God who, prototypically and mythologically on the top of Mount Sinai, gave us the rule of law in the first place. Indeed, it is well within my own lifetime and personal experience that huge swathes of 'the people' would regularly find themselves in a church standing in front of painted representations of the two stone tablets carved with the Ten Commandments given to Moses by God himself: To worship only God, to honour one's parents, to keep the sabbath day holy, and also the prohibitions against idolatry, blasphemy, murder, adultery, theft, dishonesty, and coveting.

However, today, for many complex reasons, many (most?) of us feel that the existence of such a supernatural god who gave the law was always a supreme fiction but this should not serve to hide from us that, again as Critchley notes,

*'The authority of the law whose essence is the general will requires the fiction of a lawgiver who overrides the will of the people. The people cannot give the law to itself without the fiction of the law being given to them by an outside agency. Political self-authorship has to be underwritten by a ghost author, a quasi-divine legislator.'*

But this need for a ghost author, a quasi-divine legislator raises a huge and problematic question for our own secular age. As Critchley asks:

*'If it is the fiction of the legislator that provides the necessary authority for a people to self-authorize itself through the general will, then can we have such authority without religion? That is, can we have law without religion, without some moment of sacrilization?'*

Rousseau though the answer was 'no' being convinced that: 'The truth is that there has never been in any country a lawgiver who has not invoked the deity; for otherwise his laws would not have been accepted.' If that is the case then we need to ask why on earth would our own society and time be any different? If Rousseau is correct then our society's pressing need for a supreme fiction, for a secular, civic, sacralizing religion appropriate for its own age should be very clear.

(Some of you will recall that I raised this matter towards the end of last week's address).

This challenging thought brings me to the insight with which I wish to finish today. It's borrowed from a theologically informed political philosopher to whom I introduced you a few weeks ago, Eric Voegelin (1901-1985), a man who experienced first-hand the collapse of the rule of law in his own country of Germany before fleeing to the USA in 1938 and becoming a citizen there in 1944.

As a sceptic with a naturally religious mind I first became deeply interested in Voegelin because of something he once told a friend of his, a certain Professor Heilman, namely, that 'Of course there is no God. But we must believe in Him.' Now why did he say this? Well, according to a perspicacious commentator on his thought, Maben Walter Poirier:

*'Voegelin was a social and political thinker who deeply wanted his fellow human beings to experience civility in their relations with one another (a far from unworthy goal in these modern and violent times) more than he wanted them to know the truth, and unfortunately this civility, in Voegelin's estimation, could only be purchased by their knowingly pretending to credit what he, and they, conceived to be an untruth. This is the cost of civility and, for Voegelin, we have no choice but to pay the price if we mean to be decent and moral. Simply put, the origin of civility is in the lie that we knowingly tell ourselves about this most important matter, namely, "there is no God, but we must believe in him" even if there is no God, for the alternative is too terrible to live through.'*

This presents a real challenge to me as a child of the Enlightenment after the death of God because it forces me to consider the disturbing possibility that, at least theologically speaking, it might not be appropriate always and everywhere to dwell solely on speaking the truth. In fact, to do so may, at times, 'be reckless . . . which is something that one ought never to be.' Maben Walter Poirier says of that this that:

*'It would almost seem as if Voegelin's sense of morality demanded that the horrendous consequences of speaking the truth be brought to the attention of those who may be inclined to be irresponsible and improvident enough to want to speak it, and this alone should suffice to induce them to be prudent where speaking the truth is concerned. Evidently, Voegelin saw a conflict between being moral and being truthful, which is something that no classicist or scholastic would acknowledge.'*

For me, at least, the thought that there might be 'a conflict between being moral and being truthful' is to begin to walk across terrain upon which it is not comfortable to travel.

But at a time when the continuing health and well-being of the rule of law seems so very important for our divided society, a continued loyalty to the beautiful, supreme fiction of a divinity who gives the law may well be more important than I, and perhaps you too, had realised, more important even than the truth that such a divine entity is vanishingly unlikely to exist.

In consequence I feel compelled to take with the utmost seriousness the words Voegelin uttered to his friend over half a century ago that ‘there is no God, but we must believe in him’ and, in the absence of any other immediately available solutions to the paradox sovereignty, we may well need continue to say this ‘even if there is no God, for the alternative is too terrible to live through.’

In short, there may be real wisdom and merit in continuing to live ‘as if’ the law were given to us by a divinity in the the kind of sacralizing religious moment recounted in the ancient book of Exodus.