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Defining Life, Defining Law

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The background assumption of my brief essay is that there is a profound analogy between *life* and *legal authority*, in the strong, ontological sense of analogy. By that I mean that there is a connection, that they represent the same principle of order expressed in two different contexts. There is a lot that would need to be said to elaborate and justify such a conception, but that lies beyond our present scope. Instead, here, I will make a simple argument that has complex implications.

The argument is that, when the law reckons with the matter of life, it inevitably reckons with its *own* foundation and its own essence. This is so because the task of formulating the significance of human life in the juridical sphere, or, in other words, the task of recognizing life as a legal matter, defining it or at least its legal parameters, and establishing the specific obligations in its regard, is not just one matter alongside others, but is rather one that forces law, either explicitly or implicitly, to come to terms with the authority that constitutes law itself. When we attempt to define life in law, in other words, we are necessarily, though implicitly, defining law in an analogous sense at the same time. In this regard, the question regarding human life in the juridical sphere is similar to the question of religion and the claim it places on law. The reason for the similarity, and the reason why one cannot grapple with the life question or the religion question without determining at a fundamental level the nature of law, is that the originating principle of life, law, and religion is absolutely identically one and the same. What is this principle? The obvious, though somewhat facile, answer to this question is God. The answer is obvious because it is true, and its truth has been recognized by essentially every serious thinker who has reflected on the matter, from the figures at the origins of Western civilization (say, Thales, Moses, and Cicero), to those who sought to break from Western civilization (for example, Nietzsche). But it is also an answer that would require a great deal of work to elaborate its distinctive and analogous bearing in each of the realms of nature, politics, and religion.

What I want to do here is look at the matter that *Roe*, and now *Dobbs*, have put on the table

from a perspective that seems to be the reverse of the more common approach, which considers what implications this juridical decision has for the question of life, not as a correction to that approach but as a complement to it. What I would like to reflect on here is the following: What does the position taken on the question of life (or perhaps the non-position) imply for the law, the foundation of our legal system, and the rule of law as it is lived? My suggestion is that there is a profound connection between the failure with respect to the life question and the general collapse of what we might call the “legal force” of law that we are currently undergoing in the United States from the Supreme Court to the local police, both of which are essentially expressions of a crisis of authority.

By refusing to acknowledge life as a *given*, the institution of law not only denies its religious roots, it also denies that it itself possesses authority. It follows that we have very little evident reason anymore to obey the law.

Almost two decades ago, Stephen D. Smith wrote a book called *Law’s Quandary* that garnered significant attention when it appeared due to the boldness of its central claim[1]: He argued that the law, as it generally understood itself in America, had been existing for some time in a state of what he called “nonsense,” insofar as it ultimately rested on assumptions (for example, that there *is* such a thing as “justice,” founded in an objective, transcendent order, that the law attempts to promote) that it explicitly denied, and that it could very well someday fall into crisis. It does not seem too far-fetched to think that that day is coming, if it is not already here.

The reality of life is something that the essentially quantitative methods that rule in science, as it is currently practiced, can only be *acknowledged* and never *demonstrated*, in the sense that they are wholly circumscribed within the horizon set by those methods so as to be exhaustively accounted for only within those terms. One can describe the functions normally associated with life in what are called “empirical” or “scientific” terms, but the question of the relationship of life to those functions is not itself an empirical one in this sense. What this means is that science must refer itself beyond this methodologically limited horizon in order to engage properly with life *as such*, to study it with the requisite rigor and adequacy. This “referring itself beyond” would connect science to authority in its various manifestations, both within the study of nature and beyond it. It is unsurprising, therefore, to discover that the practices of science prior to the systematic installation of an abstract empiricism beginning in sixteenth-century Europe occurred within an organic connection with other branches of learning, with the broader political community and, ultimately, with the Church. It is not possible to elaborate the point here, but it can be argued, and indeed has been argued, that the dissolution of this organic connection, and the methodological refusal of this self-transcending reference, has introduced a principle of disorder and fragmentation into the foundations of science, the consequences of which we are only beginning to deal with. One of the consequences directly relevant to the present argument is that, without an organic connection to *real* authority, science has made itself vulnerable to the pseudo-authorities of social and political ideologies, as but two examples.

Now, law faces a question—or perhaps a “crisis” in the etymological sense of the word, which is to say, a moment of decision in which the essence of the matter is at stake—that is similar (or analogous) to the one in science. There are numerous assumptions about what things are and what they mean that have to be taken in some respect as *given* as a foundation that makes

legal reasoning and decision-making possible. For example, what is liberty? What is a person? What is property? What is marriage? What is power? What is justice? Or even simply: What is law? These are not questions that the law can determine itself, or, if circumstances require that it attempt to do so in a particular case, it will always be on the basis of other things taken as authoritatively given. Among these given realities there is arguably none that is more fundamental than human life. These realities, and what they mean, can only be acknowledged as already established in some respect; they cannot be wholly accounted for and justified from within the system of law itself. So, what is it that grounds the assumption of these given realities, if the legal system cannot do so? What ultimately justifies a particular interpretation of their significance? This question is more radical than it may seem. Clearly, a reference to legal precedent simply defers the question in its ultimate sense. By its very nature, the "voice of the people," which generally has something of a sacred status in the US, *cannot* be an authority, not only because it cannot make any abiding claim (that is, any claim that could not be overturned the very next moment by the same voice), but also because the point of this voice's appeal is always to eschew authority as something *given* a priori. Until fairly recently, the Constitution represented something of an ultimate point of reference. But it cannot serve this function in a finally adequate way. Speaking against it is, of course, the increasingly common recognition of the unresolvable hermeneutical quandary: Who determines in the end what the Constitution means? But even if there were a way to establish a univocal meaning to the claims articulated in the Constitution, this would not suffice because the Constitution cannot logically establish its own authority. It may be the case that we have been able successfully for over two centuries to skate on the relatively thin ice covering over the deep abyss of what Smith called the "nonsense" that has always lain beneath our legal system. But we can all now see the cracks emerging. What does one say to those who are currently calling into question the foundations of American government as radically unjust? A purely pragmatic answer—such as, "if you don't like it, you can just leave"—by definition works only as long as it works. History is now summoning us to address this question in a more fundamental way.

Let us look at what is happening concretely with the question of human life. On August 27, 2022, NPR published a spot that addressed just this issue, which bore the title "When does life begin? As state laws define it, science, politics, and religion clash." The point of the little piece was to show that Dobbs has introduced a new instability into the political landscape because it has opened a question that had ostensibly been bracketed out and has required the states to give an *answer* to it. (Note how this *particular* issue lies so deep within, arguably at the very foundation of, the political order, so that to raise a question about this matter, compared to others, such as tax code or health care, is to disturb that order.) The task of giving an answer to the question of when life begins, however, inevitably entails, at the same time, determining the *grounds* for such a response. To what, or to whom, does one appeal in order to define what represents life warranting legal protection? The article first goes to what would appear to be the most obvious authority in this matter, namely, "science." But this move, however obvious it might seem, is not neutral, which is to say that it implicitly takes for granted assumptions about the nature of life without acknowledging that fact as constitutive of its nature. The appeal is made to science not just because it is assumed that life, at least as a factual matter, is most properly the matter of the objective and quantitative methodologies of biology, but also because it is assumed that such methodologies do not depend on any particular interpretation of the nature and meaning of life which means that their determination or judgments can be made outside of any fundamental philosophical or theological commitments. This is, moreover, assumed to mean the judgments are essentially "a-political." Science would appear to be a "value-free" and "metaphysical commitment-free" source for normative judgments.

First, it is worth pointing out that the hope of providing a “neutral” authority on these terms is frustrated. The NPR article itself explains that there is no “consensus” among scientists and doctors about when life, sentience, or personal life begins: “Medicine can answer the question ‘When does a biological organism cease to exist?’ But they can’t answer the question ‘When does a person begin or end?’ because those are metaphysical issues.” The appeal to science as an authority fails because science itself, as it currently understands itself, has no stable and unifying foundation that would allow it to provide a common standard for judgment. The abstraction from metaphysical commitments does not open up the possibility of universal consensus but, precisely to the contrary, makes such an intellectual communion impossible, leaving the supposed scientific “data” vulnerable to extra-scientific exploitation. My primary purpose here, however, is not simply to highlight the confusion and attempt to resolve it by marshaling evidence in favor of life. Instead, I am proposing that we step back and think about what all of this means for the political order and the rule of law more generally.

The NPR article expresses a pervasive sense that, if we need to define life in law, we ought to turn to science precisely because science represents a fund of knowledge that does not derive from any authority, and thus can operate strictly on its own terms, innocent of any transcendence and the tricky questions this would raise in a “pluralist” society. But this appeal to science is an appeal to an authority that is not organically connected to any source of authority, which is to say that what is being sought is *not* an authority but a functional *substitute* for authority. To the extent that the legal institution makes an appeal to such a pseudo-authority, it is in fact confessing its own refusal of authority in principle. What I am suggesting is that this radically de-natures law. It renders law essentially impotent and empty—or as Stephen Smith puts it, “just words.”

Let us look at the matter more closely. In a passage from his illuminating book, *On Power: The Natural History of its Growth*, written in 1945, Bertrand de Jouvenel observes that law can genuinely govern human affairs only insofar as it inspires what he calls a “religious veneration,” but what I would prefer to call real authority as distinct from mere power. Law can regulate human behavior *qua* human only if it directs human reason and the human heart, giving order to human passions—which is to say, only if it appeals to, informs, and illuminates the imagination. The great legal historian Harold Berman presented a profound understanding of this point when he argued for the religious roots of the law and the constitutive significance of the solemn ritual that attends its practice, and a similar point has been made from a very different perspective (and with a very different purpose) by the contemporary Italian political philosopher Giorgio Agamben in his book *The Kingdom and the Glory*. For his part, Jouvenel explains that law was able to *be* law only if it retained a connection to the transcendent, that is, to a dimension of existence beyond the flux of history and the fleeting storms of passion driven by immediate interests and reactionary opinion: “There had . . . to be a belief in the necessary character of the laws; they had to be looked on as inscribed in the nature of things, and not merely as a product of the human will.”[2]

Jouvenel goes on to argue that this belief faded in late modernity, and the consequences of its absence came to fruition in the mid-twentieth century in Europe. Whereas we in the US tend to interpret fascism as having some sort of causal lineage with the earlier tradition of absolute monarchy, Jouvenel presents it as a result of absolutized democracy, in which no aspect of existence, no publicly acknowledged “truth” about God, man, or world, is allowed to stand above political process. This he describes in another part of the book not so much as a determination of the “will of the people” through voting, as it is a submersion of all individual thought and judgment under the indomitable sway of parties in the “political machine” of the

modern world:

> Whereas formerly only the choice of the rulers was committed to the strife of parties, there was now not a single rule of social life which did not depend for its continuance on the issue of an election. The life of democracies has been marked by a growth in the precariousness of laws. Kings, chambers of peers, senates, anything that might have checked the immediate translation into law of whatever opinion was in vogue, have everywhere been swept aside or rendered powerless. The law is no longer like some higher necessity presiding over the life of the country; it has become the expression of the passions of the moment.[3]

This description, which no doubt would have appeared to Americans in 1945 like the vision of a lonely prophet whose claim to divine inspiration is not obviously to be trusted, has become the dominant experience of our time, plain to everyone.

Now, I want to highlight the "as if" character of Jouvenel's interpretation of law: for it to function properly, he says, law must be regarded "as if" it were inscribed in the nature of things; law has to be "like some higher necessity." For Jouvenel, who is himself very much a modern in his intellectual commitments, it is not necessary for law actually *to be* related to a higher necessity, which draws its claim on the imagination from its actual inscription in the nature of things. For all practical purposes, it is enough that we think it so. Smith's book sought to bring to light precisely the dilemma generated by this "as if." In America, he explains, we do not have a single religious tradition that would unify us as a people and give an evident substance to those institutions that would seem to rest on that tradition and derive their authority therefrom. Instead, we have many religious, and even—increasingly—no religion at all. But this gap cannot but be filled, and among the viable candidates in America for "religion substitutes," he suggests, "law surely appears near the top of the list. Its power, its majesty, its imperial scope, its deep roots in tradition, and its well-honed ceremonies all fit it for the role."[4] America has been able to remain a nation in spite of the rigorous separation of its political institutions from an established religious tradition, because it has managed to find an alternative foundation for the common good. Key to American history in this regard "has been the substitution of law—or the 'rule of law,' or the Constitution—for traditional religion as a unifying force and an object of common loyalty."[5] Smith quotes in this context Pierre Schlag's observation that "modern law [is] 'the continuation of God by other means.'"[6]

A basic dimension of the argument Smith makes in his book is, first, that modern law turns out to be a very strange substitute for religion, insofar as, unlike most idols, it explicitly claims to be wholly without any religious significance; to the contrary, it insists on its secularity: "if contemporary law is a species of idolatry, it is a peculiar and confusing sort of idolatry, in which the devotees regularly *deny* that the idol has the transcendent qualities it would need to justify the uses they make of it."[7] And second, that the so-called "rule of law" has been able to survive so far in America in spite of what amounts to a self-contradiction at its roots. We have been able up till now to live with the "beneficent illusion" that law has a foundation, and, in a sense, itself *is* a foundation. Smith in fact quotes Antonin Scalia as having confessed this worrisome situation: "That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it."[8] Smith concludes his book with a kind of exhortation that is all the more disturbing for being offered in reassuring tones that come off as somewhat anxious: "Let's hope we can keep up the illusion," he effectively

says, deriving some consolation from the fact that it has apparently worked in the past. And then Smith suggests that, eventually, if the time comes when the illusion no longer holds, we ought to consider the possibility of opening ourselves, in a leap of faith, to a higher reality.

I would like to respond by saying the dilemma, "Law's Quandary," goes even deeper than Smith's book allows, to the extent that the book assumes that a "beneficent illusion" could in any respect, even in primarily practical terms, be "good enough." "As if" language is the language of despair; it is Kant's adoption of such language as modernity settled in as the regnant form of thought in the West that led Nietzsche to give him the title "the Great Delayer," insofar as Kant sought to prop up the old values that governed existence in its social and political expression on useful fictions of reason. The sense that law can function "as if" it were an expression of some higher necessity as long as we recognize we are all better off—safer, more prosperous, etc.—for thinking it so, is a spell whose power over us has died. In the first place, it works only insofar as people actually believe they are better off for thinking it so, and second, much more profoundly, human beings cannot remain human if they allow the horizon of political life to be set merely by "what works." To think that law could at least *function* as a "beneficent illusion," is to misunderstand the nature of law, which is not a mere tool to control public behavior but is able to regulate human action in a proper sense only insofar as it first bears witness to the truth of things, and among these truths there is none more basic than the truth of human life. The regulation of behavior cannot but take its bearings, whether explicitly or implicitly, from the nature of things and the nature of things cannot be the nature of things only as a functional part of some practical project, no matter how noble its aims. Instead, the nature of things is their *truth*, and as such can be affirmed only as in some respect absolute, independent of public opinion, and relatively indifferent to practical consequences. This sort of truth is something that must be respected by science. It cannot be taken as the outcome of some experiment. Law can properly appeal to science for standards only if science itself rests on the tradition-sanctioned authority of truth.

The "rule of law" not only fails as a substitute for the religious tradition that grants unity to a people because it explicitly rejects this function, it also fails in practice by refusing to bear witness, in any authoritative way, to any truth about reality. The paradigm of this refusal is the refusal to acknowledge human life as a given reality to be respected. Note that the strongest statements in favor of life in the Dobbs decision speak of the "State's interest in protecting life": it is cast as a matter of the interest of a particular party, in this case, the State, rather than simply the acknowledgment of a good, a truth, a reality that speaks for itself. In other words, by refusing to acknowledge life as a *given*, the institution of law not only denies its religious roots, it also (and I would say: therefore) denies that it itself possesses authority. It follows that we have very little evident reason anymore to obey the law, to pretend to be a "people," and so forth. The lack of reason may have been there for a while—some, including myself, would argue it came with the foundation of the country—but it has become patent and effective in our age. The confessed incapacity to deal with the life question is a symptom of this absence of reason, and will no doubt also be a cause of its further disappearance.

It is in this sense that the question posed by *Roe v. Wade* and *Dobbs v. Jackson* introduces a *crisis* into law in the etymological sense we described: a moment of decision in which the essence of what decides is at stake. Where the question is directly posed, no illusion regarding the law, its nature and foundation, is possible, because responding to the question inevitably requires determining not just an answer, but the very standard by which to determine an answer. In this case, the standard by its very nature cannot be given *within* the law in the sense of deciding the relative weight of various precedents. Instead, the standard in this case can only be the ultimate one, or else it will prove to be a substitute for the ultimate one that

cannot fulfill the function to which it inevitably pretends, that of being an idol, a representation of the transcendent order of things, that which opens human existence to its proper dimensions. The standard can be provided only by what is *actually* the ultimate principle of human existence, both in its biological and its socio-political sense. If the law does not acknowledge an authority in this paradigmatic instance, this case of all cases, it thereby confesses its own lack of authority to which there can be no legal remedy.

[1] Stephen Smith, *Law's Quandary* (Cambridge, MA: Harvard University Press, 2007).

[2] Bertrand de Jouvenel, *On Power: The Natural History of Its Growth* (Carmel, IN: Liberty Fund, 1993), 307.

[3] Jouvenel, 307–08.

[4] Smith, 160.

[5] Ibid.

[6] Ibid., 161.

[7] Ibid., 164.

[8] Ibid., 163.

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