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Reconstructing the Rule of Law

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Many thanks to the organizers of this event, and much gratitude to Mark Tushnet, whose work, collegiality, and friendship we honor today.

Let me begin by noting that there is a seventh response to *Bush v. Gore*[1] not included in Balkin and Levinson's litany of responses[2] but expounded at length in an article published a few weeks back in the *Nation*, by Vince Bugliosi, the ex-District Attorney for the City of Los Angeles.[3] The action taken by the five conservative Justices on the United States Supreme Court, Bugliosi argued, was not just wrong as a matter of law, but criminal: It was a *malem in se*, fully intended, premeditated theft of a national election for the Presidency of the United States.[4] Now, as Balkan and Levinson would argue, this seventh, "prosecutorial" response—that the Court's action was not just wrong but criminal—is also not available to a devotee of either radical or moderate indeterminacy. Even assuming both criminal intent and severe harm—a wrongful, specific intent to thwart the democratic outcome and a profound harm to democracy—an element of the crime, namely the act, which in this case has to be misstating the law, cannot be borne out. The indeterminacy thesis, if true, logically precludes the moral or legal condemnation of a certain sort of criminality and venality—that of the official who intentionally and with harmful consequences violates an oath to uphold the law. If the indeterminacy thesis is correct, then there is no demonstrable violation of an oath to uphold the law merely because conclusion *X* does not follow from premises *A* and *B*, and there is no sense in trying to show one. More broadly, there is no sense, given indeterminacy, to holding this particular act of power (either *Bush v. Gore* itself or any other judicial construction or misconstruction of law) to the light of reason—at least, if by the light of reason we mean the light of *legal* reason. One can hold up power to the light of power, but nothing much follows morally from doing so, although quite a bit may follow politically, as Stanley Fish has never tired of reminding us.[5]

There is a basic incompatibility between the indeterminacy thesis on the one hand and, on the other, the moral condemnation of official conduct as violative of one's duty to uphold the law. This incompatibility is, I think, what lies behind Frank Michelman's unease at being asked to sign the law professors' letter declaring his sense of "betrayal" by the Court's decision in *Bush v. Gore*, as a

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1. 531 U.S. 98 (2000) (per curiam).

2. Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 188–91 (2001).

3. Vincent T. Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11.

4. *Id.*

5. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS (1980); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING, TOO) (1994). *See generally* Stanley Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645 (1986).

law professor dedicated to the Rule of Law[6] (although he may just be reacting against the pomposity). The Rule of Law, presumably (or at least so the law professors' letter seems to imply) requires that decisions be logically deduced from prior decisions, and this decision cannot be so derived. But, Michelman worries, logical deduction of legal conclusions from what went before is flatly impossible, and everyone now teaching law knows that. There just isn't some mosaic or tapestry or seamless web of prior material—statutes, codes, decisions, constitutions, texts, primary documents, and all the inferences one can possibly draw from all of that—from which it follows that *Bush v. Gore* was wrong. It is indeed the case that *Bush v. Gore* does not follow logically from prior decisions, but that inconsistency can be claimed for many decisions, certainly including, for instance, *Brown v. Board of Education*[7] or Holmes's dissent in *Lochner v. New York*.[8] If the worst that lawyers-as-lawyers can say of *Bush v. Gore* is that it just does not follow from what went before—well, then, however bad, horrific, or imponderable the consequences of this terrible decision and however wrongful, deceitful, self-serving, or short-sighted the intent of the Justices that decided it, there has been no professional betrayal of our ethical identity as lawyers. Whatever disgust or anger or betrayal we feel is political, pure and simple, not legal. There is no determinate legal ground to stand on, if one wishes to cloak that disgust in the Rule of Law, once one grasps the inescapable meaning of even moderate versions of the indeterminacy thesis. If we're angry, we're angry as politically involved citizens, not as professional upholders of the Rule of Law. This is what law professors, particularly those committed to critical legal theory, perhaps even more so than lawyers, specifically know. It hardly makes sense for us to claim a betrayal when our description of the betrayal is contradicted by what we specifically and professionally know.

I am not a devotee of indeterminacy, and I think someone ought to respond to Bugliosi's argument. He is one angry prosecutor who has no patience for critical legal studies or the indeterminacy thesis; unlike the critical legal professoriate, he has indeed devoted his professional life to upholding the Rule of Law. He feels, as a prosecutor, profoundly betrayed. But that task—responding to or fleshing out Bugliosi's argument—is not what I want to ask or do here, in part because it takes us way too far afield from Mark Tushnet's work. Instead, I want to ask a question regarding those who share, to some degree, Bugliosi's anger and his palpable sense of betrayal, but don't share his commitment to determinacy. The question, which I think is raised by both Balkin and Levinson's and Michelman's papers, is whether it follows from the incompatibility of the indeterminacy thesis with the condemnation of official conduct as wrongful—an incompatibility I provisionally grant—that there are no legal, professional, lawyerly grounds on which to morally criticize either the constitutional decision

6. Frank I. Michelman, *Tushnet's Realism, Tushnet's Liberalism*, 90 GEO. L.J. 199, 213–14 (2001).
7. 347 U.S. 483 (1954).
8. 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

of the Court in *Bush v. Gore* or any other. Levinson, Balkin, and perhaps Michelman all seem to assume, or worry, that the answer to that question is yes.[9] They seem to assume, in other words, that if we are morally outraged as lawyers by this decision, it must be because we think the decision is wrong, but that we cannot possibly think that the decision is wrong if we hold to some version of the indeterminacy thesis. What follows, they worry, is that the moral outrage we profess to feel is either disingenuous, false consciousness, or just not connected in any meaningful way to our identity as lawyers. But that worry seems wrong. "Legal determinacy" does not exhaust the moral ideal of law or the moral idea sometimes expressed by the Rule of Law or the moral ideals for which lawyers qua lawyers may speak, the breach of which may induce a feeling of betrayal in lawyers. Any feeling of outrage about *Bush v. Gore* for violating a Rule of Law requiring determinate answers to legal questions would necessarily be hypocritical; however, that hypocrisy does not preclude the existence of secular ideals, so to speak, to which at least some lawyers, as lawyers, owe some special loyalty, and regarding the breach of which some lawyers, as lawyers, have both a claim and a duty to speak.

Let me give two examples of moral ideals that may be embedded in the Rule of Law, ideals that are untouched by the tattered idea of legal determinacy and the vacuous idea of the Rule of Law on which determinacy rests. The first is drawn indirectly from Tushnet's work and the second directly.

First, some lawyers (not all) may be professionally committed to the Rule of Law, by which is meant not determinacy or judicial objectivity, but rather, an understanding, roughly, of the quasi-Hobbesian moral value to the human community of law over lawlessness. Many lawyers understand, professionally and morally, that law is, for the most part, better than no-law. Some lawyers are so committed to that proposition, in fact, that we are mightily tempted, when faced with sure-fire counter-examples—that is, with law that is demonstrably worse than any real or imagined state of nature—to unmask those truly horrific legal regimes so as to expose them as in fact unlawful, an instance of "not-law." The moral point of that commitment, for some lawyers, is basically an opposition to, maybe even a revulsion toward, the wrongful subordination of some persons to others, through the medium of the others' superior strength; law, then, when envisioned as better than no-law, is better than a state of nature in which the strong dominate and exploit the weak.

Understood in this way, the idea of law and the ideal of the Rule of Law have a direct and definitional connection to an utterly constructed, thoroughly unnatural, humanistic, and humane egalitarianism. Law tempers, regulates, controls, and mitigates the misery inflicted by the strong on the weak in its absence. (This is, I think, the ideal and idea of law, not just politics, embedded in Tushnet's

9. *See* Balkin & Levinson, *supra* note 2, at 192–96; Michelman, *supra* note 5, at 200–04.

youthful remark regarding the Constitution and socialism.)[10] Of course, this is an *ideal* of law. Law in practice doesn't always work this way; in fact, law in practice is easily co-opted by the strong toward their interest. When this co-opting occurs, law becomes a mask of power rather than a check upon it. But that law can be perverted in this way, even on a massive and global scale, underscores rather than undercuts its essence: Law is a more or less good thing, when and because it tempers the aggressions of the strong; it betters the condition of the weak; it makes life less brutal, less nasty, and a little longer, for all.

If so, then lawyers have a role-defined, professionally constituted, critical, and moral obligation to decry, protest, and correct when possible, pockets of lawlessness. This is true particularly when those pockets reflect either a willfully neglectful state or a virulently aggressive state—a state that has identified itself with or yoked itself to oppression. This lawlessness must be opposed wherever it appears: in unchecked, unpoliced violence in domestic homes insulated against the intrusion of law by spheres of privacy; in unchecked, rarely noticed violence on the playground insulated against legal regulation by bizarre norms of in loco parentis combined with destructive and discredited "naturalist" theories of childhood and particularly male childhood aggression; in unchecked, unregulated exploitative workplaces worldwide, protected against the intrusion of protective law by constitutional and increasingly international norms of individual and corporate right, property, and trade. The lawyer decrying these pockets of lawlessness may be expressing a "politics"—there is, I suppose, a politics embedded in a preference not to allow people to be beaten to a bloody pulp so as to ensure the privacy of their intimate partners; there is a politics in a preference not to allow children to harass and bully each other in ways that are treated as criminal when engaged in by adults, but to which adults and the state turn a collective blind eye (at least until one of the victims of this unregulated harassment finds his parent's unregulated, unlicensed gun); and there is a politics in a preference not to allow employers to lock their employees in chicken factories so as to cut down on bathroom and cigarette breaks, thus risking their deaths in the substantial likelihood of a fire. But politics is not the only force at work when lawyers object to this lawlessness; there is also a moral value working, and it is a moral value itself embedded in the good that is law. The lawyer professionally committed to the moral value of the Rule of Law, so understood, has a critical (in both senses) role to play in decrying the peculiar form of social injustice that is found in lawlessness.

Second, a lawyer may be committed to an idea of the Rule of Law that is roughly convergent with the set of legal ideals and principles—equality, democracy, and liberty—contained in what Mark Tushnet now calls the "thin Constitu-

10. Mark Tushnet, *The Dilemma of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (stating that Tushnet would decide cases by finding the result that is "likely to advance the cause of socialism").

tion."[11] If so, those moral values, embedded in law, might inform legal criticism and might also inform a sense of outrage by a decision like *Bush v. Gore*. The coherence of that critical relation between the thin Constitution and the object of legal critique is in no way dependent upon the false idol of determinacy. Thus, just as pockets of lawlessness can be criticized by reference to an ideal of the Rule of Law central to legalism, so the thick, interpreted, judicially-controlled Constitution (and any part of it, as well as any other aspect of social reality) may be subjected to moral critique by reference to the moral and political ideals of the thin Constitution—the aspirational legal and constitutional commitment of the national government of the United States to justice, democracy, and equality.

The critical claim here is not that a line of cases or a case is violative of a particular constitutional meaning or text. Again, that is what is precluded by a commitment to indeterminacy. Rather, the claim is that a line of cases or a case or a social reality is violative of a particular constitutional ideal. At the extreme (which may not be so extreme) the critical claim may be coherently mounted that the entire thick Constitution—judicially controlled and generated, from *Marbury*[12] to *Dred Scott*[13] to *Plessy*[14] to *Brown*[15] to *Griswold*,[16] *Roe*,[17] *Casey*,[18] *Morrison*,[19] and *Bush v. Gore*[20]—whether determinate or not, is no longer what Tushnet, quoting Lincoln, refers to as the silver frame around the golden apple.[21] Rather, it has become a danger to the golden apple. It has become, to mix the metaphor, a ravenous beast that is devouring—tearing to shreds—the commitment to democracy, happiness, and social justice at the heart of the thin Constitution. If so, then the publicly involved lawyer, as a lawyer, has a moral obligation to sound the alarm. The people—constituted by, committed to, and possibly loyal to, the thin Constitution—do after all have a right to be informed.

So the idealized lawyer, committed to both the Rule of Law and to constitutionalism, may indeed feel betrayed because of a Court's decision, but it need not follow that this lawyer is thereby committed to either a false idol of legal determinacy or to the thick Constitution imposed upon us by this or any Court. It may be, instead, that he holds a professional, lawyerly commitment to the

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11. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000). In this work, Tushnet argues for an appreciation of the Constitution's commitments, expressed in the Preamble, to justice and happiness, and argues that these commitments should play a role, not in judicial deliberation, but in political struggle. It is this "thin Constitution" that he argues is endangered, rather than protected, by judicial review.

12. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. Dred Scott v. Sandford, 60 U.S. 393 (1856).

14. Plessy v. Ferguson, 163 U.S. 537 (1896).

15. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

16. Griswold v. Connecticut, 381 U.S. 479 (1965).

17. Roe v. Wade, 410 U.S. 113 (1973).

18. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

19. United States v. Morrison, 529 U.S. 598 (2000).

20. 531 U.S. 98 (2000) (per curiam).

21. TUSHNET, *supra* note 11, at 11.

humanitarian goodness at the heart of the Rule of Law and the democratic ideal that informs the sweet fruit of the thin Constitution. This ideal lawyer is not morally emasculated, pardon the militaristic image, by the indeterminacy critique, for the simple reason that he recognizes that the moral value of both law and constitutionalism is dependent upon neither the determinacy of law nor the wisdom of judicial review. The moral value of law lies not in its "determinacy," but in its facilitation of an egalitarian and just peace. The moral value of our Constitution lies not in the objectivity of the judges that maintain it, but in its democratic and humanistic aspirations toward justice. The moral-critical lawyer, and his surprising capacity to feel betrayed, is not undercut by the discovery of even radical indeterminacy.

So, the surprising and novel sense of having been betrayed by the Court's decision in *Bush v. Gore*, a sensation which was experienced by many street savvy and sophisticated lawyers (who are not in the habit of worshipping at the feet of false idols, and particularly not in the habit of worshipping at the false idol of legal determinacy), may be traced to a forgotten commitment to the moral import of other legal ideals—ideals embedded in a Rule of Law that puts law in the service of the community rather than the strong; in an idea of rights that actually empowers rather than starves and deceives those who possess them; in an idea of justice tied to community rather than to the past or to profit; and lastly, to an idea of the Constitution as expressive of democratic urgings for a just and communal happiness, rather than one that is expressive of nothing but regressive constraints imposed by pretenders to the throne of objectivity in the name of preferencing a strong individualism over the will of peoples.

If so, then the lawyer's feeling of outrage is based neither in an indefensible claim of legal determinacy, nor in a purely political disgust with the outcome of the decision. Rather, *Bush v. Gore,* regardless of whether its reasoning can be defended as determined by prior law, pitted this Court and its interpreted Constitution against the legal ideals of the thin Constitution—ideals that are constitutive of lawyering as well as of this country—and did so, furthermore, in order to empower an administration expressly hostile to the idea of law as expressive of a fundamental commitment to those disempowered by economic or physical states of nature. It is not all that surprising that lawyers wedded however unconsciously to this complicated legal identity felt betrayed by such an act. I do think, if I might be allowed a normative moment, that it would behoove us as critical, radical, progressive, or liberal lawyers to commit ourselves to the project of rehabilitating, articulating, and enriching the promissory legal ideals so betrayed—and doing so in the name of an understanding of law, not solely in the name of politics.

So, what is the role of the lawyer, or the law professor, who feels betrayed by this decision? For those with a commitment to the ideal of law as expressed by the idea of legal determinacy, perhaps the thing to do is to register one's dissent—although, because Justices Ginsburg and Souter have already done that, it is hard to know what one may add. But for lawyers who feel no

allegiance to legal determinacy and who nevertheless feel betrayed by *Bush v. Gore*, I think there are two possible paths. One is to demonstrate, once again, the indeterminacy of the law, and hence the falsity and even disingenuousness of the Court's claim of necessity—the Court's claim, in other words, that in spite of their love of democracy and respect for the will of the people, the law of Florida and of the Equal Protection Clause compelled them to halt the counting of votes. The other, and I think more fruitful path, is to engage in what may be called legal protest, by which I mean not protest that happens to be lawful, but rather, protest on behalf of and toward the end of the Rule of Law and the thin Constitution both.

In an early book, Martin Luther King noted that while returning home to Atlanta from Boston University in a club car on a southbound train, as the train crossed the Mason-Dixon line, a dark curtain would descend in the club car, separating whites from coloreds, leaving him in shadow. "I felt," King said, "as though the curtain had dropped on my selfhood."[22] What does one do, precisely, when one feels, and fears, a curtain of injustice falling, casting a shadow on egalitarian ideals for law and on democratic ideals of constitutionalism, casting the Constitution, the Preamble, and any decently humanitarian ideal of justice in shadow? With all due apologies for the appropriation, I submit that when faced with the imminent darkness of injustice, no less than when faced with the imminent darkness of death, one ought not go gentle into that good night. Rather, one should rage, said our poet of protest, against the dying of the light.[23]

Dylan Thomas gave us, you may recall, as examples of those who do not go gentle into that good night, the Nietzschean man of action and the Emersonian man of wisdom. What he did not explain in that poem or elsewhere was how an exceedingly, painfully, gentle man—a man who is also an intellectual, a lawyer, and a constitutional historian, but more than all of that, a gentle man—can follow suit and not gently succumb to the night of injustice. In Mark Tushnet's case, he wrote a book. *Taking the Constitution Away from the Courts*, contrary to all my expectations, is Mark's gentle, lawful, measured, and intellectual expression of his rage against the dying of our Constitution's light. And because of that I thank him for writing it and today's speakers for raising such provocative questions about it. And I thank you for listening.

22. STEPHEN B. OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR. 17 (1982) (internal quotation marks omitted).

23. DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, *in* THE POEMS OF DYLAN THOMAS 207, 207–08 (Daniel Jones ed., 1971).