

Nihilism and the End of Law

Phillip E. Johnson

Professor of Law, University of California at Berkeley

Published in *First Things*, March 1993, No. 31

When President Bush nominated Judge Clarence Thomas to a vacancy on the United States Supreme Court, liberals opposed to confirming the nomination at first directed critical scrutiny to statements the nominee had made in favour of employing "natural law" in constitutional interpretation. The Chairman of the Judiciary Committee that had to pass upon the nomination, Democratic Senator Joseph Biden, emphasised that he too believed in the existence of natural law. Indeed, he had successfully opposed a previous Republican nominee to the Supreme Court Judge Robert Bork, in part because Bork had denied that the Constitution protects certain "natural rights" that are not mentioned in the document itself. At that time senator Biden had insisted that "myrights are not derived from any government ... my rights are because I exist. They were given to me and each of our fellow citizens by our Creator and they represent the essence of human dignity."

Senator Biden feared, however, that Judge Thomas might believe in the wrong kind of natural law. He explained the difference between good and bad natural law in a newspaper article that expanded on the theme first advanced in *The New York Times* by Harvard Law School professor Laurence Tribe. According to Senator Biden's article, good natural law is subservient to the Constitution - i.e., to positive, man-made law - and its use is therefore restricted "to the task of giving meaning to the Constitutions great , but sometimes ambiguous, phrases." Second, good natural law does not dictate a moral code to be imposed upon individuals; instead it protects the rights of the individuals; to make moral decisions free from dictation by either legislators or judges. Finally, good natural law is not a static set of "timeless truths" but rather an evolving body of ideals that change to permit government to adjust to new social challenges and new economic circumstances. In short, good natural law doesn't prevent us from doing any thing we really want to do.

As a legal scholar, I had hoped Judge Thomas would accept Senator Biden's challenge and articulate a vision of natural law with real content, but this was not to be. Robert Bork had debated his legal theories with Senators candidly, with disastrous results, and political strategists had concluded from that experience that the way to get confirmed is to say as little as possible. Judge Thomas took their advice, and stuck to a simple set of unilluminating answers when the Senators tried to probe his judicial philosophy.

The resulting stalemate illustrated the ambivalence with which our contemporary legal culture regards the proposition that there exists some objective standard of right and wrong against which human legal standards can be measured. Anyone who says that there is such a standard

seems to be denying that we are morally autonomous beings who have every right to set our own standards. On the other hand, any one who denies that there is a higher law seems to embrace nihilism, and therefore to leave the powerless unprotected from the whims of whoever controls the law-making apparatus. Either alternative is unacceptable. The safest course is to be impenetrably vague or confusing on the subject.

The Biden-Thomas exchange reflected at the partisan political level a problem that permeates the literature of legal philosophy. I call this problem the modernist impasse. Modernism is the condition that begins when Humans understand that God is really dead and that they therefore have to decide all the big questions for themselves. Modernism at times produces an exhilarating sense of liberation: we can do whatever we like, because there is no unimpeachable authority to prevent us. Modernism at other times is downright scary: how can we persuade other people that they want to do to us is barred by some unchallengeable moral absolute?

Yale Law Professor, Arthur Leff, expressed the bewilderment of an agnostic culture that yearns for enduring values in a brilliant lecture delivered at Duke University in 1979, a few years before his untimely death from cancer. The published lecture - titled, "Unspeakable Ethics, Unnatural Law" - is frequently quoted in law review articles, but it is little known outside the world of legal scholarship. It happens to be one of the best statements of the modernist impasse that I know. As Leff put it,

I want to believe - and so do you - in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe - and so do you - in no such thing, but rather that we are wholly free, not only to choose for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good to create it.

The heart of the problem, according to Leff, is that any normative statement implies the existence of an authoritative evaluator. But with God out of the picture, every human becomes a godlet - with as much authority to set standards as any other godlet or combination of godlets. For example, if a human moralists says "Thou shalt not commit adultery", he invites the formal intellectual equivalent of what is known in barrooms and schoolyards as 'the grand sez who?' Persons who want to commit adultery, or who sympathise with those who do, can offer the crushing rejoinder: What gives **you** the authority to prescribe what is good for **me**? As Leff explained:

Putting it that way makes clear that if we are looking for an evaluation, we must actually be looking for an *evaluator*, some machine for the generation of the judgements on states of affairs. If the evaluation is to be beyond question, then the evaluator and its evaluative processes must be similarly insulated. If it is to fulfil its role, the evaluator must be the unjudged judge, the unruled legislator, the

premise maker who resets on no premises, the uncreated creator of values ... we are never going to get anywhere (assuming for the moment there is somewhere to go) in ethical or legal theory unless we finally face the fact that, in the Psalmist's words, there is no one like unto the Lord ... The so called death of God turns out not to have been just *His* funeral; it also seems to have effected the total elimination of any coherent or even more-than-momentarily convincing, ethical or legal system dependent upon finally authoritative, extrasystematic premises.

Leff pointed out that is it not we who define God's utterances as unquestionably true, in the manner that we define a triangle as a three-sided plane figure. In a God-based system, God is not the idea in the human mind but a separate and controlling reality. If human reason aspires to be the judge of God's statements, it makes itself the unevaluated evaluator, which is to say it takes God's place. In Leff's words , "Our relation to God's moral order is the triangle's relationship to the order of Euclidean plane geometry, not the mathematicians. We are defined, constituted as beings whose adultery is wrong, bad, and awful. Thus, committing adultery in such a system is 'naturally' bad only because the system is supernaturally constructed."

The relationship between natural law and supernatural authority requires a bit of explanation. In the philosophic tradition of Thomas Aquinas, "natural law" is distinguished between divine law because its commands are accessible to human reason even in the absence of divine revelation. To a theist like Aquinas, the reality of moral law was not in question. The question was how much of that law we could know from natural reason? (Or academic philosophy), and how much we could know only from scripture or the Church. This two level system of reason and revelation made it possible for Aquinas to fuse the pre Christian philosophy of Aristotle with the revelation based doctrines of the Roman Catholic Church.

To a modernist, who relies only by definition upon human authority, natural law in the Thomistic sense is no longer supportable because it would have to rest upon the unacceptable premise that nature was supernaturally created. There are still plenty of people around who would like to argue that a moral code can be discerned from nature, but the modernist understanding of nature undermines their efforts. According to Judge Richard Posner, the very idea of natural law rests upon a premodern picture of nature that science has discredited.

Even the term "natural law" is an anachronism. The majority of educated Americans believe that nature is the amoral scene of Darwinian struggle. Occasional attempts are made to derive social norms from nature so conceived, but they are not likely to succeed. It is true that a variety of widely accepted norms, including the keeping of certain promises, the abhorrence of unjustified killing of human beings, and perhaps even the sanctity of property rights, promote the adaptation of human species to its environment. But so does genocide.

In other words , a certain amount of social co-operation is natural, in the Darwinian sense, because it tends to promote the survival of a tribe or kinship group. Murderous violence against

outsiders is equally natural, because it promotes the spreading of one group's genes by eliminating competing genes. In fact Darwinian natural selection is defined as a process by which the superior varieties exterminate their inferiors, whether by attacking them directly or by competing more effectively for limited resources. It is therefore no wonder that equating what is natural with what is good - i.e., trying to derive "ought" from "is" - is dismissed these days as the "naturalistic fallacy."

Modernists therefore see no merit in natural law propositions about, say, sexual morality. For example, even if one grants that homosexual intercourse or abortion is in a sense less natural than heterosexual intercourse or child birth (because it does not further reproduction), it does not follow that "unnatural" means wrong, or even undesirable. It is equally unnatural for humans to fly in aeroplanes, since we are not born with wings. Rejection of the naturalistic fallacy does not necessarily mean that modernists discard natural law altogether, however. As Senator Biden's article indicates, modernists are much more comfortable with the idea of natural rights than with natural obligations. Because the individual human subject - Leff's godlet - is the modernist starting point, it seems reasonable to place a heavy burden of justification upon anyone who seeks to restrain the liberty of that subject. This burden of justification is what Leff whimsically called "the grand sez who."

The assertion of rights cannot for long be separated from the impositions of duties, however. If we give X the right to do as she wants, and she wants to get an abortion, we must soon face the question of protecting her from Y, who wants to protect the rights of the unborn children. If majority opinion in the legislature favours some restrictions upon abortion, and there is no specific language in the Constitution on the subject, then "pro-choice" forces have to invoke something very much like a natural law duty to get their way. "Thou shalt not interfere with a woman's right to choose abortion; indeed thou must help pay for abortions through tax money; more than that, thou shalt not legislate that the woman contemplating abortion must be fully informed about the potential adoptive parents who so desperately want to provide a loving home for her unborn child." Sez who?

The modernist impasse, in other words, does not stymie as long as all we are doing is proclaiming liberties. The problem of modernists is how to justify imposing obligations. Homosexuals have a right to be homosexuals, of course, but do employers who disapprove have an obligation to hire them? The poor have a right to public assistance, of course, but do the more fortunate and productive citizens have a right to refuse pay when they think the tax burden has become unreasonable? The rights of all citizens must be protected, of course, but who are the citizens? What about infants, the unborn, foreigners, and the animals? Who or what has the authority to tell us whom we ought to admit to the sphere of protection?

Most of Leff's lecture consisted of a review of all the unsuccessful attempts to establish an objective moral order on a foundation of human construction, i.e., to put something else in God's place as the unevaluated evaluator. The asserted non-supernatural sources of moral authority are many and varied, and each is only temporarily convincing. They include: the command of the sovereign; the majority of the voters; the principle of utility; the Supreme Court's varying interpretations of the Constitutions' great but ambiguous phrases; the subtle implications of platitudinous shared values like "equality" or "autonomy"; and even a hypothetical social

contract that abstract persons might adopt in the imagery "original position" described by John Rawls. Every alternative rests ultimately on human authority, because that is what remains when God is removed from the picture. But human authority always becomes inadequate as soon as people learn to challenge its pretensions. Every system fails the test of "The grand sez who".

Leff's lecture made a powerful impression upon a generation of legal scholars because he stated the nature of the nature of the impasse so convincingly. Most modernist thinking consists of attempts to evade the impasse with superficial resolutions. Scientific solutions can usher in a secularised Kingdom of Heaven by giving economic power to the proletariat. Criminal tendencies in individuals can be greatly reduced by providing education, psychiatric treatment and economic opportunity. Public education can produce rational, self controlled citizens, who can govern themselves through liberal political institutions and free markets. Scientific technology can provide abundance and health, and even eventually improve the human species itself by genetic engineering. Above all, we can still know what the good is, however difficult it may be to achieve it . Modernist philosophy teaches that when we lost God, we lost only the projection of the best that was in ourselves; what was real in that projection therefore remains, and only the illusion is gone.

Arthur Leff had a deeper understanding of what the death of God ultimately means for man. He saw modern intellectual history as a long, losing war against the nihilism implicit in modernism's rejection of the unevaluated evaluator who is the only conceivable source for ultimate premises. Leff rejected the nihilism implicit in modernism, but he also rejected the supernaturalism that he had identified as the only escape from nihilism. Here is how he concluded his 1979 lecture:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinary, unappetising prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cane and Abel. Neither reason, nor love, nor even terror, seems to have worked and made us "good", and, worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us could law be unnatural, and therefore unchallengeable. As things stand now, everything is up for grabs.

Nevertheless:

- Napalming babies is bad.
- Starving the poor is wicked.
- Buying and selling each other is depraved.

Those who stood up and died resisting Hitler, Stalin, Amin and Pol Pot - and General Custer too - have earned salvation.

- Those who acquiesced deserve to be damned.
- There is in the world such a thing as evil.
- [All together now:] Sez who?
- God help us.

What Leff said is fascinating, but what he failed to say is more fascinating still. If there is no ultimate evaluator, then there is no real distinction between good and evil. It follows that if evil is none the less REAL, then atheism - i.e. the idea of the non-existence of that evaluator or standard of evaluation - is not only the extraordinarily unappetising prospect, it is also fundamentally untrue. Because the reality of evil implies the reality of the evaluator who alone has the authority to establish the standard by which evil can deserved to be damned. When impeccable logic leads to self contradiction, there must be a faulty premise. In this case the premise is that because God is dead, "it looks as if we are all we have" Why not re-examine the premise?

By not asking the last question, Leff in effect placed the death of God, in the place of God. In his system, the absence of a supernatural evaluator was a premise so far beyond question that it could not be doubted even when it pointed to a conclusion. Leff desperately wanted to escape, even a conclusion he acknowledged to be false. If we know that totalitarian mass murder is evil, and that those who acquiesced in it deserved damnation, then we know something about the absolute evaluator as well. Leff offered no reason for protecting modernism's founding premise from the brilliant sceptical analysis that he directed at everything else. To a theist this must seem indefensible, but Leff could not have done otherwise without ceasing to be a modernist. A system's ultimate premise is always beyond question; that is what it means to say that is an ultimate premise.

The most interesting aspect of any argument is not what it explicitly states, but what it implicitly assumes. A rationalistic culture teaches us to think that truth is the product of a process of logical reasoning. When we are dealing with intermediate or detailed truths, this model is correct. The model breaks down, however, when we try to apply it to the fundamental premises themselves. This is because logic is a way of getting to conclusions from premises. By its very nature, a logical argument cannot justify the premises upon which it rests. When these premises are questioned, they have to be justified by a different logical argument, which rests upon different premises.

We may follow this process forever, and we will still never encounter anything but another logical argument, which will itself be based upon premises.

But then what is the ultimate premises, the Archimedean fulcrum on which intellect can sit and judge all the rest? If we try to answer that question by employing logic we lapse into the absurdity of circular reasoning. Reasoning has to start somewhere. Any attempt to justify the ultimate starting point necessarily fails. Because it only establishes a different starting point. Hence, the really important step in any argument is apt to be the unexplained, unjustified, and often unstated starting point.

For example, take the rationalist philosopher who demands philosophical proofs of God's existence. From a humanistic standpoint, which finds its Archimedean point in the self-existent human mind, the demand is perfectly reasonable. But where did this mind come from, and why should we trust its philosophical ground rules? From a biblical theistic standpoint, human reason

possesses a degree of reliability because God created it in His own image. When human reason denies its basis in creation, it becomes unreason. Those who have thought that they are wise in rejecting God end up as fools, carried along by every intellectual fad and approving every kind of hateful nonsense. Many people who live in modern times find this analysis confirmed every day by what they see on the TV. and read only in the newspapers. Then why is the biblical starting point out of the question for modernist intellectuals?

The primary answer is that modernist thinking assumes the validity of Darwinian evolution, which explains the origins of humans and other living systems by an entirely mechanistic process that excludes in principle any role for a creator. In the word of the neo-Darwinist authority George Gaylord Simpson, the meaning of evolution, is that "man is the result of a purposeless and natural process that did not have him in mind." For the modernists intellectuals, belief in evolution in precisely this sense is equated with having a scientific outlook, which is to say with being a modernist. The price for denying "science" is to be excluded from modernist discourse altogether. That is why "it looks as if we are all we have," even if the model for "we" is Cain and Abel.

In my book "Darwin on Trial" I explained that Darwinian theory finds its basis in the philosophy of scientific naturalism rather than in an unprejudiced examination of the evidence. In other words, the theory that is itself the most important supporting pillar for the modernist system is itself supported by that very system, in a classic example of circular reasoning. If that analysis is correct, then scientific investigations. In that event, the modernist impasse may be a problem of the mind that has sold itself into captivity. Can a way out of this captivity be found in "religion"?

Not if religious thinking itself accepts the ground rules of modernism. R. Kent Greenawalt, a University professor at Columbia University, is a distinguished legal philosopher who has tried to justify a mild theism without directly challenging the modernist definition of rationality. In Greenawalt's words: "with some uncertainty and tentativeness I hold religious convictions; but I find myself in a pervasively secular discipline" . In 1986 Cooley Lectures at the University of Michigan Law School, Greenawalt defends a limited role for religious convictions in a jurisprudential culture whose ruling paradigm, called "liberalism", is roughly identical to what I have been calling modernism.

Some legal philosophers say that liberalism implies the exclusion of religious considerations from public life. Their reasoning is that public decisions should be made on the basis of principles and arguments accessible to all persons. This basic principle implies that common sense and science must supply all the essential factual knowledge, and that standards of ethics and justice must come from secular philosophies that rest upon uncontroversial assumptions. For example, Cornell University philosophy professor David Lyons declares that to reject the idea of "a naturalistic and public conception of political morality ... is to deny the essential spirit of democracy." In the same spirit , Yale Law School's Bruce Ackerman writes disparagingly of those who want to restrict abortions "on the basis of some conversation with the spirit world". According to this influential version of liberalism, people who want to make public policy on the basis of some private knowledge of God are fundamentally undemocratic, because they refuse to share a common base of discourse with their fellow citizens.

Responding to this "religion is for private life only" position, Greenawalt argues that in some circumstances citizens of a liberal/modernist State may rely upon their personal religious values in casting votes or framing arguments. Some religious citizens may have difficulty understanding why the argument even has to be made. All they have to do after all is invoke "the grand sez who" and then vote and argue as they like. Greenawalt concedes that citizens of a secular liberal state have a legal right to vote their convictions, but he is more concerned with when and whether they ought to exercise self restraint in the interests of good citizenship. Model citizens do not do everything they are legally entitled to do. They do not for example, advocate the legal subjugation of one race by another or the establishment of a particular religion, even though such advocacy is constitutionally protected. Good citizens also decide how they will vote on rational grounds, as far as they are able. But according to modernist liberalism, religious beliefs are inherently nonrational. Does it follow that model citizens should leave their religious convictions at home (where they are relatively harmless) and base their votes and arguments concerning public questions on secular considerations only?

Greenawalt concedes that "legislation must be justified in terms of secular objectives." Nonetheless, "when people reasonably think that rational analysis and an acceptable rational secular morality cannot resolve critical questions of fact, fundamental questions of value, or the weighing of competing harms, they [may] appropriately rely on religious convictions that help them answer these questions." He assumes the modernist position that only secular reasoning can be completely rational, because he thinks that "a critical nonrational element" is always present in religious belief. The presence of such a nonrational element does not disqualify religious values from consideration in law making, however. Because "rational secular morality" cannot conclusively decide such important value questions as how highly we should rate the preservation of foetal life, or how generously we should provide for the poor, legislators and judges as well as ordinary voters may with good conscience rely on their personal religious convictions to resolve such questions.

By implication, Greenawalt accepts the crucial modernist assumption that there exists a common secular rationality capable of resolving some important public issues without relying upon controversial and unprovable (i.e. nonrational) assumptions. Otherwise the conceded distinction between "religious" and rational secular thinking would collapse. This is an extremely important concession: giving modernists the power to define rationality ensures that, even if "religion" is allowed a modest place in public discussion, God will continue to be effectively excluded. The reason lies in the very basis of modernist metaphysics. "Religious belief" in fairies. All religions are equal - equally imaginary, that is. To modernists "God" is an idea in people's heads not a reality outside of human subjectivity. As long as modernists make the rules, every godlet can undermine every theistic proposition at will by invoking the grand sez who. The culture will still be left to choose between an intolerable nihilism and continuing to chase the illusion of liberal rationalism.

At times Greenawalt seems to accept that illusion, but at other times he shows an awareness that it IS an illusion. Here is how he explains his own understanding of rationality:

I confess to considerable uncertainty about where rationality ends; but among rational convictions I conclude those that are apparent to anyone with rational faculties or that can be demonstrated or persuasively argued on rational grounds. Beliefs that humans have greater ethical capacities than leaves, and that love is more productive of happiness than hate, can be rationally established. An irrational conviction is contrary to what can be established on rational grounds. A nonrational conviction, in my sense, is conviction that is not irrational but that reaches beyond what rational grounds can settle.

When a philosopher defines his central concept only in terms of itself (rational propositions are those that appeal to rational people or that can be supported on rational grounds) it is a sure sign of confusion. Moreover, a secular rationalism that can't resolve anything more controversial than that humans have more ethical capacity than leaves is useless. The point modern rationalism has to establish, or assume, is that a common secular rationality exists which is capable in principle of resolving the issues that actually divide people.

Examining the most famous recent example of such a system, the rights based Liberalism of John Rawls, Greenawalt clearly recognises that this basic modernist assumption is false.

Recognising that citizens in Liberal societies have variant religious beliefs and ideas of the good, Rawls begins with the premises that are widely shared by people who disagree on many fundamental questions. From these premises he aspires to draw principles of justice whose acceptance allows political decisions to be made without reference to the fundamental religious or metaphysical beliefs that divide citizens ... Contrary to what Rawl supposes, he does not provide a theoretical basis for thinking that this ambition is either realisable or desirable.

But why then does Greenawalt build his defence of religious opinion on the assumption that this ambition is both realisable and desirable? The probable answer is that in these lectures he was addressing an audience of modernist liberal rationalists, and wanted to persuade them that even their own philosophical system had to concede at least some room for nonrational opinions on public questions, and therefore for religious opinion. Moreover, Greenawalt is a generous minded person who understands that it is desirable to conduct public discussion on as ecumenical a basis as possible. However confused his notion of rationality may have been, his intention was to persuade his adversaries by meeting them on their own metaphysical territory.

Up to a point, this way of arguing is itself an act of good liberal citizenship. If a society is to be governed on the basis of consent rather than force, it is important that the laws make sense to as many citizens as possible. To that end, we should try to justify the laws on the least controversial basis that is available. That is why nowadays we defend Sunday closing laws (if at all) by the secular purpose of encouraging a general day of rest and recreation rather than the original purpose of honouring the Lord's day or maximising church attendance. In a more general sense, the courtesy we owe to fellow citizens argues for framing public questions in language that

invites everyone to participate in the discussion on comfortable terms. It would be insensitive as well as ineffective, for example, for Christians to exhort their Jewish, Muslim, or agnostic neighbours about what Jesus would want us to do. On the other hand, Christians (or religious people in general) shouldn't be excluded from the political conversation either, as they would be if only agnostic opinions could count. Greenawalt's moderate and nuanced position about the proper role of religion in secular political discourse rightly addresses these questions of political good manners.

But good manners is one thing; giving away the authority to define rationality is something else altogether. Good citizens treat their neighbours' deeply held convictions with respect not because they are necessarily rational, but because they are deeply held. Standards for defining rationality are as controversial as any other assumptions. What Greenawalt accepts as "rationality" is actually the irrational assumption that we can get along very well without employing any controversial assumptions about the nature of ultimate reality. This assumption is the idol of rationalism, the faith commitment that holds the tribe together. We should perhaps treat the idol gently, because it is still very dear to many admirable people, but we should not bow down and worship it. For any genuine theist, ultimate reality must be God - not the unanchored, self-validating human mind.

Theists may be entering a time of great opportunity for affirming that understanding of reality, because the modernist idol's substance is dissolving a little more every day. In the twenty-first century, philosophy's task will be to rebuild a positive response to the human predicament that starts with the cause of that predicament, man's alienation from God. Before it can undertake the positive task, it must complete the critique of atheist rationalism. On the scientific side, theists need to continue to expose the vulnerable philosophical assumptions that provide the only real support for the Darwinian theory of evolution. On the ethical and cultural side, they need to help the public as a whole to understand that the nihilism permeating contemporary life is the inevitable consequence of apostasy. King Lear's words provide the appropriate epitaph for modernism: "Nothing will come of nothing."

Secularised intellectuals have long been complacent in their apostasy because they were sure they weren't missing anything important in consigning God to the ashcan of history. They were happy to replace the Creator with a mindless evolutionary process that left humans free and responsible only to themselves. They complacently assumed that when their own reasoning power was removed from its grounding in the only ultimate reality, it could float, unsupported, on nothing at all. As modernist rationalism gives way in universities to its own natural child - postmodernist nihilism, modernists are learning very slowly what a bargain they have made. It isn't a bargain a society can live with indefinitely.