

# REFLECTIONS ON VOEGELIN ON THE NATURE OF LAW

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We all owe a great deal to Eric Voegelin for bringing new light to numerous fields of inquiry. I have been reading his work, and teaching it, for over thirty years. It is only recently, however, that I took the opportunity to read his essay on *The Nature of Law* in Volume 27 of the *Collected Works*. What I have to say will be based principally on my reflections on that work.

Among the many insights we have gained from Voegelin, I want to mention two in order to put the present discussion in context: 1) His identification of gnosticism, continually present in the tensions of the Christian tradition, as a fundamental, though often unrecognized, feature of the modern situation, and 2) His insistence that the concepts we employ for analysis must be referable to, and not disconnected from, actual, concrete experience.

There are numerous ways of analyzing modern political life that have been offered to us. Within this variety it is, nevertheless, apparent that modern politics produces a tension between utopianism in varying degrees of intensity, on the one hand, and skepticism in varying degrees, on the other. The tension between idealistic aspiration and cynical reduction to struggles for power is obvious. Modern politics has the character it has because it is experienced in terms of such tensions. Following Voegelin we could say that gnostic tendencies suffuse the modern Western tradition but not without attendant, powerful forms of resistance. Hence in different times and places utopianism, abstract idealism, rationalism, perfectionism appear with greater or lesser intensity. Claims to or hopes for enlightenment are visited by disillusionment and despair.

Among the institutions that offer resistance to, or put restraints upon, these powerful tendencies are constitutions, legal systems, the rule of law. The United States is an extraordinary example of all these tendencies and tensions and may be described, in this respect, as a or the laboratory of modernity. The American polity exhibits both extraordinary aspirations on a global scale B one could mention proclaiming the *novus ordo seclorum*, a century of Wilsonian foreign policy coupled with the urge to economic globalization B along with a constitutional tradition

based on limited government, the rule of law, due process, decentralized power and a realistic estimate of human nature and its limitations. The debate over Nation or Empire? is perennially carried on in terms of restoring our true purpose, recalling us to the founding principles and their meaning for us now.

We find ourselves speculating on the Aend of history@ and also on the Aclash of civilizations.@ We cannot avoid debating the rise and fall of nations and empires, both historically and presently. We relive the antagonism between the ancient Augustinian depreciation of worldliness and the utopian expectation of the heavenly kingdom on earth. We are compelled to question the enlightenment claim, that the decline and disappearance of religion in favor of secularity must triumph, as we face the fact that religion not only has not declined, let alone disappeared, but has shown itself to be a central and powerful presence, in many places dominant. At any rate, we see that while we may separate church and state we have no prospect whatever of separating religion from politics. Voegelin provides one of the most satisfactory explanations for this fact.

Since it was prominent among Voegelin=s intentions to identify and demystify modern gnosticism by explaining its sources and dynamics, it is of considerable interest to examine what he has to say about the nature of law in an essay that relies heavily on the character of the American legal and constitutional experience. This reliance on the American experience may not be surprising since he was lecturing to American students, but it is not less significant in its implications, as we shall see.

He knew that we have been living in a revolutionary era that has been underway for several hundred years. He knew also that the extremes of tyranny and totalitarianism in our part of this revolutionary era were to be understood in terms of the virulent aspects of our age that were not well understood and often misinterpreted because of defective philosophical and political analyses which had lost connection to ancient sources of inquiry into the human condition or had wilfully denied their relevance to our time.

Nevertheless, these sources and experiences remain available to us if we know what we are looking for, and if we are able to disengage from historical immediacy. Also, we could depend to

a degree on the persistence of institutions, as in American constitutional order, which carried forward residual wisdom about our situation in our practices. Within the Western tradition in general there is a respect for law and the rule of law which is salutary, and an indispensable feature of the modern state. Many thinkers in responding to the rise of totalitarianism, two great world wars, the advent of the nuclear age and the cold war, the bipolar division between East and West, sought wisdom in returning to the ancient sources. Voegelin was by no means unique in this respect even though his project of recovery had distinctive features which insure that the story of the revival of political science and political philosophy cannot properly be told without understanding his role in it. What, then, can we learn from examining Voegelin's reflections on the nature of law?

First, to repeat, the essay on the nature of law is a decidedly American document in which Voegelin freely uses American institutions and practices to analyze what law is and what the rule of law may be. He does this while, at the same time, insisting that it is not clear whether law has an essence. The American experience is important but will not turn out to exhaust the sources of insight. There is no doubt that he has Aristotle's political philosophy and Thomas Aquinas' analysis of the essence of law in the back of his mind in this discussion. He knows that it has been a common feature of legal philosophy to determine the essence of law, but he resists too easy definition of it, not questioning the question itself but questioning whether such definition will be possible. But where does he end up? That is what remains to be seen.

He points out that there is no convenient way to distinguish between the essential and the non-essential rules within a legal system, and yet we cannot identify law's nature simply by reference to the aggregate of all rules. Moreover, the essence or definition of law might seem to require a fixed, permanent answer but, if we refer to our actual experience, as we must, we can see that rules come and go, and the interpretation of their meaning changes, through time. A legal system gains and loses rules. Legal orders continually transform as laws come and go, constituting what Voegelin calls a sequence of aggregates. What makes these rules valid? One might answer that question by pointing to the undergirding of a consistent rule-making procedure, or a constitutional order, a process which encompasses the content. What then activates the process, that is, How is the rule connected to the underlying procedure?

Do we have to say that validity is only momentary or transitory? By focusing on the temporality of law Voegelin tries to show that law is either what was valid or what is coming but is not yet valid. This would certainly reflect the political/practical experience of always being caught between Awhat is@ and Awhat ought to be.@ But this reflection allows Voegelin to pose the question, Where is that presence which would reveal the essence of law and not just what has been characteristic of a legal system at different moments?

One might like to say that there is something that persists while other things change. But to distinguish in this way is not easy. The question of how the unchanging is connected to the changing remains unsettled. But, further, constitutions and procedures also change so that even the continuum of process cannot escape the realm of changingness. Essence seems ever to withdraw or retreat from our analysis.

One must then look to the larger society of which a legal system is part where one might identify purpose or direction that informs a legal system as an instrument. But the difficulty here is that we hit upon the distinction between law as living-together *in modus vivendi* and law as binding us to a direction, or an end, defining us as functional factors in a corporate enterprise. If our experience tells us that we as human are real individuals then we must question whether law=s purpose is to override our real individuality, but are we merely individuals such that common purpose is illusory?

To be sure, we recognize rules and judgments and we make use of them in our chosen transactions with one another. Voegelin thus suggests that we are all law-makers at some level. That is, a legal system cannot function if those subject to it are not somehow able to appropriate the rules to themselves and voluntarily determine their use in specific instances. The nature of law has to do with this widespread law-making activity; we must want to be related to each other in certain law-like ways that we acknowledge to be beneficial. There are, then, rules for the whole which have to proceed from some acknowledged authority, and there are the vast array of rules for us in particular. Individuals must be oriented to law-abiding conduct. Individuals must want that to be the case and thus we make the inevitable distinction between law-abiding and law-breaking conduct. This does not yet tell us if there is an essence of law, but it would seem that Voegelin is telling us that there are features of human interaction which emerge such as to

point towards the desirability of lawfulness, suggesting an as yet undefined essence but establishing for sure that the notion of law-like conduct is continuously accessible to human beings in general.

A rule-oriented society diffuses this distinction between abiding by and breaking the law throughout the society to its members: self-regulation and self-rule within a system of rules. Self-rule is thus not a liberation from rules but a collaboration in the extension of rule-bound behavior beyond what the general legislative rules can accomplish. Indeed, the law-makers are dependent upon this diffusion for their success. That is, a rule of law society articulates law-based relationships all the way down. This also seems to mean that rulers and ruled alike participate in recognizing and instantiating law-like order. Voegelin sees some version of this as universal to mankind. Law-like conduct cannot then be merely imposed, the element of recognition and acceptance must be present. So far this seems to be compatible with the utter temporality of rules themselves that Voegelin has earlier established.

But what is all this for? Is it for convenience? For maximizing freedom? For securing peace without uniformity of beliefs or values? Is there some substantive, common end served by law? Obviously many versions of all these positions are offered to us all the time. To orient our thinking, Voegelin briefly refers to several significant approaches:

One is the Aristotelian in which the attempt to define the *polis* shows the tension between focus on the persons who make up the polis and the form of the *polis* involving an ideal of citizenship independent of the particular individual members: form vs. multiplicity.

Another is the American in which the Declaration of Independence expresses the animating idea of order, and the constitution instantiates it so that the form is in-formed by the Idea. Voegelin takes the American approach to represent a conservative version of modernity which preserves standards that are above procedures while acknowledging the universality of human agency.

Finally, there is the National Socialist version which Voegelin describes as Aintrasytematic proceduralism.@ There is an internal consistency of rules without reference to a substantial order which it denies to exist.

The first two of these are responses to the question of the meaning or purpose of law. The third is an inward-looking suppression of the question especially for its subjects. One might think Voegelin is suggesting that reflection on the experience of law must eventually produce the experience of tension between the changing and the unchanging, response to which tension is, while not necessarily answering the question of essence, nevertheless impelling us to be more thoughtful about how we understand ourselves, and in ways allowing for widespread participation in that deliberation.

It becomes clearer that Voegelin is all along pointing towards some sort of larger order transcending all regimes even though legal systems are inadequate to show it in universal terms, and may, by proclaiming their autonomy, obscure or deny it. Legal systems are inadequate because they must be particular to time and place and they must move with the temporal transition that is man. But they are perfectly adequate to point to that to which they are inadequate or passing responses. Following his reflections so far, we have been led from the legal order to the larger social/political order to the question of the structure of reality. Voegelin's method is to move from the bottom up not from the top down. He has avoided using the traditional terminology of natural law theory but it would be hard to deny that there is an affinity especially at the point where law-like relations are seen to be a function of all human interaction no matter how well or badly carried out.

Revolution, for instance, cannot alter the reality of things but only the immediate experience within particular orders. The tendency towards the law-like relationship, with all its tension between individual and collective, cannot be eradicated or transformed so that the tension is eliminated. There is a concreteness of lasting order in the daily actions of every human being.<sup>(40)</sup> The order does not exist independently but in every human participant. The concreteness of order is found in and amidst the multiplicity of conduct. A legal order must somehow be usable, non-arbitrary, compatible with human interaction, constructive not destructive. Validity, which we ran up against earlier, is achieved when individuals can actually make the legal order concrete in their interactive conduct. Procedure is necessary but not sufficient.

Thus a collection of persons is not ordered by the imposition of norms. Rather, there has to be reciprocity between the laws made and the diffused enactment of law by individuals and groups in their varying particular circumstances. Form and content are not independent. The Alasting order@ thus both persists and alters in a manner that cannot be captured by analogy to mechanism or organism.(43) Order is discovered through trial and error in the inevitable tension between Awhat is@ and Awhat ought to be.@

And at this point Voegelin introduces the great Ought which is implied in the daily oughts of life. It would seem that a legal order is to be considered as to the degree to which it affords or distorts attunement to the larger structure of reality which it B imperfectly B represents. This tension, unless suppressed, must lead to reference beyond the rules themselves, and even beyond the mere revision of the rules for temporal, practical purposes. What sort of order do we compose? How best do we express it? How shall we successfully promulgate it? Law thus, for all the reasons given, cannot be reduced to command. Law demands a constant interpretative debate. At the immediate level of this experience Voegelin finds reason to praise the legal profession. It is lawyers who are trained and attuned to these issues who have necessary expertise, and it establishes their special vocation.

Yet beyond the lawyers there is still a further special category of the philosopher whose quest is for insight into the Ought above all oughts. The philosopher acutely senses what is present to all in some degree and is potentially the law maker of the true order of things. Voegelin makes these points in part to establish the distinction between the Atrue order of society@ which is a particular order in fruitful tension with the larger structure of reality, and an ideological or totalitarian order which seeks to substitute an immanent picture of reality that will close off the tension. No matter how legalistic or procedurally consistent such an order may be it is not a true legal order. Keeping the distinction alive is the special function of the philosophical man who allows reflection to lead to encounter with the divine and who knows that there is a *ius divinum et naturale* and who establishes thereby the required rejection of the *ius sociale et historiale*. For, while it is true that one must always be in a concrete, actual society, and while it is also true that the truth of order must be sought within particular social orders, and while it is further true that social orders vary with respect to the degree to which persons are allowed to order their lives, nevertheless all these considerations point beyond themselves. At the simplest level, individuals

cannot deny the existence of other individuals; societies cannot deny the existence of other societies, other purposes.

Voegelin once more distinguishes the Aristotelian from the American approach: For Aristotle the *bios theoretikos* can be pursued in philosophy within the well-ordered city; in America it is Life, liberty and the pursuit of happiness@ which establishes the idea of self-development coupled with self-regulation or self-restraint. In both cases, despite obvious differences, there is openness to a larger truth about man which he did not make and which he cannot avoid. This, which is unsought and unavoidable always and everywhere, is natural.

The argument allows us to think that there are both ancient and modern modes of recognizing the truth about reality, establishing the idea of an Ought which transcends all the oughts but to which all the oughts tend whether they are acknowledged to be doing this or not. The analysis ascends only to meet that which the experience presupposes before it recognizes it. In American terms this means we accept a rule-making authority because we not only need rules to make our multiplicity coherent and safe, but we really want them. Convenience and self-interest enter into this but they are not by themselves adequate to the purpose. We are continually reminded of the informing idea of our order above all processes and procedures and thus are not permitted to forget the distinction between Asocial truth@ and Atruth as such.@ The acceptance of the rule-making authority does not imply that authority=s superior wisdom about the order of the American polity since, as we have seen, the instantiation of the order by all of us in our particular circumstances cannot be a matter of speculative wisdom and cannot be in anyone person=s or group=s control. Again, there is an affinity between the American approach and Aristotle=s recognition that a theoretical examination of practical decision-making is never a substitute for adequate judgment in practical decision-making itself. Here Voegelin offers a way to overcome a mere conflict between ancient and modern ideas of law without denying that they have their differences. We must seek the perennial in the interstices of our practices.

By bringing the Aristotelian and American approaches into contact, however, I believe Voegelin is also doing something else of significance for our thinking: If both approaches are valid responses it may follow that the differences between the ancients and ourselves are not constituted in the greater wisdom of one or the other. In other words, for Voegelin reflection on

the nature of law leads to an appreciation of different polities not in terms of earlier or later but in terms of relative openness to the great Ought. Or, to put it another way, Voegelin is not advocating historicism or progressivism. He is not saying that the American order has simply advanced beyond the Aristotelian while he does acknowledge what is different and appropriate to us. This is important because it allows him to defend the rule of law in its modern form without defending modernity altogether, and without suggesting a simple supersession of antiquity as if we had nothing to learn from that quarter.

His refusal to endorse progressivism is also to be seen in his justification for the continued need of force and enforcement: Perfection is impossible, truth is always in dispute, social order itself is a compulsion to the extent that there is no spontaneous or automatic order.

Legal rules are neither personal experiences nor the Decalogue. Debate and compromise, procedures such as adjudication and voting, are proper responses to the condition under which we achieve and seek to maintain order, that order in which we all willingly participate without truncating or sacrificing our thought as to what lies beyond it.

Yet there are forces in the soul that disrupt attunement and are ineradicable. Voegelin allows that enforcement imposes maturity on the not fully mature. Thus law has an educative function. We may well agree to this while remembering that the relation of voluntary transaction and self-regulation to Aeducative@ enforcement and punishment are themselves occasions for reflecting on the difference between Asocial truth@ and Atruth as such.@