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Postmodern Decline? The Belief in a Rule of Law as a Tenet of American Ideology

By David Ray Papke*

A belief in the rule of law has traditionally been an important tenet in American ideology. This belief includes a respect for law itself and for independent courts that decide cases fairly in keeping with the law. The United States, ideologues proclaim, is more devoted to the rule of law than are other nations. But is the belief in a rule of law as a tenet of American ideology still firm in the emerging postmodern society? Popular sentiments as well as contemporary jurisprudence powerfully challenge the functionality and very attainability of a rule of law.¹

Keywords: ideology, rule of law, postmodern society.

Introduction

Although “ideology” varies from one nation to another, it is always a building block of sociopolitical life. One somewhat distinctive tenet in American ideology is a professed belief in the rule of law. Presidents, politicians, and other American ideologues have championed this belief since the earliest decades of the Republic. However, in the context of an emerging postmodern society many Americans have complained that there is too much law and that legal institutions are arbitrary and unpredictable. Legal intellectuals have proffered postmodern jurisprudences that do not defer to the rule of law. Might a belief in the rule of law be losing its longstanding place in American ideology?

The Nature of Ideology

The notion of “ideology” can be and is conceptualized in different ways. For some, ideology is duplicitous and manipulative.² It is a system of propositions and promises that particular classes and groups use to disingenuously advance their interests or, at least, to preserve a status quo. For others, meanwhile, ideology is simply the expression of dominant beliefs,

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² Williams (1976) p.126-30.

meanings and ideas.¹ In this second conceptualization, ideology continues to have normative implications and be susceptible to misuse, but ideology is not necessarily sinister. Regimes, in fact, depend on plausible ideologies for self-definition, strength, and cohesion. Understood in this way, ideology is virtually universal.

While political leaders and government officials are most likely to be “ideologues,” that is, spokesmen for and champions of a given ideology, other individuals and institutions also produce and convey ideology. The unpredictable French Marxist Louis Althusser reminded us in this regard that it was too easy to think of all ideologues as active in politics or part of the public sphere. Others who have different callings and are parts of the private sphere also express and transmit ideology. Ideology, Althusser insisted, has almost countless sources. Not only government and political parties but also churches, schools, publishers, and news organizations are often ideological. Even holiday celebrations, festivals, and cultural events are sources of ideology.²

Identifying the specific tenets of a nation or a people’s ideology is difficult task. Ideology, after all, does not consist of beliefs, meanings, and ideas that are completely distinct from one another. Rather, an ideology combines and juxtaposes various beliefs, meanings, and ideas into a type of network or grid that might appeal to the ideology’s adherents or potential adherents.

Then, too, an ideology is hardly fixed for all time. An ideology is realized within particular historical circumstances, but as these circumstances change, the ideology might also change. Indeed, if a particular ideological tenet is too fixed, it runs the risk of losing its believability. If the overall network or grid of ideological tenets is too inflexible, it might shatter.

Bearing in mind the multiple sources of ideology, ideology’s combination of various tenets, and ideology’s changes over time, caution is necessary when attempting to identify the chief tenets of traditional American ideology. With no shortage of trepidation, I would list the following as American ideology’s chief tenets: (1) The acquisition of wealth is not only possible but also moral, (2) Individuals are free say what they want when they want, (3) Government rests on the democratic participation of the governed, and (4) The United States is a special nation on the world stage, “chosen” by a non-denominational but likely Christian God to promote freedom and justice.

Perhaps needless to add, all of these tenets can be critiqued. Most commonly, the critics of an ideology will point out the ways actual social life does not measure up to the ideological beliefs, meanings, and ideas. Even though wealth acquisition is taken to be possible and moral, many Americans are born poor and have virtually no chance to become wealthy. Even though the polls are open on election day, a majority of Americans do not participate in the democratic process by voting.

But ideology continues to exist, and even if the ideology critiques are searing, ideology can affect public policy and government undertakings. In particular, ideology is “an essential element in the process of legitimation . . .

¹ Eagleton (1991) p. 3.

² Althusser (1971) p.36-37.

.¹ In the domestic setting, ideology contributes to the acceptance of governance and to the preservation of existing social relations. In international affairs, ideology enhances a nation's standing and credibility. Ideology, then, is not truly separate from sociopolitical life. Ideology influences social norms, political agendas, and international affairs. We ignore it at great peril.

The Rule of Law

In addition to the previously mentioned American ideological mainstays, a belief in the rule of law is also an important tenet in American ideology. This belief has several components. The first is a respect for the law itself, which is presumably made in public, understandable, and useful for average citizens. In addition, law is supposed to be applied without arbitrariness or bias, and independent courts in particular are expected to treat similar cases in similar ways and to adjudicate all disputes fairly. Blessed with good laws, legal institutions, and legal proceedings, Americans can live by the rule of law. Indeed, in the United States more so than any other nation, the ideology assures us, law rules men rather vice versa.

Political leaders and government officials, not surprisingly, have been the most likely champions of a belief in the rule of law, and leaders and officials have been rule of law ideologues throughout American history. In 1838, for example, an ambitious Illinois lawyer named Abraham Lincoln addressed the Young Men's Lyceum in Springfield, Illinois. Worried about his era's "wild and furious passions," Lincoln thought a reverence for the law could be a calming force. Lincoln even proposed that Americans swear an oath by nothing less than "the blood of the Revolution." An oath-taking American should promise "never to violate in the least particular the laws of the country and never to tolerate their violation by others." A man who violated the law, Lincoln thought, tore "the character of his own, and his children's liberty." For Lincoln, a belief in the rule of law was something of a political religion:

Let reverence for the laws be breathed by every American mother to the lisping babe, that prattles on her lap – let it be taught in schools, seminaries, and in colleges; - let it be written in Primers, spelling books, and in Almanacs; - let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; let the old and young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice upon its altars.²

Twenty-five years later, some wondered just how strong Lincoln's reverence for the law was. In 1861, at the beginning of the Civil War, Lincoln suspended habeas corpus. Not only rival Democrats but also some Republican allies deplored his lack of commitment to well-established constitutional

¹ Hunt (1985) p. 17.

² Lincoln (1894) p. 42.

protections.¹ Roger Taney, Chief Justice of Supreme Court of the United States and at least symbolically the first defender of the rule of law, also blasted Lincoln for failing to respect civil liberties.²

American Presidents of the twentieth and twenty-first centuries routinely boasted of the nation's commitment to a rule of law. John F. Kennedy's short but legendary Presidency of the early 1960s included its share of tributes to the rule of law. When speaking at a 90th anniversary celebration of the founding of Vanderbilt University, Kennedy told the assembled that "the educated citizen has an obligation to uphold the law." Why point specifically to the "educated citizen"? Beyond the elitism to which Kennedy was hardly immune, he thought it was those who had studied history, ethics, and civics who would most appreciate that "a respect for the law makes it possible for free men to dwell together in peace and progress." "The educated citizen," Kennedy said, knows that "law is the adhesive force in the cement of society, creating order out of chaos and coherence in place of anarchy."³

Toward the end of his remarks, Kennedy underscored the way American respect for the rule of law contrasted with other nations' acceptance of "the rule of force."⁴ He presumably had in mind the Soviet Union and other nations in the so-called "Communist Block," against whom the United States was at that point in time waging the proverbial "Cold War." The United States respected the rule of law, Kennedy thought, but evil Communists did not.

Similar comparisons surfaced in conjunction with the establishment of the national holiday called "Law Day." Congress created the holiday with a joint resolution in 1961, and Kennedy in turn issued a proclamation saying May 1, 1962 would be the first celebration of the holiday. "Whereas, just as freedom itself demands constant vigilance," he said, "it is essential that we nurture through education and example an appreciation of the values of our system of justice and that we foster through improved understanding of the function of law and independent courts an increased respect for law and for the rights of others as basic elements of our free society."⁵ What better day to do this than May 1. Communists, after all, foolishly thought May Day should be devoted to the celebration of worker solidarity and Marxist revolution.⁶

Ronald Reagan, the most popular President of the second half of the twentieth century, issued his own Law Day proclamation in 1984. "Our unique experience demonstrates that law and freedom must be indivisible partners," he said. "For without law, there can be no freedom, only chaos and disorder; and without freedom, law is but a cynical veneer for injustice and oppression." "One of our nation's strongest principles," Reagan continued, "is that voluntary adherence to the rule of law expands, rather than limits, the opportunities for freedom."⁷

¹ Neely, Jr. (1991) p. 9.

² Goodwin (2005) p. 355

³ Kennedy (1963).

⁴ Ibid.

⁵ Kennedy (1962).

⁶ Foner (1986).

⁷ Reagan (1984).

President Barack Obama need not worry about the Communist menace as much as his recent predecessors in the White House, but he, too, has referenced the rule of law. In an address welcoming senior staff at the beginning of his second term in 2009, Obama told the assembled: “Transparency and the rule of law will be the touchstones of this Presidency.”¹ Like Abraham Lincoln a century and a half earlier, Obama worried about the turmoil and potential violence in his era. In particular, he worried that decisions by prosecutors and grand juries involving police shootings of African Americans would spark arson, looting, and riots. He cautioned Americans to remember: “First and foremost, we are a nation built on a rule of law.”²

As with pronouncements regarding other tenets of American ideology, these pronouncements regarding the rule of law need not be taken as accurate descriptions of American life. The independent World Justice Project (WJP), a nonprofit organization based in Washington, D.C. that studies and reports on the rule of law, has used 47 indicators to generate a so-called “Rule of Law Index.” Referring to this Index, the WJP then ranked 99 nations according to the extent they lived by the rule of law. The United States was nineteenth in the ranking.³

Standing nineteenth out of 99 is surely respectable. Citizens of the United States could conceivably take pride in how their nation compares to Zimbabwe, Afghanistan, and Venezuela, which appear at the very bottom of the WJP’s ranking. Yet given assorted ideologues’ claims that the United States is distinctively committed to the rule of law, one might have expected the United States to stand higher than nineteenth. Other common law nations such as Australia, Canada, and New Zealand rank higher than the United States, and the top four nations in the WJP’s ranking – Denmark, Norway, Sweden, and Finland – do not boast of their commitment to the rule of law as does the United States.

Regardless of the WJP’s ranking, American Presidents and others can and do righteously express their belief in the rule of law. Ideological pronouncements of this sort do not depend strictly on social realities. American ideologues take law to be a good thing. They assume courts will apply laws fairly. And they think, because of its laws and the workings of its courts, the United States is able to live by the rule of law rather than men to a greater extent than do other nations.

An Era of Decline?

As noted earlier, ideologies have some degree of fluidity. Social conditions shift, and ideological tenets change in and of themselves and also in

¹ Barack Obama, “Remarks of the President in Welcoming Senior Staff and Cabinet Secretaries to the White House, January 21, 2009,” Office of the Press Secretary, <https://www.whitehouse.gov/the-press-office/remarks-president-welcoming-senior-staff>.

² Obama (2014).

³ World Justice Project (2014) p. 14.

relationship to other tenets. It is even possible for an ideological tenet to be turned completely on its head, that is, to reject the same thing that it earlier had endorsed.

At one point in American history, for example, the rags to riches tale was central in the ideology. Presidential candidates claimed to have been born in log cabins, readers devoured Horatio Alger novels, and newspapers lionized prominent inventors, industrialists, and sports figures as self-made men. In the present, by contrast, the rags to riches tale has much less resonance among Americans and is rarely mentioned. In fact, Americans have grown quite leery of the rages to riches tale. A recent survey revealed that only 17 percent of Americans think everyone has a chance to get ahead in life, while 60 percent think only a few people already near the top have the opportunity to advance.¹

The belief in the rule of law as a tenet of American ideology might also be in decline, and the tenet might be losing its place in the American ideological network. In the opinion of many, the postmodern society became a reality in the United States in the final quarter of the twentieth century, and postmodern society abounds with skepticism regarding freestanding prescriptions and proscriptions and includes an unwillingness to defer to authority, legal or otherwise. If law is not taken to be authoritative, it is unlikely to inspire much respect and deference.

The attitudes of the postmodern society, it might be noted, are not to be confused with varieties of mass culture, art, and philosophy often labelled “postmodernism.” Enjoy the music of the Talking Heads, the novels of Thomas Pynchon, and the reflections of Jacques Derrida, but the postmodern society is more of a sociological and historical matter. Most commonly, commentators see the postmodern society first appearing in Japan, Western Europe, and North America in the 1970s.

The best way to appreciate the postmodern society is to contrast it with the modern society that presumably preceded it. A product of the grand transformative process known as “modernization,” the modern society began to develop in the later stages of the Enlightenment, extended through the Industrial Revolution, and in the United States included the progressive and liberal periods of the first two-thirds of the twentieth century.² Although differences of opinion were numerous, the main philosophical thrust of the modern society dated back to the *philosophes* and accepted individualism, utilitarianism, and the notion that man-made rules could and should direct both government and human conduct in general. Even socialists and anarchists embraced Enlightenment thought. Yes, capitalism had developed in dangerous ways, but modernists on the political left did not call for a return to premodern norms but rather envisioned a liberated postcapitalist modern society of the future. Despite genocides, exploitative imperialism, terrible wars, and economic collapses, the dominant attitude of the modern society somehow

¹ Scheiber (2015).

² For a brief history of modernization in North America, see Brown (1976).

remained confident and even optimistic. Rational and resourceful humankind could pursue progress.¹

Modernization theory is often criticized as both simplistic and Eurocentric, and the characteristics of postmodern thought are not wholly new or original. The postmodern society does not cleanly break away from the modern society.² Nevertheless, there are pronounced features of the present that differ from the norms of modernity. In the present, many take language to be indeterminate and both rules and their application to be contingent. Within the middle and upper classes and also more generally, there is often no reigning authority beyond individual preference. Most recently, with the spread of digital and personal communication, a new shallowness and superficiality has become evident. The dominant postmodern attitude, some assert, is anxious rather than confident.

The disappearance of reliable authority in the postmodern society has the greatest ramifications for a belief in the rule of law as a tenet of American ideology. A belief in the rule of law was central and even energizing in the modern society, as evidenced by the often-heard suggestion that a society is better off if governed by the rule of law rather than the rule of men. “Implicit in this vein is the belief that legal rules are objective things distinct from the subjective actors who are confronted by them”³ In the postmodern context, meanwhile, people are less inclined to defer to law as authority, thinking law, like everything else, is subject to interpretation and therefore highly variable.

Skepticism regarding the rule of law surfaced during the final third of the twentieth century within the general public and also among legal intellectuals. Within the general public, the idea increasingly took hold that the United States had too much law. Local ordinances, state and federal statutes, and government regulations were said to be increasing at an incredible rate, and decisions reported by courts and also regulatory agencies reportedly multiplied like rabbits. Distinguished Indiana University law professor James W. Torke, who had been a member of the legal profession for over 30 years, admitted that “at times it has seemed that the law has become smothering.” “At times, I feel law more as a menace than as sword or shield. I feel claustrophobic amid its ever-growing baggage and clutter, and I am supposed to be an expert – to know my way around.”⁴

Bayless Manning was one of the first to underscore the popular sense that law was teetering out of control. The former Dean of the Stanford Law School and President of the Council on Foreign Relations, Manning dubbed this development “hyperlexis.” Writing in a 1977 issue of the *Northwestern University Law Review*, he said law was becoming a national disease, “the pathological condition caused by an overactive law-making gland.” He

¹ Best (1995) p. 18.

² Ibid, 20-21.

³ Mootz (1993) p. 259.

⁴ Torke (2003) p. 8.

maintained that the nation's law libraries were swamped, the citizenry was confounded by the legal blizzard, and the forest preserves faced depletion.¹

Not only the number of complaints about the law but also the metaphors used to complain about it were intriguing. The connotations conveyed by the metaphors suggest just how seriously Americans took the problem of too much law to be. In particular, as Mila Sohoni has pointed out, the media liked metaphors suggesting natural disasters. The ever-growing law resembled "floods, tidal waves, tsunamis and other uncontrollable watery phenomena."²

With laws thought to be inundating us, it is hardly surprising that proceedings in the courts were also called into doubt. Some complained that lawsuits had run amuck and that the United States had become the world's most litigious nation.³ What's more, a survey undertaken by the American Bar Association revealed that Americans considered their courts to be unfair and arbitrary. The survey revealed that 47% of those surveyed thought their courts were racially and economically biased. Over 90% thought the wealthy and large corporations had unfair advantages in courtroom proceedings.⁴ The sense that lawsuits were too common and pursued in biased courts evoked for some not uncontrollable watery phenomena but rather illness and infection. The nation's excessive litigiousness struck some as a "disease and even an epidemic."⁵

Politicians, not surprisingly took up the complaints about hyperlexis and about excessive litigiousness. Senator Edmund S. Muskie, the United States Senator from Maine who had been the Democratic Party's nominee for Vice President in 1968, read Bayless Manning's entire hyperlexis article into the *Congressional Record* on March 16, 1978. On the other side of the aisle as well, members of the Congress grouched about the wildly and unnecessarily growing law. As the twentieth century gave way to the twenty-first, the proposition that there was too much law was one of the few propositions that could command bipartisan support.⁶

While the laments among journalists and politicians about 'too much' law translated into little more than a call to minimize legislation and regulation, various schools of legal intellectuals attempted to explain the problems with legal authority and a belief in the rule of law. In the opinion of one scholar, the five most important postmodern jurisprudential schools were law and economics, critical legal studies, feminist legal theory, law and literature, and critical race theory.⁷ Although quite different in their concerns and political alignments, all five shared a postmodern skepticism regarding law and a sense that legal theory articulated onto itself was impossible.⁸ "A striking feature of

¹ Manning (1977) p. 767.

² Sohoni (2012) p. 1628.

³ Rhode (2004) p. 456.

⁴ Greenhouse (1999).

⁵ Sohoni (2012) p. 1628.

⁶ Ibid. p. 1639.

⁷ Minda (1995) p. 1.

⁸ Ibid. p. 9.

much postmodern legal thought, particularly its post-structuralist variant, is its flat rejection of the possibility of the Rule of Law.”¹

Limitations of time and space preclude an examination of the five schools, but a discussion of the Law and Economics Movement might illustrate how at least one school of postmodern legal intellectuals put aside their belief in the rule of law. The Law and Economics Movement, is arguably the most important and enduring of the five schools. According to Anthony Kronman, former Dean of the Yale Law School, “the intellectual movement that has the greatest influence in American academic law in the last quarter of the twentieth century is law and economics.”²

Blessed with significant support from the John M. Olin Foundation, the Law and Economics Movement found an early home at the University of Chicago Law School and then spread to other schools. Its leading figures included Nobel Prize-winning economists Gary Becker and Ronald Coase; scholars Robert Cooter, William Landes, Henry Maine, and A. Mitchell Polinsky; and United States Court of Appeals for the Seventh Circuit judges Frank Easterbrook and Richard Posner. The latter had earlier in his career been a member of the University of Chicago Law School faculty and published *Economic Analysis of Law*, a work that went through multiple editions and was as much a treatise as a textbook.³ According to one study, Posner was the most-cited legal scholar of the twentieth century.⁴

Intellectually speaking, the Law and Economics Movement looked not to such traditional concerns as precedents or statutes but rather to considerations of allocative efficiency, that is, the movement of resources to their most valued use. Law tended to this end, Law and Economics scholars told anyone willing to listen, and we should be encouraged by that. Market forces, after all, were better guides for social life, and law appropriately bent to those forces. Also, if one area of law or another seemed to be heading in an “inefficient” direction, it should be nudged, pushed, and shoved in the right direction. The Movement, in this sense, was not merely predictive but also normative.

In recent years, law and economics scholars have moved beyond the rigidly doctrinaire prescriptions of the earlier Law and Economics Movement, and law and economics scholars have become more “pragmatic,” to use their own preferred term. In 2015, law and economics scholars also tend to focus on the relationships of rule systems and behavior. But the Movement in the 1970s and 1980s superbly illustrates how one school of legal intellectuals came to insist that law be understood and shaped from a position outside itself.

Both the popular sentiments about law and the theories of the postmodern jurisprudes include a degree of “anti-legalism,” that is, a decidedly negative attitude about law. To some extent, Americans have stopped liking law. There is too much of it. It cannot be counted upon to stand apart from social life and guide us. This strikingly contradicts the traditional ideological belief in the rule

¹ Mootz (1993) p. 251.

² Kronman (1993) p. 166.

³ Posner (1973).

⁴ Shapiro (2000) p. 409.

of law. Instead of believing in law, many Americans have grown skeptical and suspicious of law, and many take the belief in the rule of law to be misguided and politically obfuscating.

Conclusion

Is the belief in the rule of law losing its place as a central tenet in American ideology? If so, the disappearance would of course be gradual and uneven. President Obama, as noted earlier, continues to insist both his administration and his society stand for the rule of law. Like the most impassioned of ideologues, he apparently believes in the ideological tenets he spouts.

But still, there is reason for legalists and others to be concerned. Large sectors of the population think that their postmodern society is plagued by hyperlexis and that their courts are arbitrary and unreliable. Politicians can and do play to these sentiments. Powerful schools of thought including but not limited to the Law and Economics Movement do not champion the rule of law and have ensconced themselves within the legal academy and within the courts as well. The two-hundred-year run of a belief in the rule of law as a tenet of American ideology may be coming to an end.

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