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April 30, 2016: The Redemption of American Public Life

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Title: The Redemption of American Public Life

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4/30/2016--Classes ended last night. I will have more to say about my class in Philosophy of Law, which ended with a meeting at my home. It was a marvelous experience, but now the work sparked by that class begins. I told my students on Constitutional Law that it is their task to repair public life in America. The question is whether law school is giving them the tools to do that. Likely the answer to that is no, for now. Or, yes only in part. Or yes, in potential.

One place to start this repair is the acknowledgment of the damage that popular nihilism has done and continues to do. By popular nihilism I refer to the lack of commitment to lasting and powerful truth. (Calling this objective truth raises philosophical issues I am not equipped to deal with at this point. "Lasting" will do to distinguish it from opinion.)

Let's start with the nihilism in political/philosophical discourse. Samuel Freeman responded to this charge against the left in a review in the New York Review a couple of weeks ago. Here is a proposed letter to the editor that I sent in, but which will evidently not be published.

To the Editors:

While there are no factual errors in his review of Roger Scruton's recent book, there are omissions and a lack of nuance that permit Samuel Freeman to doubt that the American left is subject to the "bleak relativism" and opposition to values objectivity of which Scruton accuses it. (The Enemies of Roger Scruton, NYR, April 21) Clearly some of the figures that Professor Freeman mentions are in fact relativists. Certainly this is so, and famously so, of Richard Rorty. It is even true of John Rawls, who had to place the source of justice in the hypothesized human consent of his "original position" because there was for him no source for objective values.

But a lack of commitment to values objectivity is even true, strangely, of one seemingly great exception to the charge: Ronald Dworkin. Yes, Dworkin always insisted that values were real—that cruelty is really wrong, as he wrote in his last work, Religion Without God and in the pages of this magazine. But, in that last work, Dworkin also repeated his long-standing fealty to David Hume's position that one cannot deduce an ought from an is. Unfortunately for Dworkin, just such a deduction from fact to value is necessary for the moral realism that Dworkin defended. We will now never know how Dworkin might have resolved this tension, since it was never pressed on him during his lifetime. (For some reason, Professor Freeman omitted the American philosopher most committed to moral realism—Hilary Putnam. But Putnam grappled with the left's nihilism for much of his life and even mentioning his name would have reminded readers of just how correct Scruton is on this matter).

The context of the left's value relativism is both philosophical and strategically political. Philosophically, it reflects the death of God and the collapse of religion. Strategically, it reflects a cheap advantage in the culture wars, where traditional morality can be easily attacked as mere opinion.

One sees this strategy of undermining traditional values in the left's support for Justice Kennedy's deeply nihilistic majority opinion in *Lawrence v. Texas*, the 2003 case that set aside

criminal penalties for gay sexual relations. Kennedy concluded that condemning conduct a majority considers immoral is not a legitimate government interest. How does Justice Kennedy and the left then imagine that progressive taxation or the protection of wilderness are to be justified? These policies can only be defended properly as morally right. And the same is true of gay rights. The only proper ground to set aside bigotry against gays is for the Supreme Court to call it bigotry. Justice, not tolerance, is what's needed.

This is not just a problem for the left, however. Scruton and the right are also subject to the death of values. Thus, Scruton's commitment to traditional institutions as a source of values is just another form of Rawls' grounding of values in human consensus. Indeed, as I show in a recent article in the Akron Law Review, *The Five Days in June When Values Died in American Law*, the jurisprudence of the right and the jurisprudence of the left are both deeply compromised by the collapse of values. This is a serious matter that cannot be engaged until it is acknowledged. Professor Freeman's misguided defense of the value objectivity of the left just postpones that needed reckoning.