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The Virtue That Has No Name

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There has in recent years been a revolution in American politics, one so at variance with how we think of ourselves that it is remarkable how little it is noticed. We are used to imagining America as the land of the free, yet we have dropped to 12th place in the rankings of economic freedom produced by the conservative Heritage Foundation. The libertarian Cato Institute is even more doubtful about us, and in their Human Freedom Index we come in only at number 20. In both rankings, we trail countries that uniformly have single-payer government healthcare systems. We used to be number two or three, behind Hong Kong and Singapore, but now we're embarrassed to find we're far behind ostensibly socialist Denmark.

For this we have a number of people to thank. With George W. Bush we took a hit, but with Obama we've been in free fall. The rise of an all-powerful executive branch has put paid to an imagined Madisonian constitution of a separation of powers and has permitted Obama to rule as what the never-too-much-to-be-praised George Mason called an "elected monarch." The very point of the Constitution was to prevent the plenitude of political power vesting in a single person, yet that's where we find ourselves.

All-powerful presidents haven't been terribly friendly to liberty in places like Borat's Kazakhstan, but that's not the only explanation for our fall. Other things drag us down, such as our failure to adhere to the rule of law. Until fairly recently, that wasn't on our radar screen. Most economists explained why some countries were wealthy and some not by reference to natural endowments, such as valuable minerals or oil. Others pointed to the country's infrastructure or to human-capital investments such as those provided by a country's public educational system. Still others pointed to differences in culture or religion. Over the last 40 years, however, economists have increasingly pointed to the role of institutions, such as a legal regime that protects property rights and enforces contracts.

Natural assets such as farmland, oil, and minerals and capital assets such as plants and machinery aren't the most important sources of wealth. The World Bank estimates that they amount to only 23 percent of a country's riches. The rest is intangible assets, the difference in institutions, of

which the most important element is adherence to the rule of law: equality before the law, an efficient and honest judicial system, and the absence of corruption. Remarkably, that accounts for 44 percent of a country's total wealth, according to the World Bank.

The World Justice Project, co-founded by a former head of the American Bar Association, ranks countries according to their adherence to the rule of law. Russia comes in at 75 in a list of 102 countries, just a little ahead of Madagascar (82) and Iran (88). And what about America? It's not Russia, not by a long shot, but it still doesn't rank all that highly on the Rule of Law Index, coming in at 19 out of 102 countries, and 12th amongst 31 "high income" nations. That might seem surprising, until one recalls that there are places like Illinois in America.

Run a regression, as we like to do at George Mason Law School, and one finds that were America's ranking to rise to that of Canada, our household per capita GDP would increase by nearly $2,500, from $53,143 to $55,628. Were, *per impossibile*, our ranking to rise to that of Denmark, our per capita GDP would rise to $61,178. For America as a whole, that would come to $1.9 trillion dollars, a 10 percent increase in the country's wealth.

How did it come to this? No country can boast of a stronger set of individual rights, guaranteed in the Bill of Rights and the Reconstruction Amendments, and that's how we're apt to conceive of the rule of law. Indeed, we see every debate about justice through the prism of rights. Yet the other countries that beat us on the Cato and Heritage rankings don't have bills of rights, or else, like Canada, adopted them only recently.

If Cato and Heritage are to be believed, such countries have few lessons to take from us on the subject of liberty. Come to think of it, just how has the Bill of Rights served the cause of American liberty? Don't get me wrong. I think that the free speech rights in the First Amendment are extraordinarily important, and there aren't any other ones I'd want to trade away. But really, just how much protection have they offered, as a matter of history?

When I think of our experience with the Bill of Rights, I am reminded of Samuel Johnson's letter to Lord Chesterfield. When he wrote his *Dictionary of the English Language*, Johnson lacked a friend at Court, an academic sinecure, a living, and therefore sought the support of literary patrons. But when he visited Chesterfield, one of the most famous patrons, Johnson was forced to cool his heels in an outer office, amongst other supplicants, and after the briefest of visits was given only £10. Yet when the book at last appeared Chesterfield deigned to commend it. Too late, said Johnson. You have withheld your notice "till I am indifferent and cannot enjoy it … till I am known and do not want it."

Seven years, my lord, have now past since I waited in your outward rooms or was repulsed from your door, during which time I have been pushing on my work through difficulties of which it is useless to complain, and have brought it at last to the verge of publication without one act of assistance, one word of encouragement, or one smile of favour. Such treatment I did not expect,

for I never had a patron before. … Is not a patron, my lord, one who looks with unconcern on a man struggling for life in the water, and when he has reached ground, encumbers him with help?

Even so, the Bill of Rights looked on with unconcern at all the cruelties under which American slaves labored or the indignities heaped upon blacks for more than a hundred years after Emancipation. It was indifferent to the savage removal of peaceful Native Americans, when settlers and politicians saw a profit to be made in taking their land. And when, finally, we arrived at our present, enlightened and liberal era, what did the Bill of Rights produce? Abortion rights and same-sex marriage.

Would we have been so much worse off without a Bill of Rights, then? That's a counterfactual. It asks us to construct an imaginary world in out minds, one where things turned out differently. But then every attempt to evaluate the importance of an historical event necessarily involves just such a counterfactual. And posing the question that way, one is permitted to wonder whether the Bill of Rights was really so important.

For Native Americans it mattered not at all. For African-Americans it mattered little before *Brown* v. *Board* in 1954, and even thereafter it was legislation that mattered more, especially the 1965 Voting Rights Act. Interestingly, it didn't matter for women either. They gained the right to vote in Canadian federal elections in 1918 and in American federal elections in 1920. In Britain, most women gained the right to vote in 1918. What mattered more than abstract legal rights, it seemed, was a common understanding about political questions in countries that shared very similar traditions about liberty. Or about restrictions on liberty, for that matter. Without a Bill of Rights, Canada interned its Japanese-Canadians after the attack on Pearl Harbor. With a Bill of Rights, the United States interned its Japanese-Americans after the attack, at the request of noted civil libertarian Earl Warren, then California's attorney general.

At high-level meetings in Washington, where some legal reform is discussed, the first question is always "should we adopt a litigation or a legislative strategy?" Whatever the issue, you see, there's always an available litigation strategy. You didn't like Obamacare? Then take it to the courts, again and again and again. The cases are losers but can be sold as quick fixes to donors and keep the conservative litigation industry well-funded.

The magic of a litigation strategy is that it's so much cheaper, even after the lawyers are paid. There's no need for lobbyists or hearings, notices and comments, or for the massive publicity campaign upon which legislative efforts rest, apart from a few well-targeted op-eds and helpful editorials. More importantly, there are no logrolling costs, like the special favors that Harry Reid handed out to get the votes to pass Obamacare in the Senate. Friends in the litigation shops, and perhaps some legal academics with time on their hands, can be relied upon to provide amicus briefs. Thereafter it's simply a matter of making the arguments, and awaiting the result from the crazy roulette table that inhabits Anthony Kennedy's brain.

Scholars such as Mary Ann Glendon and Jeremy Waldron have argued that legal issues are often better left to legislatures than to the courts. Unlike Justice Kennedy's decisions, legislative changes have the legitimacy conferred by democratic institutions and are easier to mend when, with the benefit of hindsight, they're found to be misguided. As the product of democratic deliberation, they're also easier to accept, less likely to result in protracted, bitter debates. If one has lost a political battle, there's always the chance of fixing it down the road, and there's no great shame about being on the losing side. Not so with a Supreme Court decision such as *Obergefell*, where Justice Kennedy announced that he sought to "teach the Nation that [rights to same-sex marriage] are in accord with our society's most basic compact." The message to losers is not merely are you churlish but you're also non-American, since the Bill of Rights is constitutive of our identity as Americans.

If one has problems with a judicial un-American Activities Committee, this argues for a thinner conception of legally enforceable rights, for a slimmer Bill of Rights. That's not to say that I think the legislature should take up the slack, however, as Waldron might want. Instead, we should ask ourselves whether we could do with less law all around, whether indeed we might improve our rule of law ranking in doing so.

We have more law, more regulation, more litigation than any other country, and somehow we're faulted for failing to adhere to the rule of law. It doesn't take a genius to figure out that the answer isn't more law, and anything that contributes to our litigation culture should be viewed with suspicion. And one of the chief offenders is our fascination with legally enforceable rights, which were greatly expanded by Justice Kennedy's decision in *Obergefell*. It wasn't simply the right to same-sex marriage, which affects only a percent of a small percent of the population, but the basis upon which the right was grounded. The plaintiffs asked for equal dignity in the eyes of the law and Kennedy held that the Constitution grants them that right.

What Kennedy had done was to graft onto the Constitution an open-ended right to respect, derived from Hegel by way of Alexandre Kojève. We suffer a psychic wound when others fail to respect us, and for Kennedy this amounts to an unbounded cause of action. Once let out of the box, there is no principled way of denying a right to marry to any kind of union, no matter how many the husbands and wives, since this would imply a want of respect for their union.

Worse still is the way in which a right to respect gives the permanently aggrieved an incentive to seek out disrespect. Robbie Blankenship and his partner Jesse Cruz sought to marry after the *Obergefell* decision and might have done so in Columbus, Ohio, where they lived. When they heard that court clerk Kim Davis was refusing to issue marriage licenses to gays, however, they got in their car and drove 151 miles to Morehead, Kentucky, to see her, in order to suffer the indignity of being turned down.

What shall we call people who go out of their way for a smack in the face? Today they're called social justice warriors. Not too long ago they were called jerks. They are also opportunists, for

they seek to exploit the correlative duty that lies behind every enforceable right. If I have a right to respect, you have a duty to show it to me, and woe betide those who fail to do so. You must give it to me, good and hard, and I'll search you out to get it.

We shape our law and then our law shapes us. At a time when the common law was less solicitous about bruised feelings, it taught us to suck it up. And that plausibly made us happier as well as tougher. When we are encouraged by the legal regime to obsess about emotional slights, we feel them more deeply and for a much longer period of time. When we can't sue over them, we get over them more quickly.

The strategic victims are tiresome in the extreme, but what interests me more is the special virtue of those who aren't like that, who don't look for payback, who won't administer the last vicious kick to a fallen opponent, who don't look for people to sue and who in their own quiet way contribute to the rule of law. I do not have a name for their virtue.

It partakes a little of magnanimity, of the kind shown by Ulysses Grant and his army at Appomattox. The circumstances of his meeting with Robert E. Lee were so extraordinary, and Grant's conduct so exemplary, that Americans today cannot fail to be moved when they recall it. Unless they happen to be social justice warriors. Grant observed Lee's splendid new sword and privately decided that he would not ask Confederate officers to surrender their weapons, lest he embarrass Lee. The surrender signed, Lee left the Court House on his horse, quietly observed by a group of Union officers who were moved to tears by the pathos of the scene.

Union General Joshua Chamberlain took the surrender. Wounded twice in the days before Appomattox, he remained in command and drew up his brigade to greet the Army of Northern Virginia as it marched past for the last time. As it did so, Chamberlain ordered a "carry arms" salute for a worthy foe. The Confederates were led by General Gordon, at the head of the old Stonewall Brigade, who reared his horse and dropped his sword in a return salute, which was carried on down the line on both sides.

What Chamberlain and Gordon had done was an act of chivalry, and chivalry is also a virtue of those who do not rush to the courthouse. We saw the same kind of chivalry in the novels of Patrick O'Brian and in old Western movies where the marshal and outlaw each waited for the other to draw first. This in turn was how the British and French fought in Voltaire's account of the Battle of Fontenoy (1745). As both sides approached each other for battle, the English officers saluted the French by taking off their hats. The French officers returned the compliment, and an English captain called out "Gentlemen of the French guards, give fire." For the French, Count d'Androche replied, "Gentlemen, we never fire first. Do you fire," at which the English finally obliged.

The magnanimous man is moved by the plight of a defeated foe, and seeks to restore his feelings. The chivalrous respect their opponents as worthy adversaries and would think themselves dishonored were they to glory in their enemy's defeat. The cynic who mocks their virtues, who

tells us that the Black Prince massacred 3,000 townspeople at Limoges, or that the Battle of Fontenoy wasn't like that at all, has missed the point. It takes nothing away from a virtue to tell us that we're not always virtuous.

For there are virtuous people, and some of them are libertarians who supported same-sex marriages, on ideological grounds that elude me. And since they are virtuous, let me name some of them: David Nott at Reason Foundation, and Roger Pilon, Walter Olson, and Ilya Shapiro at Cato. What makes them virtuous is their conviction that gay rights should stop with same-sex marriage, that they shouldn't be used as a battering ram against the wedding photographer who refuses to participate in a gay marriage or the baker who refuses to bake a gay-wedding cake. Nothing is less magnanimous, less chivalrous than the gay-rights supporter who now wants to reenact *la guerre franco-française* in America by attacking every person and institution that adheres to traditional religious teachings about homosexuality.

Not that my libertarian friends would support the photographer and baker in the name of virtue, mind you. Instead, they'd do so in the name of another right, the right to freedom of association. If I carry on business, I shouldn't be forced to deal with people I don't like, be they gay or straight. An abuse of one right can't be mended by opposing it with another right, however, for freedom of association has its limits too. Because it carries on a public calling, a restaurant is required to serve African-Americans; and it is distinctly unamiable for a baker to refuse to bake a birthday cake for someone because he is gay. What is needed, instead, is a zone of behavior that is governed not by law or rights but by virtue.

But then I still don't have a name for the mensch-like virtue that scorns to turn every slight, real or imagined, into a cause of action. The virtue resembles temperance, to the extent that those who look for a legal quarrel are intemperate and self-indulgent. They are like the glutton who stuffs himself with food, the drinker who craves his wine. What I seek can also be likened to the virtue the Greeks called *praotes* or gentleness, which is shown by those not moved by unjust or unworthy anger. None of these quite capture what I have in mind, however, and I have another candidate. When I think of how we have slipped in rankings or freedom, and of how our culture of adversarial legalism can bear a good part of the blame, the special virtue of those who refrain from frivolous lawsuits might be called patriotism.