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Citation: 9 Harv. J. L. & Pub. Pol'y 123 1986



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Wed Mar 23 11:04:09 2016

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MORALITY, PRAGMATISM AND THE LEGAL ORDER

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In the announced topic, "Equality, Justice and the Market," I take the word "justice" to have a moral connotation. It surely does not refer to whether I am deciding the rights of litigants before me in accordance with the laws as they are written, "doing justice" in the legal-positivist sense. Rather, it refers to what is just in our society's economic arrangements by appeal to some moral or natural law perception.

One would be foolish to deny the relevance of moral perceptions to law. Society's moral beliefs necessarily affect its constitutional perceptions in general and its perceptions of what economic rights are protected by its constitution in particular. There is no need to apologize for the phenomenon, even when the moral beliefs spring from a theological belief. In any case, it is useless to rail against the phenomenon because it is inevitable. Even if one is an absolutist utilitarian and insists that the business of laws and constitutions is not to enshrine moral perceptions but simply to achieve the greatest physical good for the greatest number, the value that one places upon competing physical goods—sexual pleasure versus economic security, or avoidance of pain versus preservation of human life—is inevitably affected by moral and theological perceptions. In fact, even the question of who is to be counted for purposes of determining "the greatest number" turns out to be an issue of moral and theological disagreement.

Moral issues are intractable. Fortunately, however, the overwhelming majority of issues of public policy do not rise to the moral level. Rare are issues such as capital punishment, where a substantial segment of our population believes one course is morally impermissible, while the rest believe the same course is morally permissible and pragmatically—though not morally—required. Even more rare are issues such as abortion, where a substantial segment of the population believes that one course is morally impermissible and another substantial segment believes it is morally required. The vast majority of political issues, though often polemicized in moral terms, ultimately boil

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down to questions of prudence or utility, to disagreement about the most effective means to more or less agreed-upon moral ends. My modest contribution to the present program is to suggest that, even though our point of departure is a morally charged word like justice, practical utility is what we are really discussing here.

State interference in the marketplace, or to give the rhetoric the inverse spin, governmental correction of the effects of de facto unequal opportunity combined with human greed, is a purely moral issue for only two groups, neither of which represents a significant proportion of our society. At one extreme, there are the doctrinaire socialists, who believe that the natural and moral order of things is for all goods to be distributed equally. For this group, the progressive income tax, for example, is necessary not because the rich are better able to bear the social burden, but because the rich should not be rich. At the other extreme are the Social Darwinists, who believe that the natural and moral order of things is for the strong and capable to acquire and retain as much of the goods of this world as their abilities—and presumably their inheritance—will permit, and for the weak and incompetent to perish. This group would not acknowledge, and indeed would positively disparage, any private moral obligation of charity to assist the impoverished. For both of these groups, the question of government intervention in the distribution of economic goods is a purely moral issue because such intervention is, in the case of the socialists, an indispensable means of achieving what the moral order requires, or in the case of the Darwinists, a means of producing what the moral order forbids.

For the rest of us who believe that there is nothing evil in varying classes of wealth, but who also believe that there is a moral obligation to assist the less fortunate out of our abundance, the situation is a good deal more confused, and one must be careful not to phrase the issue too quickly in moral terms. Moral considerations cannot be dispositive for this larger group unless one adopts either of two unrealistic assumptions. The first is that government cannot properly enforce any of the purely moral values of society. But if that is so, why can it be made illegal to torture dogs—or for that matter, to marry two wives? The other unrealistic assumption is that government must enforce all moral values of the society. But

then why has it not been made unlawful to fail to support one's aging parents? And come to think of it, given that assumption, what was wrong with the Spanish Inquisition? Unless one or the other of these assumptions is accepted, the question of whether the government can enforce what its proponents call distributive justice, and the question of how much, turn upon such prudential and pragmatic considerations as whether the ultimate moral goal will in fact be furthered rather than obstructed and whether governmental intervention on behalf of one moral value disproportionately impedes the achievement of other moral values.

Some might seek to elevate the debate to the level of broad governmental theory somehow based upon moral precepts by asserting that certain socially acknowledged moral obligations are obligations of justice, others are obligations of charity, and only the former can be governmentally imposed. I have never found that distinction helpful because I have never been able to isolate obligations of justice, except by defining them as those obligations that the law imposes. As far as moral imperative is concerned, I hardly think that the obligation to return a phonograph record that I have shoplifted, which would normally be considered an obligation of justice, is more significant and hence more appropriate for governmental enforcement than the obligation to give a piece of bread to a starving man, which would normally be considered an obligation of charity. I think that it is foolish to say that the former may be governmentally imposed and the latter may not.

Another approach to disposing of the matter on the basis of some generalized governmental principle would be to appeal to our constitutional tradition, which surely requires that some moral precepts be embodied in law—for example, the precept against the taking of innocent human life—and certainly forbids other moral precepts from being embodied in law—for example, mandatory worship of the Creator. But the moral precepts of distributive justice, which is what we are talking about here, surely fall within the broad middle range of moral values that *may* be embodied in law but *need not* be.

It is impossible to say that our constitutional traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute. In the early days of this nation, that was the task of the churches. Even providing

a grammar-school education to those who cannot afford the cost did not become a generally accepted task of government until the last third of the nineteenth century. Nor can it be said, on the other hand, that distributive justice in our constitutional tradition is one of those moral notions, like worshiping the Creator, that may never be imposed by law. Redistributive legislation—some good, some bad—has always been with us. As examples of the good, I might cite legislation by the earliest Congresses providing funds for the education of Indians, or setting aside lands for land-grant colleges. As examples of the bad, it is enough to refer to the trade-protectionist legislation of the colonies, which, like all trade-protectionist legislation, hurt some citizens and helped others.

Thus, to say that there is a moral obligation to achieve a particular distributive result is not to say that government must undertake the function. And conversely, to say that distributive justice is a purely moral matter is not to say that government cannot undertake the function. We are left with the usual problem of political choice. Moral perceptions are, I repeat, relevant to that choice. We are more likely to pursue those moral perceptions we feel strongly about—feeding the hungry, for example, as opposed to assuring everyone a free college education. Having chosen to implement the moral perception, however, we must still determine whether that is best done through governmental compulsion. Often that turns out not to be the case. Article 23(3) of the United Nation's Universal Declaration of Human Rights provides that: "Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity" That is a lovely precept and it has been embodied in the constitutions of many of the countries of the world, including that of the Soviet Union. I doubt whether any of those countries has come closer to achieving that goal than the United States—and those that have attempted to do so primarily through governmental prescription have necessarily instituted systems of pervasive state control and supervision that erode moral values that are at least as important as distributive justice.

In sum, the judgment how much to tax and how much to spend for welfare programs is almost invariably a prudential one. Those who would exclude from the calculus moral considerations describe a governmental process unrecognizable in

human experience. Those, on the other hand, who assert that the mere identification of the moral evil of economic want in the midst of plenty conclusively determines the policy outcome of compulsory redistribution until that evil is eliminated, greatly underestimate both the complexity of an economic system based upon individual responsibility and the capacity of substantial departures from that system to affect moral values apart from the equitable distribution of wealth.

