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WHAT IS THE GOVERNMENT'S ROLE IN PROMOTING MORALS? . . . SERIOUSLY?

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In thinking about the government's proper role in promoting morals, it is helpful first to understand the nature of the disagreement. Part I of this Essay examines what is commonly meant by—as the great Lon Fuller described it—the “morality of law.”¹ Following Professor Fuller's framework, this Essay distinguishes between two very different moralities of law: the “morality of duty” and the “morality of aspiration.”² The morality of duty consists of the basic proscriptions—against murder or theft, for example—required by any governmental authority.³ The morality of aspiration, however, is a different matter altogether. It comprises the rules associated with promoting virtue.⁴ Part I concludes by recasting government's role in promoting virtue, in light of Professor Fuller's insight, as an attempt to promote a specific type of morality: the morality of aspiration.

Part II explores the wisdom of giving the government the role of regulating the morality of aspiration by asking why there is an apparent inclination to legislate virtue. The Essay concludes that this inclination owes more to history than to nature and can be traced to the merger of the state and the church in Tudor England. “Aspirational morality” was once the exclusive province of the church, outside the jurisdiction of the state. King Henry VIII, however, saw this separation of church and

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1. LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. Press 1969) (1964).

2. *Id.* at 5. This distinction must itself be distinguished from the dichotomy offered by Professor Randy Barnett when he referred to Aquinas's distinction between “public” and “private” morality. See Randy E. Barnett, Remarks at the 2007 National Federalist Society Student Symposium (Feb. 23, 2007) (transcript on file with Author).

3. See FULLER, *supra* note 1, at 5–6.

4. See *id.* at 5.

state as onerous because the Church repeatedly exercised its freedom from his control by condemning his adultery as "immoral."⁵ To correct this state of affairs and facilitate his own "affairs," King Henry commandeered the responsibilities of the Church and made morality the responsibility of the State.

Finally, Part III suggests that it is a mistake to look to government for moral guidance, even in the rare case when a society can agree upon moral principles. There is no reason to assume that democratic governments are virtuous in theory, and there is good reason to believe that they fail to reflect popular concepts of virtue in practice.

I. LON FULLER'S DICHOTOMY: THE MORALITY OF ASPIRATION VERSUS THE MORALITY OF DUTY

Those who characterize law as a moral enterprise are undoubtedly correct. It is important, however, to determine at which level it is appropriate for morality to drive the law. Professor Lon Fuller distinguished between two different types of morality with which the law deals: the "morality of aspiration" and the "morality of duty."⁶

The morality of aspiration is that conception of moral principles to which humans *ought* to aspire.⁷ It is "the good life" of virtue, to which Professor Barnett has referred.⁸ It is the "higher" standard of morality, to which both churches and individuals hope to conform, and which people hope to impart to their children.

The "morality of duty" is, on the other hand, that lower standard of morality and behavior by which a much greater part of society agrees it ought to be judged, measured, and even constrained.⁹ These are the rules that all must be expected to obey: those certain, basic rules that must restrain those who have no desire to conform to the values shared by the rest of society.¹⁰ The morality of duty is, in the nomenclature of Oliver

5. See *infra* Part II.

6. FULLER, *supra* note 1, at 5.

7. See *id.* at 5-6.

8. Barnett, *supra* note 2.

9. See FULLER, *supra* note 1, at 5-6.

10. See *id.* at 5-6.

Wendell Holmes, Jr., the morality for the "bad man."¹¹ All are constrained by a basic duty to respect the person and property of others.

More concretely, laws regarding murder or theft can be thought to impose the morality of duty. Laws requiring church attendance or graduate level education are representative of laws imposing the morality of aspiration. All agree that government ought to curb murderous or larcenous behavior. Professor Fuller's morality of duty is not frequently at issue; disagreements usually center on the morality of aspiration. The real question is not whether the government has a role in prescribing morals, but which *type* of morality the government should prescribe.

Professor Fuller's dichotomy focuses the debate on the wisdom of the government's imposition, through law, of the morality of aspiration. Should the government outlaw or even speak against gambling, smoking, and drinking (especially when it also profits immensely from these activities)? Should the government promote the consumption of milk, but prohibit the consumption of marijuana? Before responding to these questions, it may be helpful to ask a more basic question. Why is there an apparent inclination to legislate virtue?

II. THE INCLINATION TO LEGISLATE VIRTUE

With the question reframed this way—"Should the government legislate virtue?"—it is helpful to ask where this inclination originates. In other words, why is it assumed that a proper role of government is to make people better?

The answer is not found in our nature. The idea that government is a proper source of moral guidance is, in fact, a relatively young idea in human history. It has not always been part of American culture or law. Chancellor James Kent, author of Kent's *Commentaries*, and one of the most influential American legal minds of all time, had a personal story that illustrates how foreign this impulse is to American law. According to Kent's grandson:

[He was] waited upon by a temperance committee and urged to give his authority and sanction to the principles

11. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

and aims of a mass meeting by adding his name to the list of those who had pledged themselves not to use intoxicating liquor, being unduly pressed after his first polite negative, he made the following reply, declining the request: "Gentlemen, I refuse to sign any pledge. I never have been drunk, and, by the blessing of God, I never will get drunk, but I have a constitutional privilege to get drunk, and that privilege I will not sign away."¹²

Kent never had the inclination to grant legislative authority over his sobriety. Indeed, he saw certain acts of *immorality* as a constitutional right. He recognized something akin to Professor Fuller's distinction. Nevertheless, virtue—the morality of aspiration—is assumed today to be the proper province of the state. Why?

Throughout most of the history of Western Civilization, questions of morality were administered by institutions wholly separate from, and in competition with, the institutions that administered law.¹³ Separation of church and state predates Dr. Michael Newdow; it was *de rigueur* for most of Western history.¹⁴ Church and state were, quite literally, separate and co-equal sovereigns.

Before the Reformation, the question whether homosexuals could marry would never have been put to the king; marriage was completely within the jurisdiction of the Church.¹⁵ Simi-

12. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 165 (1898).

13. Although St. Augustine is credited with developing the idea of separation of church and state in *City of God*, developments in Europe during the Middle Ages entrenched this separation, as popes fought for independent appointment without the interference of kings, and the kings fought against papal supremacy over secular matters. See STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1999); see also UTA-RENATE BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY (1988) (detailing Pope Gregory's successful attempt to wrest control of papal appointment from civil rule); H.E.J. COWDREY, POPE GREGORY VII, 1073-85 (1998) (detailing same); GERD TELLENBACH, THE CHURCH IN WESTERN EUROPE FROM THE TENTH TO THE EARLY TWELFTH CENTURY (1993) (detailing same). The development of Gallicanism on the Continent also reinforced the idea of separation of church and state. See THOMAS P. NEILL & RAYMOND H. SCHMANDT, HISTORY OF THE CATHOLIC CHURCH 431-35 (1957). The First of the Four Gallican Articles pronounced by French clergy in 1682 held that the pope had supreme spiritual power but no secular power. *Id.*

14. See Michael Newdow, Remarks at the 2007 National Federalist Society Student Symposium (Feb. 23, 2007) (transcript on file with Author).

15. See ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 72 (1966).

larly, the idea that enfeoffment of property might be a question for a bishop would have been quite laughable; lands of the realm were the province of the king. Questions involving the morality of aspiration were the province of the Church and the ecclesiastical courts.¹⁶ Questions of property—the morality of duty—were the province of the king and the king's courts of law.¹⁷

When did questions of the "higher" morality become the province of the king? In Anglo-American legal history, it happened when the state took over the role of the church by taking over the Church. Specifically, a particular King of England found the constraints of the Church too constraining. Our practice of looking to the state to define morality began when King Henry VIII—acting as the State—decided to imprison and execute a queen so that he could marry a woman more "worthy" of the throne.¹⁸ To effectuate his intentions, the King had to overcome a significant obstacle posed by the condemnation of the Church. Because his—the State's—authority did not extend to marital issues, which were the province of the Church, he simply assumed by force the Church's responsibilities and powers.

In other words, the State became the keeper of morality to enable the King's adultery. The State's first act in its new role as the regulator of morality was to facilitate its own immorality. Ever since, the state has occupied and further assumed the traditional functions of the church: approving marriages,

16. See *id.* at 72–73. A prerogative writ issued by Edward I in 1286, *Circumspecte Agatis*, recognized and reaffirmed the King's understanding of the distinction between purely spiritual matters (*quae mere sunt spiritualia*) and civil matters. *Id.*

17. See *id.* at 71.

18. The new queen turned out later to be not so worthy, and so had to be executed so that yet another queen could take her place. This brief, "tongue-in-cheek" interpretation of the reign of Henry VIII and the English Reformation dramatically oversimplifies the merger of ecclesiastical and civil law. Church historians often refer to the merger of spiritual and civil affairs under the absolute state as "Gallicanism." See THOMAS P. NEILL & RAYMOND H. SCHMANDT, *supra* note 13, 431–35. The term Gallicanism refers to the most complete expression of the movement of nation-states away from shared power with the pope, as it took shape in seventeenth-century France under Louis XIV. *Id.* at 433. The term, however, is misleading. The movement away from ecclesiastical law and authority, and toward the absolute state, began much earlier than the Gallic events, and was expressed most dramatically, if not completely, in the schism between the Church of England and the Roman Catholic Church under Henry VIII. See GOLDWIN SMITH, *A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 264–66 (1955).

making proclamations about moral behavior, and educating children.¹⁹

Understanding this traditional distinction between the role of the church and that of the state suggests a final point: if those who seek virtue look to government to promote it in others, they are likely to be disappointed.

III. GOVERNMENT'S UNSUITABILITY TO PROMOTE MORALITY

Why cannot government provide moral guidance? What exactly is government? Is it something better than the individual? Is it "practiced" by those higher or more virtuous? Does it respond to popular, obviously flawed concepts of virtue? Even if it does, are its operatives sufficiently skilled to regulate such a delicate area of human affairs?

Public choice theory has provided many reasons, in addition to those provided by the Founders, to mistrust pure democracy. Majoritarian processes are now known to be limited and corruptible by "logrolling," Condorcet cycling, and Arrow's Theorem, resulting in special interest legislation that does not even represent the views of the majority.²⁰ Why would legislation of aspirational morality be immune from these legislative infirmities?

Furthermore, even if legislation actually reflected the will of the majority, why should one expect fifty-one percent of the electorate to be particularly "moral?" The simple and familiar examples of the duly elected Chancellor of Germany in the 1930s and 1940s, Jim Crow legislation throughout the South during much of the twentieth century, and the eugenics projects of the so-called "Progressive" movement of the early twentieth century should disabuse one of the notion that majorities are always "moral majorities."

But even if the majority were always a "moral majority," one should still be reluctant to turn over the reins of moral aspirations to it. Why? The experience of the European churches is

19. Edward I recognized an even longer list of "traditional" functions of the Church, many of which arguably would be regarded today as purely civil matters. See HOGUE, *supra* note 15, at 72-73.

20. For a thorough treatment of the limitations on and corruptibility of democratic institutions and decision making, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 171-88, 265-95 (1962). See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) (explaining Arrow's Theorem).

instructive. A recent cover story of the European edition of *Newsweek* magazine described the current condition of churches and cathedrals across Europe.²¹ Church attendance is dropping so “precipitously” that many churches are being labeled “redundant.”²² Because these church buildings are protected by law, they cannot be razed, and in many countries must be maintained. To generate the revenue necessary to maintain them, these spaces are now rented for commercial purposes. A church in Cheltenham, England, for example, is currently used as an Italian restaurant.²³ A nightclub in Amsterdam is in the sanctuary of a cathedral.²⁴ A twelfth-century church in Prague is used for exotic dancing and techno music parties.²⁵

To a Christian, this is sad and even outrageous. These sacred places are abused through disuse and commercial expedience. Taking care not to conflate religion with metaphysics, the comparison is striking. Government-supported churches in Europe sit empty while self-sufficient churches in America overflow every Sunday. Why, then, would one want to adopt a European, socialized model of virtue? Americans do not let civil servants build stealth bombers, provide health care, or distribute food. Americans resist allowing civil servants to provide the most important services. Why should civil servants be entrusted with shaping character?

When society turns its aspirational morality over to the state, the state makes a mess of it. The handiest example is public education. A guided tour of Chicago’s public schools would persuade even the most ardent opponent of school vouchers that public education, at least in some settings, simply does not work. It might have been better to keep prayer in schools while getting government out of them.

CONCLUSION

For Christians, morality, virtue, and salvation require freedom. My father, Gilbert Cole, often said that he “had never

21. William Underhill, *Remodeling the Churches*, NEWSWEEK (ATLANTIC EDITION), Feb. 12, 2007, at 50.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

seen a problem that couldn't be solved with a little physical violence." Although he was not referring to government, his expression accurately applies to the law. Law, and government enforcement of it, is coercive, and legitimately so. The gun on the sheriff's hip implies that challenges to law and legal authority will be met with physical force, and if need be, violence.

Although we can compel compliance with the law through physical violence, we cannot compel salvation, virtue, or genuine morality through such means. As a Christian, I believe that we cannot, through government's monopoly on the legitimized use of physical violence, compel the ultimate choice between good and evil, between salvation and damnation. This is the very choice for which our Creator gave us free will. To be Christian ultimately means to believe in freedom: freedom of conscience as well as of action, freedom to choose or reject sin or salvation, so long as our actions do not injure others or deprive them of their equal freedom.

This is not to say that government does not do certain things well. It does. Those things, however, are all along the lines of what Professor Fuller describes as the "morality of duty." It is great at collecting things: taxes and information to name just two. It is relatively good at things like defense and policing criminal harms. Asking government to compete with freedom when it comes to aspirations and virtue, however, is asking it to aspire to heights beyond the reach of its arsenal.

So, if one really cares about morality, why would one let government anywhere near it?