

GOVERNMENT PROMOTION OF MORAL ISSUES: GAMBLING, SMOKING, AND ADVERTISING

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What makes gambling, smoking, and advertising and the encouragement of those activities “moral” issues? The use of the word “moral” should prompt the question: From what is “moral” being distinguished? This Essay tries to avoid use of the word because it usually conceals more than it clarifies as a basis for policy judgments. The usual distinction is between a principle-based morality, as advocated by Immanuel Kant, and utilitarianism, a morality based on consequences. The issue, therefore, would seem to be whether government should or may regulate conduct on any other than purely utilitarian grounds.

Utilitarianism maintains that the rightness or wrongness of conduct depends on its consequences. To a secularist claiming no aid from the supernatural, the above assertion seems self-evident. How is it possible to judge an action except by its consequences? Kantian tradition answers by judging an action’s inherent justice or rightness, which should somehow be determined apart from and regardless of consequences. “Do justice,” the Kantian view advises, “though the heavens fall”¹—that is, do what is inherently right, even though it brings about an unimaginable disaster. Surely that has to be wrong: If doing justice will bring about an unimaginable disaster, we must rethink our idea of justice. The fanaticism underlying the Taliban’s destruction of the Buddhist statues may illustrate the alternative of a morality apparently not based on consequences.²

Taking as a given on utilitarian grounds that human liberty is a good thing, the answer to the question whether govern-

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1. R v. Wilkes, (1770) 93 Eng. Rep. 327, 347 (K.B.) (translation of “fiat justitia, ruat cælum”).

2. See CNN.com, Afghanistan’s Taliban Orders Destruction of Statues, <http://edition.cnn.com/2001/WORLD/asiapcf/central/02/26/taliban.statues/> (last visited Jan. 2, 2008).

ment should prohibit certain conduct, and thereby restrict liberty, on any grounds other than its consequences is not a difficult one. Government should prohibit conduct only to produce beneficial consequences sufficient to overcome the resulting loss of liberty. This answer presents a problem because consequences yielding a net benefit for some people may not yield the same result for others, at least not immediately; utilitarianism, it is said, is not sufficiently respectful of the individual.³ To some extent, however, that problem is a necessary and inevitable consequence of any system of law; "immediately beneficial for every individual" does not provide a workable test for determining what constitutes permissible government action. Almost every change in the law makes some people better and other people worse off.

Taking as another given on utilitarian grounds that the welfare of each individual is equally important, utilitarianism may result in the highest degree of welfare achievable for everyone in a world of limited resources. The difficulty is not that the consequences of an action may vary for different people, but in determining the consequences. Consequences vary significantly depending upon how far into the future one looks.⁴ As a result, individuals must make decisions according to generally useful rules without attempting to determine the actual consequences of their actions. In addition, it is necessary to accept the reality that decision-making according to rules necessarily produces some suboptimal results.

The source of the disagreement between Kantian moralists and utilitarians is that the Kantians try to make certain rules absolute and seek an unattainable degree of certainty. Some libertarians, such as John Stuart Mill, make the same mistake when they try to answer all problems of legal coercion with "one very simple principle,"⁵ namely, that government should limit individual freedom only to prevent harm to others and never to protect the individual from himself.⁶ The meaning of this principle turns on the highly debatable question of what

3. Jeremy Waldron, *Rights*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 575, 581 (Robert E. Goodin & Philip Pettit eds., 1993).

4. See, e.g., R. I. Sikora, *Unforeseeable Consequences*, 29 *ANALYSIS* 89, 89 (1969).

5. JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *THREE ESSAYS* 14–15 (Oxford Univ. Press 1975).

6. *Id.* at 92–93.

constitutes harm to others. Mill's principle does not necessarily produce what most people would consider desirable results. The perhaps less brilliant but eminently sensible jurist, James Fitzjames Stephen, correctly answered Mill by noting that "the state of our knowledge is [not] such as to enable us to enunciate any 'very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.'"⁷ Specifically, society does not know enough to settle all questions of legal coercion with a single, simple rule. In fact, there probably can never be such a rule because the occasions of legal coercion are too varied and complex to formulate one.

Whether prostitution or the use of certain drugs should be legalized, for example, should depend not on any *a priori* principle, but on society's best judgment of the consequences of legalization. The same is true as to the legal regulation of gambling and smoking; the answer cannot be found in a single principle that courts can enforce as a supposed principle of constitutional law.

Indeed, on issues of public policy, constitutional law is often a means of avoiding consideration of a problem on its merits and defending an indefensible position. For example, I once debated Arthur Fleming, then Chairman of the Civil Rights Commission, on the merits of busing to increase public school racial integration. If busing does not improve educational achievement, he was asked, why should we continue to do it? "Because," he replied, "it is necessary . . . to enforce and to implement the Constitution of the United States."⁸ Justice Robert Jackson famously answered the assertion in a different context by noting that the Constitution is not a "suicide pact."⁹

The Constitution does require some unfortunate, anti-democratic consequences, such as making Governors Arnold Schwarzenegger of California and Jennifer Granholm of Michi-

7. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 85 (R. J. White ed., Univ. of Chicago Press 1991) (1873).

8. Lino Graglia, Debate at Dunbar High School in Washington, D.C. (1976), <http://realaudio.cc.utexas.edu:8080/asxgen/law/depts/media/Reels/Graglia1976.wmv> (last visited Jan. 2, 2008).

9. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1948) (Jackson, J., dissenting).

gan ineligible to be President,¹⁰ creating the privilege against self-incrimination,¹¹ and giving Wyoming two Senate seats¹² and Supreme Court Justices lifetime tenure.¹³ It does not, however, make the vote of a majority of Supreme Court Justices a superior alternative to the vote of elected legislators on all issues of public policy.

For example, Dr. Michael Newdow mistakenly believes that his policy preference of banning all government recognition of religion must prevail, regardless of opposition by the vast majority of the American people. This is not, he asserts, simply because it is his policy preference, but because it is a command of the Constitution¹⁴—which, as it happens, it clearly is not. More seriously, because one can expect better of a leading legal theorist, Professor Michael Moore argues that all sex discrimination by government is subject to “strict scrutiny” and thus strongly presumed unconstitutional because the word “equal” appears in the Fourteenth Amendment.¹⁵ He considers it irrelevant that the Fourteenth Amendment was not meant to have anything to do with sex discrimination.¹⁶ The desire of some legal academics to have their policy preferences prevail leads them to resort to constitutional arguments with no basis in the Constitution.

A result of constitutional law is that serious questions occupy the attention of some of our best minds that could not arise anywhere else because they would correctly be seen as silly. Only in America do legal scholars argue that although the government can ban cigarettes altogether, it cannot take the lesser step of banning only cigarette advertising, because that

10. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President . . .”).

11. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

12. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . .”).

13. U.S. CONST. art. III, § 1 (stating that federal judges “shall hold their Offices during good Behaviour”).

14. See CNN.com, *Litigant Explains Why He Brought Pledge Suit*, <http://archives.cnn.com/2002/LAW/06/26/Newdow.cna/index.html> (last visited Jan. 2, 2008).

15. See Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 51 (2008).

16. It took the Nineteenth Amendment to give women even the right to vote. U.S. CONST. amend. XIX.

would violate the First Amendment.¹⁷ Such an assertion illustrates George Orwell's famous statement that "[t]here are some ideas so wrong that only a very intelligent person could believe in them."¹⁸ It would not occur to an ordinary American that the First Amendment restricts the power of government to prohibit advertising of a harmful product any more than the First Amendment restricts the power of government to prohibit perjury. The Framers intended the First Amendment to prevent the national government from adopting the crime of seditious libel.¹⁹ Whatever more, if anything, it was meant to do, it was not meant to prevent the government from prohibiting advertising of a noxious product.

To answer the question posed, government can, but probably should not, ban smoking. Currently, government is moving toward an effective ban by limiting the places where it is permissible to smoke and by imposing near-prohibitive cigarette taxes in many places.²⁰ The government also can, and probably should, ban cigarette advertising. No inconsistency exists in permitting people to sell a harmful product, but prohibiting them from encouraging its use through advertising.

Similarly, with respect to gambling, the question arises whether the government should prohibit it, permit it, permit but discourage it, or permit and encourage it. Again, the application of a general principle creates inappropriate limitations because the conduct, gambling, has many different forms and these different forms may require different treatment. Whether or not one favors prohibiting some forms of gambling, few people, not even libertarians, would argue that government should encourage it. Encouraging gambling, however, is what most states are actually doing in connection with state-operated lotteries. Although lotteries were once banned in

17. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

18. OXFORD DICTIONARY OF HUMOROUS QUOTATIONS 158 (2d ed. 2001).

19. See generally LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Harper & Row 1963) (1960); but see Leonard Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985); David M. Rabban, *An Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

20. See, e.g., Assemb. B. 846, 2002-2003 Sess. (Cal. 2003) (enacted) (banning smoking within 20 feet of public buildings in California); Editorial, *Put Down the Cigarette, and Dial*, N.Y. TIMES, May 11, 2005, at A18 (noting that the price of a pack of cigarettes in New York City is now about \$7).

every state but Nevada—recognized as a sort of national red light district—in recent years they have been legalized in a large majority of the States.²¹ Despite being generally recognized as an evil, lotteries were legalized to avoid the often greater evils of illegal lotteries, other gambling, and, worst of all, money diverted to lotteries run by other states.²² In addition, supporters asserted that state lotteries would raise money to finance public education,²³ and surely nothing can be more important in this country than every person receiving more education regardless of desire or ability.

Today, one cannot travel around Texas, for example, without seeing billboards and other advertising describing the riches to be won through the purchase of lottery tickets. “Purchase,” however, is never the word used. It is called “playing the lottery.”²⁴ States merely invite people to participate actively in a fun game. Some people play tennis and golf, and others, an almost entirely different group, play the lottery. Encouraging people, likely mostly the poor,²⁵ to buy lottery tickets cannot be good social policy.

But, libertarians will tell you, lottery players are, after all, adults, and it is their money. If they would rather spend it on an impossible dream than on food, clothing, housing, or recreation, their choice should be respected. There, indeed, should be a strong presumption in favor of government leaving people alone; any restriction on human freedom by law requires justification. Although that is a good principle, it should not preclude thought as to particular cases. Sufficient justification sometimes does exist for government prohibition of certain conduct. When it appears obvious to most people that other members of society are engaging in an activity that hurts indi-

21. See DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENT AND THE TAXING OF DREAMS 60–61 (2000) (listing thirty-seven states and the District of Columbia as having state-run lotteries with a total revenue in excess of \$34 billion by 1996).

22. RICHARD MCGOWAN, STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE 16 (1994).

23. *Id.* at 17.

24. ALAN J. KARCHER, LOTTERIES 75–76 (1989).

25. See MARY O. BORG ET AL., THE ECONOMIC CONSEQUENCES OF STATE LOTTERIES 19, 29 (1991) (showing that while total purchases of lottery tickets increase with income, total purchases decrease as a percentage of gross income as a purchaser becomes more affluent).

viduals, their children, and society, it must be permissible and appropriate for the society to prohibit that activity. Although it is true that argument has led to such things as coercion of a minority to give them the ultimate good of saving their souls, it merely illustrates the necessity of making distinctions. It is not true that, as the ACLU claims, if *Hustler* is banned, *Hamlet* will soon be next.²⁶

Banning lotteries does not present a more difficult question than banning false advertising; in both cases the government interferes with free choice to protect people from products it considers harmful or ineffective, even though others might consider them beneficial. Government can and probably should ban lotteries, and there should be no question at all as to its power to ban, and the desirability of its banning, advertising that encourages smoking and participation in lotteries.

26. See American Civil Liberties Union, Freedom of Expression, <http://www.aclu.org/freespeech/gen/21179pub20051031.html> (last visited Jan. 2, 2008).