

INTRODUCTION

Liberty
and
Hard Cases*Tibor R. Machan*

WHAT IF A tornado hits? What if a lot of tornadoes hit?

The issue in this volume isn't complicated, but it is challenging. The free society is supposed to be governed with an eye to securing the rights to life, liberty, and the pursuit of happiness. In an earlier volume of this series, *Individual Rights Reconsidered: Are the Truths of the U.S. Declaration of Independence Lasting?* we have discussed why in detail and offered numerous rebuttals to critics as well. So we shall not extensively revisit the basic issue. But we will address a problem faced by those who hold that this position is sound.

Briefly, though, a free society rests on the fact that human beings at all times, in all places, are first and foremost sovereign individuals with the capacity for self-rule, self-directedness. This capacity is a defining attribute of human beings, not merely specific to certain cultures, as some critics of classical liberalism would have it. An adult human being needs to and is capable of learning how to live and flourish independently. Any community worthy of being considered a human one must accommodate this fact about us. We are also social beings, but not just any kind of society will do our individuality justice. The novelty of the American political vision,

however ill or well realized it has been, is an affirmation of the sovereignty of individuals and an established legal order in which this sovereignty is to be secured, protected, and maintained.

But what do we do when disaster strikes? Natural calamities—earthquakes, floods, tidal waves, hurricanes, tornadoes, typhoons, and the like—seem to warrant an expansion of governmental authority beyond what a free society would sanction. And government has indeed habitually stepped in with all sorts of measures whenever and wherever disasters have struck. Flood control measures are usually deemed to be its business. Few batted an eye even when the U.S. Army was called out to battle Hurricane Andrew in Florida. What is government for if not to come to the aid of citizens in such circumstances? Charles Dunlap argues that deploying the military for extraneous, nondefensive purposes is likely to convince military leaders and enthusiasts that they, not civilians, ought to be governing the country. (See Charles J. Dunlap Jr., “The Origins of the American Military Coup of 2012,” *Parameters*, winter 1992–93, pp. 2–20.)

Even in personal affairs, using physical force can sometimes be justifiable—for example, when one needs to yank an unsuspecting person from the path of imminent deadly danger. John Stuart Mill argued that physically blocking someone from stepping onto a collapsing bridge is justified even in the context of adhering to the basic principles of individual liberty and minimal government.

Yet as Robert Higgs (in *Crisis and Leviathan*) and others have shown, it is nearly impossible to reestablish limits on government once it has acquired the legal authority to expand its powers for the sake of handling emergencies. In the law and in the making of public policy, precedent counts for a great deal; there is a slippery slope here. Once an approach is legitimized, extensions of power beyond the particular and special areas originally intended are almost inevitable. The definition of what constitutes an eligible emergency tends to broaden. Eventually, no dire need whatever

Introduction / xiii

can be neglected by lawmakers. What might slow or reverse such encroachment is a change of heart, some fear of going too far or the like. But once the logic of intervening in a particular special case has been established, it is difficult to offer a persuasive rationale for declining to apply the same logic to similar cases—unless the legitimacy of the original intervention itself is challenged. As a result, most “temporary powers” assumed by government remain part of its permanent repertoire.

Consider gun control legislation. The Second Amendment to the U.S. Constitution was undermined early on in our legislative history. And now, especially in the wake of tragic shootings—at schools, restaurants, post offices, amusement parks—it has become harder and harder to raise principled objections against more and more restrictions on the right of self-defense. Vocal members of the citizenry demand it, and the politicians have precedents.

Such decline and fall of political principles serves to underscore the integrity of those principles. They can’t normally be violated, even a little, with impunity; minor incursions tend to snowball, especially when hallowed in law. Even so, a powerful tradition of political thinking challenges the value of such integrity. In contemporary U.S. politics and, indeed, around the world, it is often deemed to be a good thing to be “flexible.” Principled politics is dismissed by many sophisticated thinkers as “mere ideology.” Instead of ideology, they argue, we should embrace pragmatism.

The term *ideology* is burdened by a number of pejorative connotations, often imported into the implicit definition of the term. For example, there is Marx’s claim that principled economic and political thinking can be nothing but rationalization for class interest (with his own economic and political thinking somehow granted exemption from this indictment, however). Those who defend a substantially laissez-faire, free market system—such as Adam Smith and David Ricardo—are on this view merely doing so to promote the class interest of capitalist, wealthy people served

by such a system. Their principled advocacy amounts to nothing more than special pleading.

“Ideology” is also supposed to be the hobbyhorse of the simplistic thinker, inclining one to provide knee-jerk solutions to complex problems. This is the charge lodged against those who would apply political principles to judge what public officials ought to do in particular cases. Presumably, the resort to principle allows one, perhaps even encourages one, to ignore details of the specific context at hand.

An objective definition of ideology (i.e., one that doesn’t import various charges against believers in a *particular* ideology) might be *a set of political values and doctrines advanced in support of a particular social-political system*. The definition says nothing about what those values and doctrines might be or whether their justification of a particular social system is successful. That has to be evaluated independently (i.e., the sheer fact of possessing a belief cannot be taken as proof of the falsehood or disingenuousness of that belief; it may well be that even if a capitalist says 2 plus 2 is 4, it really is 4.) And, to be sure, even the critics of ideology have ideologies of their own. Of course, theirs is usually construed as being the result of long and hard thinking and observations about community life, productive of sound judgments and evaluations; it’s the other person with the other ideology who is the thoughtless propagandist for rigid and unworkable answers.

We don’t have to choose between facts of the case and principles that govern, however. Politics, in fact, requires both principled thinking and proper flexibility in applying those principles to the relevant context.

Just as in our personal lives, so in politics and law we need basic ideas that serve as the foundation for understanding how human communities ought to function. And we need to practice and abide by those ideas. If they’re valid, we ought not ignore them when the tough cases come along, sacrificing the long-term benefits of

Introduction / xv

principled action for the sake of short-term convenience. Yet it is also vital that cases be considered in light of the detailed facts, many of which may be new and might even require some modification of the principles that guide legal decision making. New ways of communicating, new religious movements, and new forms of artistic expression all require the application of familiar principles (such as those embodied in the First Amendment) in imaginative yet consistent ways.

Certainly, it is unrealistic to expect that either flexible case-by-case assessment alone, or rigid and unreflective application of principles alone, could be sufficient to formulate sound public policy. The dogmatic approach is largely eschewed by prominent contemporary political intellectuals. However, many do regard every problem as unique, thus fostering public policies and legal decisions that do not in practice conform to any basic principles (except perhaps the principle of pragmatism itself).

As a result, those who administer public policy and law more and more have become the ultimate arbiters of what will be acceptable public policy. And that, in turn, defeats the ideal of the *rule of law*, the only reasonable alternative to the *rule of arbitrary human will*, whether of a majority, a king, or a single ruling party. The rule of law allows everyone to participate in the assessment of public policy and legal decision making; we can all evaluate whether our policy and lawmakers are doing the right thing by reference to a knowable, objective standard. If no principles apply, then anything goes. Usually, the most emotionally appealing choice of the moment is accepted, which means that those who are most adept at expressing and manipulating emotions—the demagogues—are the ones who tend to carry the day. In emergencies, especially massive emergencies that have a wide impact on a society, the opportunities for such demagoguery abound.

Is the championing of flexibility a good idea? Is it a valid approach to politics and law making? A hint that it might not be is

the fact that even pragmatists may recoil from their own approach when they think the values at stake are too important to be forsaken even a little. No self-respecting moral theorist would propose that when a man forces a woman to have sex with him, the moral and legal status of the act should be mulled anew with each case. Instead everyone accepts the principle that a person has the right to choose with whom he or she will have sex and thus that any clear violation of this right is grounds for sanction. But this is the opposite of being pragmatically flexible without regard for principle.

Imagine how members of a jury in a rape case might deliberate if they were eager to be flexible and avoid being “rigid.” They would steer clear of blind obedience to “dogmatic” principles—such as the need to respect the rights of the victim or to be objective about the evidence for the guilt of the defendant. Rather, the jurors would attend to such emotionally resonant considerations as whether the perpetrator is a nice person, has appealing attributes, serves the community vigilantly, promotes economic prosperity, paints well, or throws a football well. The distress of the victim may or may not enter into such a calculation. After all, what if the victim has a checkered past, is rude to the bailiff, or just doesn’t emote well on the stand? By the standard of pragmatic flexibility, basing decisions on such factors may well be unimpeachable. By contrast, a principled approach would not gainsay that it is a violation of basic human rights to rape someone or that determining the guilt of the defendant on this score is the only purpose of the proceedings.

Is being principled “mere ideology”? Is it “simplistic”? Is it deficient in appropriate flexibility? No. Nor would it be simplistically ideological and excessively rigid to judge various other social matters by reference to certain tried and true principles, ones we have learned over many years of human experience with community life.

Thus, for example, when someone objects to government intru-

Introduction / xvii

sion in the marketplace, regarding it as a violation of our economic freedom, this objection is grounded in arguably well-developed and well-established principled thinking about public economic policy. Similarly, to criticize restraint of trade because it violates private property rights and freedom of contract is no less based on tried and true principles—not as they apply to one’s sovereignty over sexual matters but as they apply to one’s sovereignty over economic matters.

If we accept the validity and force of moral principles in every case that the principles legitimately govern, there would be no basis for excusing lying, cheating, fraud, rape, murder, assault, kidnapping, and any of the other myriad ways people can damage their fellows. In politics, no less so than in ethics or morality, general principles come into play as we evaluate how people conduct themselves. It is not a matter of whether we need principles, only of which principles we in fact need.

Principles are tested by hard cases. Despite the temptation to abandon the principle of limited government when it comes to calamities, we might do well to encourage the development of institutions that meet the problems without the involvement of the government (private insurance policies are one such institution). Of course, the temptation to use government power is difficult to resist, and it is legitimate to ask whether the use of government power in such cases can ever be proper and consistent with the ideal of limited government or whether it must always generate that slippery slope.

We are not unfamiliar with the hazards of the slippery slope in our own personal lives. If a man hits his child in some alleged emergency, the very act of doing so may render him more amenable to smacking the kid under more typical circumstances. Slapping someone who is hysterical may make it easier to slap someone who is only very upset or recalcitrant or annoying or just too slow fetching the beer from the refrigerator. Similarly, a “minor” breach of

trust can beget more of the same, a little white lie here and there can beget lying as a routine, and so forth. Moral habits promote a principled course of action even in cases where bending or breaking the principle might not seem too harmful to other parties or to our own integrity. On the other hand, granting ourselves “reasonable” exceptions tends to weaken our moral habits; as we seek to rationalize past action, differences of kind tend to devolve into differences of degree. Each new exception provides the precedent for the next, until we lose our principles altogether and doing what is right becomes a matter of happenstance and mood rather than of loyalty to enduring values.

The same is true of public action. When citizens of a country delegate to government, by means of democratic and judicial processes, the power to forge paternalistic public policies such as banning drug abuse, imposing censorship, restraining undesirable trade, and supporting desirable trade, the bureaucratic and police actions increasingly rely on the kind of violence and intrusiveness that no free citizenry ought to experience or foster. And the bureaucrats and the police tell themselves, no doubt, that what they’re doing is perfectly just and right.

Consider, for starters, that when no one complains about a crime—because it is not perpetrated *against* someone but rather involves breaking a paternalistic law—to even detect the “crime” requires methods that are usually invasive. Instead of charges being brought by wronged parties, phone tapping, snooping, anonymous reporting, and undercover work are among the dubious means that lead to prosecution. Thus the role of the police shifts from protection and peacekeeping to supervision, regimentation, and reprimand. No wonder, then, that officers of the law are often caught brutalizing suspects instead of merely apprehending them. Under a paternalistic regime, their goals have multiplied, and thus the means they see as necessary to achieving those goals multiply too.

The same general danger of corrupting a free society’s system of

Introduction / xix

laws may arise when government is called on to deal with calamities. There is the perception, of course, that in such circumstances the superior powers of government are indispensable, given the immediateness of the danger. The immediate benefits—a life saved by a marine—are evident. Yet the dangers of extensive involvement by legal authorities in the handling of nonjudicial problems are no less evident, if less immediate in impact.

The contributors to this work set out to explore (a) whether government action is indispensable under such circumstances and (b) what might be done to restrain the expansion of the scope of governmental power if indeed emergency circumstances warrant governmental intervention.

This is a work in normative political theory and public policy. Contributors are at times examining imaginary cases, doing thought experiments, with the aid of what might be considered approximations of historical models.

This approach is typical not only in scholarship and research on normative human affairs (where experimentation is precluded unless conducted on volunteers) but also in ordinary life. We often wonder how we might best acquit ourselves under difficult circumstances, even if we realize that rarely does everyone do his or her best at the task. The point is, we might do our best if we prepare well. Asking “what if?” helps us prepare.

So what if a fully free society were battered by calamities? Could it preserve its liberty while also handling the emergencies promptly and well? This is the question taken up by contributors to the present volume.