

Lawmaking in a Good Society

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The issue Christopher Beem's text raises is pivotal for communitarians: Why should we not be much more willing to enforce the good through law? If one can enact civil rights reforms, minimum wages, and welfare reforms—why not ban abortions, divorce, and homosexual activities?

Liberals can avoid this issue because they basically hold that there should be no shared formulations of the good, thereby ensuring that no one will be forced to heed them. I write “basically” because there are several nuances and qualifications to the basic liberal position, variations to which liberals attribute great significance—but, as I see it, these variations do not alter their basic position. Thus, some liberals, evoking the work of Isaiah Berlin, are willing to define some conduct as beyond the pale but insist that all other formulations of the good are equally legitimate. Others maintain that a few virtues (e.g., teaching citizens to think critically) must be promoted by the liberal state because they are needed to maintain its liberality; Tom Spragens refers to these as the “traits of civic character.” Still others are quite willing to enact laws that protect civil and individual rights. These laws are considered legitimate because they protect the individual from the state rather than encompass a morality enforced by the state. Also, these rights are viewed as truths whose validity any “rational” person would recognize, or they are considered to be “natural” or self-evident—but not based on a community's shared formulations of the good.

Beyond the well-known liberal objections to legislating morality, and the already listed limited exceptions, liberals escape the Beem challenge in a way they are much less willing to acknowledge: they justify policies based on those substantive values of which they do

approve, with what amounts to a philosophical slight of hand. They deny that shared formulations of the good inform these policies, instead finding some other way to endorse them. Thus, some liberals who favor the minimum wage support it not in the name of a substantive conception of social justice, but either because it can be said to protect some inalienable right, because poorly paid people will make inattentive citizens, or in the name of some abstract concept of fairness that “every rational person” would endorse. Some who favor stewardship of the environment, a common good par excellence, claim that environmental laws should be respected because individuals choking on polluted air cannot conduct themselves as citizens of a liberal state must, and so on. But such links are not found for those additional substantive values that others hold dear.

Spragens helpfully narrows the issue by pointing out that not all legislation is coercive. Some of it is merely expressive, encouraging good traits, honoring good deeds. However, this is a narrow escape hatch since most legislation—maybe 99 percent of it—has a coercive element in addition to any expressive one. (Taxing, of course, is included.)

A major difficulty with the liberal position is that it does not deal with the protection of children. Children do not fit into contemporary liberal formulations, which implicitly assume that people are born at age 21 with their individualized values fully formed. (Once one acknowledges that values are acquired through the processes of moral education that draw on the shared moral culture of the community, one cannot avoid questioning why one should oppose the influence of such a culture on a person of any age, given that people’s character requires continued communal reinforcement.) Thus to favor legalization of drugs and drinking underage, as Spragens implies that he does, does not take into account the effects of such measures on children, who are unable to form responsible judgments and who, once addicted, tend to remain addicted when they become adults. Indeed, protection of children, especially those 13 and younger, is a major substantive value communitarians should endorse (and the state should enforce) unabashedly because children are a major social good—and a particularly vulnerable group. (The same is true of older senior citizens.)

Which takes us right back to the Beem challenge. How are we to tell those values that are to be enforced by the state from those that should be supported only by the moral voice of the community?

Guiding Criteria

Prudential considerations apply. If a law cannot be effectively enforced (or if it can only be enforced through undemocratic means) or if it has major corruptive effects, it has at least one strike against it—especially if it suffers from both of these faults. Prohibition seems to be everyone’s favorite case in point.

Bruce Douglass introduces another major consideration: a value must have “broad” political support for it to be properly codified through law. Some might see this position as majoritarian. That is, as moral differences in a democratic society that concern public policies must eventually be brought to a closure, a majority in the legislature should carry the day. Indeed, this is a very common occurrence in the United States Congress these days, where laws are enacted by very thin majorities. Civil rights reforms had such a majority and hence were legitimately turned into laws; banning abortion and divorce do not, and hence stay off the books.

Another interpretation of “broad” support does not directly concern the political process. We must, as Douglass notes at one point, put a high premium on persuasion. As I see it, there are basically two rather different kinds of laws: “bare” ones—laws that have been somehow pushed through the legislature by a narrow interest group, using trade-offs, campaign contributions, or some other stealth technique—and “covered” laws, which reflect a shared moral understanding, reached through a prolonged and well-developed moral dialogue. This understanding is much wider than a mere majority, often encompassing 70 to 80 percent of the public, and is much deeper than a mere vote because people’s values have been engaged and changed. (This leads not merely to much stronger support for a law than a majority vote does, but it also leads people to change their behavior voluntarily and hence minimizes coercion.)

While prohibition is a bare law par excellence, a ban on smoking in public places is my favorite candidate for a well-covered law. It was enacted after a very prolonged and persuasive dialogue brought

about a law that is widely supported and almost completely self-enforcing—a communitarian masterpiece. In between these two ideal types, on the bare side of the continuum there is bussing, opposed by the majority of whites and blacks; on the covered side, laws requiring the immunization of children.

One may say that policies concerning smoking and immunization involve matters of public health and hence do not rest upon moral commitments but upon self-interest. This is hardly the case. If the matter were left to self-interest, selfish parents would often assume that they need not accept the very small risk to their child and the trouble involved in immunizing them because other parents will immunize their children (what is called the “free rider” problem). To gain broader support for these policies, moral commitments to the common good are required. Similarly, for those who smoke, not smoking in public is an act of foregoing some pleasure for the sake of others’ health. Though they continue to endanger their own life through smoking, they have come to recognize that they should not endanger the lives of others.

All this does not mean that any law endorsed by very large segments of the public as morally sound should be enacted. We have not a majoritarian but a constitutional democracy; all morality enforcing laws that offend the constitution and its Bill of Rights—for example, those that would force marriage—should of course not be enacted, despite whatever amounts of support they have (unless it is under the very exceptional condition that the support is strong enough to pass a constitutional amendment). And vice versa: enforcement of the Bill of Rights requires no majority votes. (When laws do not directly seek to violate rights but seem to impinge on them at the margin—by banning hate speech on campuses that receive federal funds, for instance—it is typically left to the courts to decide whether basic rights have been offended.)

Moreover, for those laws that are enacted, we can grant exceptions to certain minority groups. Although the rest of the nation can be expected to follow one law, reflecting one set of values, those who strongly hold to a different set can be granted a waiver from this particular law, making enforcement less insensitive to what we have concluded are legitimate value differences. The Native American Church’s use of peyote for religious ceremonies is one such exception.

The criterion for allowing these exceptions is itself subject to the formulation of shared moral understandings. For instance, some hold that we ought to consider whether the behavior in question infringes upon a compelling public interest.

Advancing Dialogues

Both Beem and Douglas may well ask: Cannot legislation itself be used to form new moral understandings, and isn't this sometimes appropriate? Before I can get to the core of this matter, I must clear away some of the underbrush.

Surely legislation can be used to trigger a moral dialogue. Indeed, sometimes laws are introduced—despite the fact that most everyone realizes that they will not be enacted—to launch or to nurture a moral dialogue. For instance, some 20 bills to make divorce more difficult were introduced in the last two decades of the 20th century in Mid-western states. None were vigorously advanced, none were enacted. But they did help call attention to the issue.

Also, minor matters may be settled through legislation which, once enacted, people will accept as legitimate although they have not been previously involved or considered in the matter. For example, a legislator may determine how many hours high school students may work in fast food restaurants. However, this presumes that the basic matter has been settled: they should be allowed to work there in the first place, even on school days, and so on.

We should note, though, that there is a tendency to turn even relatively small legislative matters into symbols for much more significant moral issues. For instance, Germans have refused to change a regulation that requires chefs to prepare pork for their cooking exam, despite appeals from Turks to allow turkey instead. This conflict—as in so many “minor” ones—bespeaks a much more important issue: the Germans are not quite prepared to cease to see themselves as a Christian nation (and as an “immigrant country” in which “foreigners” come to stay and become members of the community). Thus, without moral dialogues preparing the ground, often even seemingly small legislative matters cannot be settled, let alone the larger issues that they reflect.

What about major matters?

Often reference is made to a military base commander who ordered desegregation of his base prior to the executive desegregation order of 1948. The rhetorical question is repeatedly asked: Why cannot the commander-in-chief, the president, follow suit and lead Congress to increase the minimum wage, enact national health insurance, or whatever else the petitioner favors? I should first note that we know precious little of what happened in that blessed military base. Was the command to desegregate preceded by moral dialogues? Did the command merely lead to new behavior, but not to moral endorsement of the new conduct? We know one thing, though, most assuredly: we do not run a democratic nation the way military bases are run.

To push the point, people who cheer for the law to truly lead on major matters and for moral endorsement to follow—thereby pushing people rather than merely hastening the pace of their dialogues—presume in the back of their mind that the legislation will be in line with values they cherish. However, the impropriety of such a reliance on the law becomes all too evident if we imagine that the law is used to enforce a value we do not share. What if, say, the law required us all to attend weekly meditation sessions in Buddhist temples? To give 10 percent of our income to a church of our choice? Of course, one could think of much more troubling examples.

In short, laws can legitimately trigger, nurture, maybe even quicken moral dialogues to some extent, but legislating a major change in conduct will by itself not lead to moral support; on the contrary, it is likely to provoke well-justified opposition. It is not merely imprudent to so act, but also a profound violation of our understanding of how a good (not merely democratic) society functions.

Furthermore, it is legitimate to try to raise or reinforce support for legislation through peaceful demonstrations, sit-ins, acts of civil disobedience, and strikes. If they successfully appeal to latent values within the public, generating new public support for a cause, their effect should not be thought to delegitimize the legislation that follows. However, if violence is employed, the opposite is true because it undermines the democratic process and because it entails forcing the majority to heed the values of a small group.

So where does all this leave the question Beem's text evokes? A communitarian can readily agree that the basic liberal line against enacting shared formulations of the good, even if redrawn some, is difficult to hold. There is clearly room for enacting legislation if it is based on truly shared moral understandings, but only if it follows a prolonged and encompassing moral dialogue; if it has gained wide support, well above a mechanical majority (say, 70 to 80 percent of the people); if it does not offend the Constitution; and if it can be effectively enforced. Banning abortion, divorce, and homosexual activities fail to meet all these criteria. Stewardship of the environment does not, and—I would argue—neither does better protection of young children from violent material, abusive marketing (e.g., of Alcopops), guns (e.g., through mandatory locks and gun-free zones around schools), and pedophiles (Megan's Laws), among others.

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