

THE LIMITS OF LAW

HOW FORMAL RULES UNDERMINE HUMAN RELATIONS

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We live in a time of law, in which there seem to be statutes, rules, and regulations regarding virtually every aspect of our lives. The battle cry of the disaffected, “there ought to be a law,” has been heeded with a vengeance. Whereas not so long ago people had to work out for themselves what kinds of benefits employers would provide employees and how a business owner would respond to a potential customer when he discovers something morally problematic about that customer (or vice versa), the law now provides guidelines and potential punishments.

Proponents of our current system argue that these laws make us freer. Laws now may make people free from potential bankruptcy caused by the cost of contraceptives. They also may make people free from the insult of being denied services, or having to find a different service provider. Thus, in a manner directly in line with Franklin Roosevelt’s “Four Freedoms” (of speech, of worship, from want, and from fear), our government

is providing us with more freedoms. And it is doing so not merely in its role as social welfare state but also in its role as law-state.¹

There is a long tradition espousing the rule of law as necessary for human freedom. Predictable rules long have been seen as providing people with the certainty they need to plan and go about their lives. Such certainty is needed if people are to have the confidence to forge their own lives rather than rely on the government, and this is the essence of ordered liberty. As Montesquieu noted, political liberty embraces “a tranquillity of mind arising from the opinion each person has of his safety.” In order to have this liberty, “it is requisite the government be so constituted as one man need not be afraid of another.”

Discussing the necessity of a separation of governmental powers, Montesquieu was arguing that people living under arbitrary governments—in which one person might write, enforce, and adjudicate law—were

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consigned to the rule of men rather than the rule of law. Under such conditions, Montesquieu argued, the rulers would be able to violate their own laws with impunity. As a result, there would be a constant fear of being subject to the arbitrary will of a ruler, and people could never enjoy that “tranquility of mind” essential for liberty.²

My argument here is that, while the rule of law is an essential public good, the actual number and extent of laws also are important factors in determining whether there will be liberty—and, indeed, the rule of law itself. In effect, too much law undermines not just freedom but also certainty, which is necessary for the rule of law. As the realm of “law” expands, it crowds out human liberty, including the freedom provided by law, understood as properly promulgated rules that can be understood and followed by the governed. Moreover, as too much law undermines freedom and its own proper character, it also tears apart the very fabric of the community in which we must live our lives.

Montesquieu defended the rule of law as necessary for tranquility of mind and, with it, the ability to plan and to build a life of ordered liberty. His point, however, goes to the form rather than to the extent of law-making. Such laws as there are, he argued, should result from a system embodying the rule of law, lest there be arbitrary rule. As to the quantity of laws, it seems clear that too many particular laws hem in our actions to such an extent that they may make us no longer free.

There is no precise, mathematical calculus by which to determine when a definite line between “free” and “unfree” regimes has been crossed. But at some point on the spectrum—between a society without law and one in which all aspects of life are subject to statutory regulation—society becomes recognizably unfree.³ Too little law may leave us

at the mercy of the strong and ruthless. Too much law eventually eliminates that “sphere of autonomy” that classical liberals refer to as the heart of liberty. I prefer to term this space a zone of prudence, because we remain under a duty (and natural impulse, when it is not diverted by sin or other bad incentives) to act in accordance with the broad but fundamental norms of natural law (for example, the Golden Rule). But the point is that the absence of formal law leaves an area within which we may interact with one another and with the associations in which we lead most of our lives. In this zone we may act according to rules and customs worked out with our fellows, consistent with our understanding of our own circumstances, needs, duties, and desires.

A regime that reduces social relations and our duties to one another to a set of laws and legal principles reduces this zone of prudence, potentially to the vanishing point. One may consider, here, recent outcries over wedding cakes and photographs. In several cases, those who bake or take photographs for a living have been penalized by the government for their religiously based decision not to participate in same-sex marriage ceremonies. Whether one sees such refusal as rude, hurtful, or an understandable desire to live one’s professional life in accordance with one’s deepest beliefs, the increasing fact of legal sanctions for decisions regarding interpersonal relations clearly narrows the zone within which one may act according to one’s own conscience. These bakers and photographers have been “legally” made unfree in a very important sense, in that they are being forced to act in a way forbidden by their own moral judgment as they seek to choose for whom they should work. That the unfreedom is imposed and enforced via legal process makes it no less an important reduction of liberty.

Proponents of such laws argue that they are freeing our society, or at least particular people, from certain forms of discrimination. But such laws are not concerned with promoting freedom; they constrain freedom in pursuit of the different goal of equality. They demand, under penalty of law, that certain categories of person (for example, employers, those renting accommodations, those providing business services) treat a given description of person the same as others putatively qualified for some service, membership, or benefit, despite possessing some characteristic or behavior pattern with which others do not wish to associate.

The justification is that said characteristic or behavior pattern is not, in fact, morally or otherwise blameworthy and therefore deserves government protection against private discrimination. Debate may be appropriate as to whether such laws are necessary, just, and actually serve the ends their proponents claim, as well as whether they do so at too great a cost. But we should not be confused about the goal and the effect—more laws producing less freedom in the interest of more equality.

One can extend this logic into any number of areas of legislation—from those concerning employment, to regulation of property rights (for example, for environmental purposes or to regulate agricultural markets) and even marriage. My point is not that all laws are oppressive. Rather, it is that all laws restrict choices. Thus, free societies tend to insist that laws regulate substantive activities only where there exists broad consensus on the need to do so, and where such laws can be enacted and enforced in accordance with, rather than in opposition to, preexisting norms and customs. In this way, as little disruption as possible will be caused to the people's reasonable expectations concerning what will be demanded of them by their laws.

This last point raises the concern of law—or too much law—with certainty. We need our laws to be predictable if we are to follow them. Lon Fuller argued that the law, if it is to have a moral claim on our allegiance (as opposed to the sheer power to force our obedience), must meet certain basic criteria. These criteria make up, in essence, the rule of law, for they describe a system according to which the people are ruled by settled laws, rather than the dictates of those who are in power. Fuller set down these criteria in the form of eight “canons”: there must be general rules; the rules must be promulgated; the rules must typically be prospective, rather than retroactive; the rules must be clear; the rules must not require contradictory actions; the rules must not require actions that are impossible to perform; the rules must remain relatively constant over time; and there must be a congruence between the rules as declared and the rules as administered.⁴

It is not necessary to go through Fuller's canons in detail to see their powerful import: a regime of law must rule according to settled, known rules that clearly signal to the people what is expected of them, as well as ensuring that the rules actually can be followed. Here I have focused on the notion of certainty because it sums up a great deal of that which concerned Fuller. It also highlights an aspect of the rule of law that is too little noted in democracies. These regimes pride themselves on their humane attitude toward rule, but too often impose requirements on the citizenry that, while perhaps not overly onerous in any specific instance, combine to form a web of regulation that is as confusing as it is confining.

Democracies have a particular problem with law. Because democratic lawmakers are assumed to act for the sovereign people, they tend to believe (and be supported in their belief) that whatever laws they promulgate

are by nature just. And, as shown by the example of antidiscrimination legislation, democratic laws have a tendency to aim at instantiating some conception of justice. The result is a tendency of democratic governments to overreach. They attempt to impose justice by statute where custom and private judgment are better situated to find solutions to potential disputes that meet the reasonable expectations and needs of all parties concerned. The result is law formulated to such an extent and in such detail that mere mortal citizens often cannot divine its purposes, let alone what it requires of them.

Certainty requires that the rules we are to follow be known to us. It also requires that the laws be predictable, not just in their language and requirements, but also in their effect, and in their interaction with preexisting rules. More laws mean more surprises. New laws continue to be promulgated such that people—especially those who run businesses and those who work in various parts of those businesses—have to keep a constant eye out to avoid running afoul of a law they did not know existed.

An abundance of new laws generates business for lawyers. But such malleability in the legal and regulatory system is not a good thing for a society. When people in economic life have to hire professionals to keep an eye on ever-changing statutory developments and check to see whether basic policies—like, say, the company health care plan—have to be changed both to fit old laws and to fit the new law, the result is constant uncertainty and fear of government sanctions. This is especially troublesome, of course, when the new law is so onerous and overly complicated as to be unworkable. Under such circumstances (including, for example, those operative under the current program of government-mandated health insurance), we may look for an extra added “bonus,” in that

those with enough money and political clout can win “waivers” from the rules the rest of us must follow, further undermining certainty as well as generality and other characteristics essential to the rule of law.

Too much law may produce a system that undermines our ability to follow that law while also living up to our duty to lead decent, moral lives. One might mention here Milton Friedman’s notion of an “invisible foot.” This metaphor is intended to balance, shall we say, Adam Smith’s notion of an invisible hand that guides actors within the market to behave in a manner that serves the public interest even as they focus on serving their own.⁵ Unlike the benign invisible hand, however, the invisible foot reflects the unintended consequences of governmental actions.

When the government chooses to pass a law, instituting a program aimed at a particular end, it generally focuses on something it considers in the public interest. Let us say, for example, that the government wishes to protect children from hunger. In pursuing this goal, the government might institute a program of payments to mothers of young children who do not have a working husband in the home. The program clearly will get money into the hands of caregivers who need it to feed their children. Simple, no?

Unfortunately, as we found out under Aid to Families with Dependent Children (AFDC), such a well-intentioned program is not a laser narrowly aimed at eliminating a specific problem. Like the vast majority of laws, it constitutes a change in the incentives provided to people to act in a variety of ways. In the case of AFDC, the program provided an incentive for men to abandon the mothers of their children and even for young women to see out-of-wedlock pregnancies as a means of establishing a kind of independence from

their families through dependence on the government.⁶

Should we marry and raise our children to be responsible adults? Or should we have children out of wedlock and depend on the government to support our “independence” from family, church, and local association? President Clinton claimed to have “ended welfare as we know it.” But the fact is that other laws, including those establishing wildly expanded, indiscriminate food stamp and disability insurance programs, continue to undermine the clearly preferable moral choice. People are not “freer” when they depend on the government rather than more natural, more human relations. Instead, the law chains them to dependency and to a way of life that undermines their moral sense.

None of this is to argue against the moral necessity of assistance for the poor. My goal here is to question the value of reducing such assistance to law. When the moral rights of the poor (which are very real) were reduced to legal rights, something important was lost: human relationships. Numerous public programs in the United States, including a wide variety of local charity boards, once received assistance from state and local governments. Reduction of these once highly personal loci of charitable funds and relationships to sets of administrative criteria and procedures certainly cut down substantially on the political use of charity by various corrupt local governments. Even so, it is open to serious question whether the result was an increase in respect for human dignity. The claim was that such procedures guaranteed fairness, efficiency, and full coverage. Whether this is true or not, these procedures also ensured dehumanization and inattention to destructive habits and “lifestyles” that destroy people’s physical and spiritual well-being.⁷

Even our schools once were embedded within communities rather than public

policy and law. Schools in America well into the nineteenth century by and large were independent local institutions that received public funding—instead of being creatures of the government itself, bound by law. But over the course of the nineteenth century, a series of conflicts and visions of progress caused us to leave behind local boards of charity and education for detailed legal programs of regulation and assistance.

As an example, one might consider public education in the state of New York during the first half of the nineteenth century. Local governments would grant monies to organizations that ran the public schools. Of interest, in a nation once committed to the free exercise of religion, these schools, though publicly funded, did not sanitize God out of their curriculum. Indeed, conflicts arose because the schools were pervasively Protestant and overtly anti-Catholic. The Catholics’ response? They did not sue; they lobbied. And in a number of important instances, they secured public funding for their own, Catholic schools.

A typically American solution to the plural structure of society was beginning to form. The character of local schools would depend on the character of the local people themselves. Protestant, Catholic, and Jewish neighborhoods would have their own schools. And their tax dollars would be available for them to run these schools according to the dictates of their own faiths. The state would leave the fundamental moral decisions regarding issues like the teaching of religion to the more fundamental moral associations acting within local communities.

Unfortunately, the response from a number of quarters to this development was to seek to outlaw such funding on the grounds that Catholics, owing allegiance to that “foreign prince” known as the pope, were violating the Constitution by receiving public

funds for their schools. We know where all this ended up. New laws established government-run schools openly hostile to any form of religious expression. The law, in the form of a misreading of our Constitution, won. Human relations and good education lost.⁸

This tragedy was the product of prejudice. It also was the product of law. Laws are by nature neutral; they are generally applicable rules. All laws make distinctions, of course. A law against murder “privileges” nonmurderers over those who commit murder. But laws embody and announce the moral precepts of a people. So a law favoring one religious group over another is making a public statement about those religions. If a people does not want to make such a “privileging” statement and policy, it must not make a law.

If a people chooses to make a law and insists on its being neutral, then it will have to institutionalize equality between the groups subjected to the law. A law that says nothing about religion in the schools may, in fact, be neutral toward all religions, in the sense that it allows local communities to make their own decisions on this critical issue. But a law that attempts to see that all religions are treated equally must interfere with these local associations, forcing them to go against the wishes of their members, allowing them to be held hostage to dissenters—particularly litigious dissenters—of all kinds in their midst.

And this is what happened in regard to education. Rather than leave decisions regarding religion in schools to the local school boards themselves, the government chose to “solve” the problem through law. States increasingly took over the schools, originally with the intention of maintaining a kind of weak Protestantism or abstract deism in the curriculum. Inevitably, given the demands of “neutrality,” government schools quickly began a never-ending cycle in

which they have become ever more strident in attempts to eliminate religion from this, as most other, areas of the public square.⁹

Laws always have unintended consequences, and in their very instantiation they crowd out important, informal incentives for right conduct, as well as social institutions, beliefs, and practices critical for the formation of good character and the maintenance of a decent public life. Perhaps this is why Saint Thomas Aquinas, by no means a moral relativist, actually voiced opposition, following Saint Augustine, to laws against prostitution.¹⁰ Obviously, Aquinas and Augustine knew that fornication and adultery are sins, and would rather they could be made less common. But they also knew that the world they lived in was one in which prostitution was sadly common, and sadly ingrained into community life owing to the use of courtesans by powerful people and the sheer number of brothels and unruly, unattached males.

We should not, of course, overlook the very practical circumstances faced in medieval Europe, where this particular bad practice was concerned. Not even cities had police forces of any note—they relied on “the watch,” a paramilitary force, for what little policing they had, and had almost no ability to tell people where they could have what kind of business. Cities tended to burn down in this era, as well as succumb to riots and other disasters, because much of the infrastructure of public order had yet to develop. Under such conditions an attempt at social reform like the ending of prostitution was more likely to produce violence than any beneficial result.

We today live in a society that, despite its many worse faults (for example, official approval for abortion), has improved the situation to a certain extent with regard to

the trafficking in women for sex. But this was made possible by a long train of reforms and changes in our social structures. Aquinas and Augustine both knew that, while the moral dictates of natural law are unchanging, the proper role of law in furthering them is not. And, in their times, they judged that any attempt to stamp out prostitution would involve too much disruption of social life, and so many demands for police action in a time when there really were no police, that it would be best not to attempt the feat through governmental means.

Now, this is no apology for prostitution. But it is, I hope, a useful example of the limits of law, even in the minds of saints and doctors of the Church, to change human behavior without risking dire adverse consequences. This problem situation can be seen more generally in our own era. Where once ours was a nation of custom and common law, we increasingly have become a nation in which law is considered the answer to social problems. Sadly, the result is less respect for the law and, as important, an undermining of the customs and personal relations on which real, functioning communities rely.

George Carey argues that the primary support government can give to communities is space. Communities, he points out, must have a reason to exist if they are to survive. They must have both “room,” or administrative freedom to maneuver, and purpose, some genuine set of practical needs to fulfill.¹¹ And this means, more than anything, that the central government must not take over the primary role of local communities in helping their members order their lives if those citizens are to be self-governing, free, and possessed of at least the possibility for virtue.

Alexis de Tocqueville painted a picture of a functioning community in America’s early

republic that evinces the kind of community life with which I am concerned here.

The free institutions of the United States and the political rights enjoyed there provide a thousand continual reminders to every citizen that he lives in society. At every moment they bring his mind back to the idea, that it is the duty as well as the interest of men to be useful to their fellows. Having no particular reason to hate others, since he is neither their slave nor their master, the American’s heart easily inclines toward benevolence. At first it is of necessity that men attend to the public interest, afterward by choice. What had been calculation becomes instinct. By dint of working for the good of his fellow citizens, he in the end acquires a habit and taste for serving them.¹²

Tocqueville here notes the importance of freedom and rights. But the sentiment of mutual respect and public service was not fostered by simple abstract notions of freedom. Rather, that sentiment was fostered by freedom in the sense of a community public space free from laws and rules emanating from the center. Long accustomed to looking out for themselves and those with whom they shared their everyday lives, Americans developed habits of public service and civil, even friendly, interaction. They also conceived a high (even “exaggerated”) opinion of themselves and their own capacities. As a result,

suppose that an [American] individual thinks of some enterprise, and that enterprise has a direct bearing on the welfare of society; it does not come into his head to appeal to public authority for its help. He publishes his plan, offers to carry it out, summons other individuals

to aid his efforts, and personally struggles against all obstacles. No doubt he is often less successful than the state would have been in his place, but in the long run the sum of all private undertakings far surpasses anything the government might have done.¹³

To see the importance of this local “space” one need only look to Tocqueville’s own discussion of the decline of communities in France over the course of the early modern era on account of increasing administrative centralization. The expanding role of orders coming from the center, whether as law or rules laid down by administrative intendants appointed by the crown, meant the demise of earlier social relations. These relations were far from optimal; they were feudal and so highly “inegalitarian,” to use a contemporary word of great opprobrium, and they clearly allowed for substantial abuses.

But these customary relations also bound people to one another, imposing obligations on both the high- and the low-born. “Reforms” from the center tore apart these relationships and, with them, whole communities. They left peasants in particular without hope of succor in bad times, and with increasing resentment toward those who, freed from their duties, retained some of their “rights” to things like monetary payments.

Now that [the aristocrat] had ceased to hold a dominant position, he no longer was at pains...to help “his” peasants, to further their interests, and to give them good advice.... This led to what might be called a spiritual estrangement more prevalent and more pernicious in its way than mere physical absenteeism. For in his dealings with his tenants the landowner who lived on his estate often

developed sentiments and views that would, were he an absentee, have been those of his agent. Like an agent he came to regard his tenants as mere rent-payers and exacted from them the uttermost farthing to which the law, or ancient usage, still entitled him, the result being that the collection of such feudal dues as still existed was apt to seem even more galling to the peasants than it had been in the heyday of feudalism.¹⁴

Tocqueville was not pining for feudalism. His point was that the rule of intendants and of various laws emanating from Paris tore apart the customary social relations in French communities. Nor is Tocqueville’s lament any kind of screed against public action, broadly conceived. Rather, it is a recognition of the need for local communities to rest on social (and economic) relations rooted in local custom and tradition. And this means that the prevalence of uniform laws emanating from the center—meaning the federal government in particular—is enervating to fundamental human relationships in a way local action is, or at least was, not. As Tocqueville observed,

There was provision for the poor from the beginning in the states of New England; there were strict regulations for the maintenance of roads, with officials appointed to supervise them, the township had public registers recording the conclusions of public deliberations and the births, deaths, and marriages of the citizens; there were clerks whose duty it was to keep these records; officials were appointed, some to look after intestate property, others to determine the boundaries of inherited lands, and many more whose chief function was to maintain public order.

Thus, in Tocqueville's view, in the United States "the law anticipates and provides in great detail for a multitude of social needs of which in France we are still now but vaguely conscious."¹⁵ Two aspects of this passage stand out. First, Tocqueville is noting the existence of laws and regulations at the state level and administered, by and large, at the very local level. Second, and perhaps more important, the list he gives of "provisions" is, by contemporary standards, extremely modest. Roads, public records, property relations, and public order: these were the essential elements of governance that the French monarchy and even its successors failed to address. While essential, rules and enforcement actions in these areas hardly threatened to crowd out customary social relations or dissolve any meaningful zone of prudence.

None of this is to say that there is no threat from excessive law so long as it is local. Even the most local laws and regulations may be frankly oppressive. One need mention only some of the more draconian rules of local governments and even homeowners' associations (with their minute regulation of signage, paint colors, and the like) to call to mind the possibility of petty tyranny. But localism tends to produce standards of behavior that maintain the essential relations of public life. It does so in significant measure because these standards, being the product of local associations themselves, have their roots in local conditions and consent. At least as important, however, local standards tend, or at least once tended, not to be statutory. They were the product not of legislation but of custom. Custom, too, can be restrictive, but it generally is preferable to legislation because of its roots in the rational expectations of the people governed by it.

In this light it becomes clear what we have lost with the crowding out of custom by

detailed statutes emanating from Washington. Local customs under our old common law tradition might have prescriptive power—even in court. But it was power of a particular, limited sort. Within the common law tradition it was recognized—even by judges—that justice in court generally should be defined as vindicating the reasonable expectations of the parties. This, in turn, meant that the role of law was, wherever possible, to apply customary usage to the particular facts of particular cases. The judge would look to previous cases and to common practice in the locality to determine the general understanding of the people in an area regarding what was right. If, for example, pigs in a number of American colonies had been allowed to run free for generations, then it would be up to farmers to fence out those pigs. But if one lived in a colony in which the pigs had been fenced in, while the crops had not, then it was up to the one raising pigs to pen them. Violation of either custom would mean paying damages, as one should expect in light of local practice.

New laws—statutes—clearly had an important role to play within such a system. When a custom came to be recognized as outdated, no longer workable, or simply wrong, the people acting through their legislature had the power to overrule that custom. They also could simply change their customary practices. Of course, such change generally is slow, resting on consensus. But customs would change, grow, and even die, to be replaced by newer, more fitting customs. Whether by statute or by customary development, change could be accomplished without necessarily producing radical alterations in the more general customs of the community.

The invisible foot existed in customary as well as statutory life, but that foot was smaller and less liable to do great damage