

Private Morality and Public Enforcement

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In his “Foreword” to Michael Novak’s groundbreaking work on political economy, *The Spirit of Democratic Capitalism*, Alan Peacock makes the following claim: “Democratic capitalism,” he asserts, “rests on the supposition that public enforcement of virtue is neither desirable nor possible. Diffused power and liberty of conscience,” he adds, “may be conferred in a capitalist system on mean-minded individuals with what David Hume called ‘a narrowness of soul,’ but as Novak points out: ‘it is the structure of business activities, and not the intentions of businessmen, that are favorable to rule by law, to liberty, to habits of regularity and moderation, to healthy realism and to demonstrated social progress—demonstrably more favorable than the structures of churchly, aristocratic, or military activities’.”¹

In a somewhat similar vein, in his book *Six Great Ideas*, Mortimer J. Adler distinguishes among three types of freedom (natural freedom, moral freedom, and circumstantial freedom); and he asserts that the domain of public enforcement is limited to the last of these—that is, to circumstantial freedom. As Adler puts it:

There would be no sense at all in saying that we are entitled to have a free will or freedom of choice. That is a good conferred on us by nature—or by God. The lower animals are deprived of it, but we cannot say that they

¹Michael Novak, *The Spirit of Democratic Capitalism* (Lanham, Maryland: Madison Books, 1991), p. 91.

are deprived of something they are entitled to. It would be equally devoid of sense to say that we are entitled to the moral freedom that consists in being able to will as we ought and to refrain from willing as we ought. We either acquire or fail to acquire such freedom through the choices we have ourselves freely made. It is entirely within our power to form or to fail to form the virtuous disposition to will as one ought that constitutes an individual's moral freedom. No other human being can confer such liberty on us or withhold it from us. According to Christian dogmas concerning man's original sin and man's redemption through Christ's saving grace, fallen man cannot, without God's help, acquire the moral virtue required for moral liberty. That is why Christian theologians refer to moral freedom as the God-given liberty enjoyed only by those whom God has elected for salvation. On the secular plane of our social lives, it remains the case that we can make no rightful claim upon others or upon society to grant us a freedom that is entirely within our power to possess or to lack. The only liberties to which we can make a claim upon society are the freedom to do as we please within the limits imposed by justice and that variant of circumstantial freedom that is the political liberty enjoyed by enfranchised citizens of a republic.²

The above positions adopted by Novak and Adler are intriguing for a number of reasons. One of these is because of the political liberalism which both views advocate. For while both Novak and Adler might consider themselves to be proponents of some sort of political liberalism (at the very least of the often referred to "Madisonian principle" of limited government), in many more progressive political circles their reputations would place them in the political camp of right wing fanatics and other political neanderthals. It is somewhat odd, then, that two such thinkers, both of whom are Thomistic sympathizers, would be adopting what appears to be an archetypal liberal position about the domain of public enforcement of what in popular parlance today is called "private morality." Seemingly, according to Novak, the intentions of businessmen (and one would presume of other human beings as well) "are not favorable to rule by law." Rather, it is "the structure of business activities" to which the rule of law applies. Similarly, for Adler, it is not to moral freedom that the rule

²Mortimer J. Adler, *Six Great Ideas* (New York: Macmillan Publishing Company, Inc., 1981), pp. 149–150.

of legal enforcement applies. Rather, legal enforcement is restricted to the domain of “circumstantial freedom,” which for Adler means to the realm of enabling means of action. That is, public enforcement has authority to exercise restraints upon freedom of opportunity and freedom of conditions, and to influence human freedom through these, but, strictly speaking, it must remain mute and immobile before the domain of moral freedom.

I do not know about others, but I find these positions of Novak and of Adler somewhat odd, to say the least; yet, at the same time I think they are in a way expressing truths about the nature of political government which are traceable to St. Thomas, and which, if framed in a slightly different fashion, can throw a great deal of light upon the obfuscated “private morality” and “public enforcement” distinction which has become such a popular foil for use by nominal Catholic politicians in the latter part of the twentieth-century.

The purpose of this article is to take a somewhat detailed look at this issue of private morality and public enforcement against the background of certain Maritain sympathizers, principally Novak and Adler, and against the background of the writings of St. Thomas himself. In the writings of the latter one can find the deeper roots out of which this contemporary moral and political “real distinction” has been able to sprout.

In order to begin this investigation, let me turn again to Michael Novak. In his fairly recent book, *Free Persons and the Common Good*, he refers approvingly to Lord Acton’s quip that St. Thomas was “the first Whig.”³ Now, I am not sure whether or not St. Thomas was the first “Whig”; and I think the case can be made for a number of other likely candidates—such as St. Augustine, or Our Lord, or, as some of my Jewish friends might argue, Moses himself. Nonetheless, I think Novak’s reference to Lord Acton provides a helpful reminder about the proximate roots of contemporary liberalism within the Catholic theological tradition. The question, however, which needs to be considered is what more precisely are these roots and how closely does the fruit which has grown from the seed resemble its source.

Taking the latter question first, it seems incredible to someone in any way familiar with the moral and political teaching of St. Thomas

³Michael Novak, *Free Persons and the Common Good*, (Lanham, Maryland: Madison Books, 1989), p. 80 and p. 201, n. 5.

to think that he would agree with Alan Peacock's assertion that "public enforcement of virtue is neither desirable nor possible." Similarly, it seems unlikely that, without serious qualification, St. Thomas would agree with the position attributed to Novak that it is not the intentions of people, but only the structures of their activities which are favorable to rule by law. Without even probing very deeply into St. Thomas's work itself, one might simply ask how the activities of people can be divorced from their intentions; since is it not through their intentions that acts of human choice receive their identity? Furthermore, according to Adler, the domain of public enforcement is not the domain of moral freedom; yet, at the same time, for him, the realm of public enforcement is the dimension of human freedom regulated by justice. Now, one might wonder, how can this be? Unless the moral domain has been ceded to the likes of Calicles, how can it be that the realm of freedom regulated by justice—one of the four cardinal moral virtues—is not within the moral order?

In making these criticisms I do not for an instant think Michael Novak actually accepts the view attributed to him by Alan Peacock that "democratic capitalism, rests on the supposition that public enforcement of virtue is neither desirable nor possible." Indeed, I would contend that Novak holds just the opposite: namely, that within democratic capitalism public enforcement of virtue is not only possible and desirable, it is even necessary. In his view, however, there is within democratic capitalism a public enforcement of virtue that is intentionally limited, decentralized, and diffused through various systems of behavioral control. In a similar vein, Novak is not arguing that within the context of democratic capitalism it is impossible, undesirable, or unjust for the governmental bureaucracies to regulate the intentions of people. Rather, he is saying that personal intentions are not favorable to such regulation, especially if such regulation is attempted directly rather than through subsidiary agencies.⁴

In the above respects Novak's views are quite similar to those of Mortimer J. Adler, who argues that the domain of public enforcement is the dimension of circumstantial liberty. Yet I do not think Novak would assert that the domain of public enforcement does not touch the area of moral freedom. In fact, I do not think that Adler himself can

⁴Michael Novak, *The Spirit of Democratic Capitalism*, p. 31–95.

be accused of seriously making such a claim. No, what Adler seems to mean when he says that only circumstantial freedom of action, rather than moral liberty, is amenable to being joined with the political liberty of enfranchised citizens under constitutional government is not that the domain of circumstantial freedom is outside the moral order.⁵ For, if this were what he meant, it would make no sense for him to assert that our natural right to circumstantial freedom of action

flows from our natural possession of a free will and a power of free choice, which we exercise in making the decisions that we must make, either rightly or wrongly, in our pursuit of happiness. What good would it do us to make decisions that we cannot carry out? Without liberty of action, our freedom of choice would be rendered totally ineffective. We would be exercising it without achieving the ultimate good we are under an obligation to seek, if our freedom of choice is thwarted by unjust limitations on our liberty of action, or is nullified by the deprivation of such freedom. Lacking free will and freedom of choice, the lower animals have no rightful claim on liberty of action. Zoos do not exist in violation of rights. However much we may sympathize with caged or confined animals, we are not moved by a sense of injustice done them.⁶

Indeed, Adler's words themselves give the firmest evidence that his intention is actually to include the realm of public enforcement within the moral order. Otherwise the above-cited passage would be incoherent. Furthermore, he says:

It would be equally devoid of sense to say that we are entitled to the moral freedom that consists in being able to will as we ought and to refrain from willing as we ought not. We either acquire or fail to acquire such freedom through the choices we have ourselves freely made. It is entirely within our power to form or to fail to form the virtuous disposition to will as one ought that constitutes an individual's freedom. No other human being can confer such liberty on us or withhold it from us.⁷

His claim is true only up to a point—as he himself recognizes. For whether we acquire or fail to acquire such moral freedom depends upon our having access to the essential enabling means of action

⁵Mortimer J. Adler, *Six Great Ideas*, p. 150.

⁶*Ibid.*, p. 152.

⁷*Ibid.*, p. 149.

through which good habits of action can be formed. Thus, it is entirely within our power to form or not to form the power to will as we ought only up to the point that we are allowed the possession of essential enabling means of so willing and only to the extent that included among the moral virtues of prudence, temperance, and courage, we are allowed to exercise, and have exercised upon us, the virtue of justice.

However, once this relationship between circumstantial freedom of action and the moral order is recognized, Adler's examination of the nature of justice and its relation to human freedom throws a tremendous amount of light not only upon the domain of private morality and public enforcement but also upon the whole private morality/public morality debate and its provenance in traditional Catholic thought. In particular, the following remark from Adler is quite telling regarding these matters: "Whether we have political liberty or not and the extent to which we have a limited freedom to do as we please depend largely, if not entirely, on the society in which we live—its institutions and arrangements, its forms of government and its laws."⁸

What I find most revealing about this comment is Adler's reference to *doing as one pleases* within the limits of *justice*; and, secondly, the dependence of *doing as one pleases* within the limits of *justice* upon forms of political arrangement—in particular, upon forms of law. I find these two assertions noteworthy because, for me at least, they indicate the extent to which the Madisonian principle of limited government is rooted in the classical cardinal moral virtues themselves, inasmuch as these are conjoined with and synthesized through St. Thomas's treatment of the variety of law in the *Summa Theologiae* I-II, Q. 91.

Specifically, in article four under this question St. Thomas examines whether a divine law is necessary beyond natural law and human law. In his reply he asserts that such a law is necessary for four reasons: a) because law directs human beings to actions proportionate to their end; b) because of the uncertainty of human judgment, especially regarding contingent and particular matters, which results in the passage of diverse and conflicting laws; c) because people are competent to make laws concerning what they are able to judge, but they are not able to judge interior human acts but only exterior movements—while full virtue requires that a person be right in each area; and d) because,

⁸*Ibid.*, p. 150.

as Augustine says, human law is not able to prohibit and to punish all evil.⁹

Now, if not all evil is able to be prohibited and to be punished, and simultaneously if the moral order is the domain of the possible (because it deals with human choice, which, as Aristotle states, is always of the actual, and must therefore be of the possible),¹⁰ then the domain of human law, as well as of just civil government, must be limited.

The question, however, remains whether all vice is to be prohibited by civil law; and if so, two other questions follow: specifically, which vices lie within the domain of civil law? and practically, how are they effectively to be limited? Put in another way, to how much freedom *to do as one pleases* is one entitled?

Again, the answer to this question lies within the recognition that the domain of civil governmental authority lies within the domain of the humanly possible. No one, not even civil governments, can be obliged, nor have they the authority to do the impossible. What, however, lies within the domain of governmental possibility within the civic order? According to St. Thomas, and as Novak and Adler have rightly observed, just governments are limited to regulating human choice through outward and observable behavior (what Adler calls circumstantial freedom). Why? Because, as St. Thomas has explained well, human beings can only rightly make laws on matters upon which they are competent to judge (because, once again, since they deal with human choice, laws are of the possible), and the interior judgments of human beings are not readily apparent to, nor regulable by, external judgment. Consequently, neither are the cardinal moral vices of intemperance, cowardice, and foolishness. Thus, when asked the question: "To how much freedom to do as one pleases is an ordinary human being entitled by just government?," it seems reasonable to conclude, as Adler has done, that a human being is entitled to the circumstantial freedom to do as one pleases within the bounds of justice.

In other words, to put the discussion within the context of contemporary political parlance, the domain of private morality is the domain of the cardinal moral virtues of prudence, courage, and temperance, and, to certain lesser extent, of the virtue of justice, along with

⁹Aristotle, *Nicomachean Ethics*, 112b–113a.

¹⁰St. Thomas Aquinas, *ST.*, I-II, 96, 3, Respondeo.

their attendant vices. Within the boundaries of these human actions, a person can be authoritatively regulated by civil government only through the virtue of justice and through institutions of justice and only when the circumstantial freedom of a person in the exercise of a vice actually begins to exert an unjust limitation upon another. Such injustice consists in impeding access to the essential enabling means of opportunity to exercise circumstantial freedom within the bounds of justice. Thus, even with respect to just and unjust actions as they bear upon circumstantial freedom, civil government cannot be expected to regulate every aspect of human behavior. Consequently, St. Thomas wisely observes that human law does not prescribe all acts of virtue but only those which, in some way, either immediately or remotely, have a bearing upon the common good, as, for example, when some way of behaving has been commanded by a lawmaker related to the character formation of good citizens so that the common good of justice and peace may be maintained.¹¹ This being the case, even acts of injustice, such as those committed by one family member against another, are not the proper subjects for rule by civil government, unless and until they begin to intrude upon the domain of those enabling means which are essential for the exercise of the justly regulated choice of another, such as the natural rights to life, freedom of association, of speech, of the press, and so on.

Thus, from the standpoint of just civil government, people are entitled to be as foolish, or as cowardly, or as intemperate as they want until they exceed the bounds of justice in the exercise of their external acts—a boundary beyond which these acts interfere with access of another to the essential enabling means of exercising just choice. When this occurs, people enter the domain of *public morality*, which is that part of the domain of circumstantial freedom of action regulable by justice; and their entitlement to circumstantial freedom to exercise their vices becomes justifiably impaired without any loss of their political freedom.

Now aware of the classical source of the contemporary domains of private morality and public enforcement, one can accept these domains as more intelligible. Beyond this, however, and in conclusion, something else becomes even more intelligible—namely, the extent

¹¹Jacques Maritain, *Man and the State* (Chicago: The University of Chicago Press, 1971), pp. 9–19.

to which the private and public morality distinction, as framed by politicians such as Governor Mario M. Cuomo, has divorced both the domain of private morality and of public morality from the moral order of vice and virtue. In substitution for the order of private and public virtues and vices (that is, the virtues of prudence, courage, temperance, and justice, and their corresponding vices), they have placed group rules arbitrarily made by the vote of group wills; and in the place of the order of circumstantial freedom regulated by the cardinal moral virtue of justice, they have put the will of consensus—a specter from the irrationalism of Rousseau.

By so doing, some contemporary politicians have made the domain of private morality an area of concern solely between individuals and factional groups within the political body—in particular, a church of one denomination or another. Now, of course, given the roots of the domain of private morality in the private judgments of individuals, there is some truth to this position. Indeed, St. Thomas makes a similar point to indicate the need for divine law to supplement human law; and, in fact, were some such form of regulation absent from a political order, beyond regulation by civil government, the body politic would suffer; for, without certain restraints on those more interior areas of human behavior, institutions of civil justice would be severely damaged. It is ludicrous to conclude, however, that, because there exists an area of private morality which, strictly speaking, is not directly susceptible in itself to regulation by the civil state, that private morality cannot be regulated by the civil state at all. Furthermore, it is even more ludicrous to contend that actions better regulated by churches because of the ability of religion to influence the interior decisions of people are in no way within the domain of civil government—especially, when these decisions have an influence upon the just exercise of circumstantial freedom by another. Consequently, even those actions expressly forbidden by the members of a religion are matters of public morality when they relate to matters of the just exercise of the essential enabling means of circumstantial freedom; all members of the body-politic have a moral and political right to object to the exercise of free choice when it exceeds the bounds of justice. After all, the right to choose and the political right to choose are not the same. One possesses the right to choose by nature, but the political right to choose is an entitlement regulated not by consensus but by just compatibility with the circumstantial freedom of others. Because they fail to keep this distinction in mind, is it any wonder that not

only in their pronouncements but also in their other forms of political behavior so many contemporary American Catholic politicians seem more to reflect the moral views of Thrasymachus and Calicles than those of Thomas More, Thomas Aquinas, or Jacques Maritain?