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Personal Autonomy in "Democracy and Distrust"

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PERSONAL AUTONOMY IN *DEMOCRACY AND DISTRUST*

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"There simply does not exist *a* method of moral philosophy,"[1] John Hart Ely tells us in a three-page rejoinder to all moral philosophers, past, present, and future. Push back each philosopher's analysis far enough, he argues, and each is seen to have made an initial value choice no better or worse than the others. "When we search for an external source of values with which to fill in the Constitution's open texture," he writes, "we search in vain."[2]

There is, of course, some truth to the point: syllogisms can't always come from other syllogisms because ultimate major premises don't come from epistomological storks. But it's an objection from which Ely himself doesn't escape. *Democracy and Distrust* relies in the end upon the manifest good of representation reinforcement. Clearing the channels of political change and correcting systemic malfunctions may ultimately be terrific things for courts to do, but we shouldn't deceive ourselves into believing that *process* is never a value choice. It can be, and for Ely it is. To paraphrase his response to Alexander Bickel, that's what he promised he wouldn't do to us; "the fact that it's done with mirrors shouldn't count as a defense."[3]

All of which leads to the point of this essay: he *shouldn't* have promised us that, because it just might not be true that we search in vain. Neither Rawls nor Nozick has the answer, Ely suggests, because they "reach very different conclusions" and, in the case of Rawls, "almost all the commentators on [his] work have expressed reservations about his conclusions."[4]

Well, there could be a little more going on here. Maybe one of them is right and the critics are just plain wrong. Ely's line from Philip Roth, applied by him to natural law—"Then the other

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1. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980).
2. *Id.* at 73.
3. *Id.* at 70.
4. *Id.* at 58.

fellow is wrong, idiot!"[5]—applies here as well: funny or not, it may nonetheless be true that the other fellow *is* wrong; and the mere fact that the other fellow disagrees does not, in any event, mean that *you're* wrong. It's just too facile to dismiss the work of Rawls or Nozick or whomever because his writing has not been universally hailed as a harbinger of the millenium. Democracy may be a great idea, but you can't decide whether a particular moral philosophy is "fine"[6] (to use Ely's word) through the use of public opinion.

It's especially necessary to get down into the trenches and respond substantively where the rejected moral philosophy is one that claims ineluctability—one that purports to follow inescapably from universally accepted intuitive premises. Perhaps the paradigm of such approaches is Immanuel Kant's categorical imperative: Act according to a maxim which can be adopted at the same time as a universal law of human conduct.[7] One must, in other words, apply the same rule to another's act that one applies to one's own act. A person unwilling to do so effectively acknowledges that his own behavior is impermissible by refusing to posit the moral principle necessary to legitimize his own conduct. Lying is thus impermissible in that one would not wish all others to lie.[8] The actions of collective entities are arguably subject to the same precept: the impermissibility of shooting down an unarmed civilian aircraft that has strayed over one's territory is demonstrated by a nation's presumed unwillingness to allow its own civilian aircraft to be shot down.

This notion of "neutral principles" is of course not foreign to constitutional jurisprudence.[9] Indeed, variants of the idea permeate theories of collective order. The principle that like cases should be decided alike is at the heart of the mandate of equal protection of the laws. The whole doctrine of *stare decisis* may in the end represent little more than the same consideration.

The theory of the categorical imperative has, it is true, generated volumes of criticism. One obvious difficulty lies in characterizing the "act" in question. Is the act a "lie" or a statement made, say, under duress to save a settlement from attack? Any act can

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5. P. ROTH, THE GREAT AMERICAN NOVEL 19 (1973), *quoted in* J. ELY, *supra* note 1, at 48.

6. J. ELY *supra* note 1, at 58.

7. I. KANT, CRITIQUE OF PRACTICAL REASON 63 (L. BECK trans. 1949).

8. *See id.* at 346-50.

9. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); T. FRANCK & E. WEISBAND, WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS (1971).

be generalized or particularized almost infinitely so as to include or exclude almost any attendant circumstances, and the breadth of the "maxim" that derives from universalizing the act will vary accordingly. Neither Kant nor anyone else has told us how to decide what facts go into a proper formulation of any given act.

Although the objection is sound, it applies to far more than simply Kant's categorical imperative. The concept of a "holding" no broader than the "facts" of a case, for example, raises precisely the same problem, as any lawyer who has ever written a brief can testify. The objection may ultimately go to limitations inherent in human conceptualization: moral precepts—rules intended to guide human conduct—are, after all, constructs of the mind, not scientific discoveries. Many of the objections leveled against intuitionist theories such as Kant's are, in reality, objections to processes of inference and syllogistic reasoning that comprise not only the methodology of law, but the life of the mind.

Less persuasive is the objection that the categorical imperative is without substance. Ely may be too quick in concluding that the neutral principles notion "does not . . . tell us anything useful about the appropriate content of those principles."[10] Arguably, the seminal moral act is the very act of formulating maxims of conduct under the guidance of the imperative ("lying is impermissible," "murder is impermissible," etc.). Applying the categorical imperative to the very act of formulating maxims may preclude the adoption of any maxim which would vitiate the process by which others formulate their own maxims.

Viewed thus, the imperative is anything but content-neutral. Kant's belief that each person must be treated as an end rather than a means[11]—that human autonomy is implied by the categorical imperative—then becomes more understandable. A Charles Manson who professes to prefer a world of mass killers is therefore not adhering to the imperative, because the act of killing eliminates the victim's ability to undertake the act of choice that the imperative demands as a part of formulating a maxim. The consequences of the maxim "killing is permissible" are, in other words, incompatible with the antecedent condition of volition upon which the possibility of adopting that maxim (or any maxim) depends.

The methodology suggested by John Rawls provides a conceptual paraphrase of Kant.[12] To shape a just society, detach

10. J. ELY, *supra* note 1, at 55.
11. *See* I. KANT, THE PHILOSOPHY OF LAW 12-13 (W. Hastie trans. 1974).
12. J. RAWLS, A THEORY OF JUSTICE (1971).

yourself mentally from your position in your own and assume the "original position" in which no one yet has *any* position—economic, social, political, or even physical or psychological. Behind a "veil of ignorance"—not knowing in which position you might ultimately find yourself—design all societal positions, as well as the governing law. The process of so designing a society is akin to the process of formulating maxims of conduct under the categorical imperative. In the "original position," assuming equal odds of ending up in any of the positions you design, you might not make all positions equally attractive so as to build in systems of incentive. Nonetheless you would infuse each with the highest possible measure of autonomy. Why? Because you don't know what characteristics and preferences you'll end up with, and you would want to make it as easy as possible to be "fulfilled" in whatever position you ultimately occupy.

To the person who claims to prefer a society that minimizes autonomy, the response is that he or she cannot assume that that same preference would exist in the new, randomly assigned position. The only means of assuring fulfillment on the part of an authoritarian personality is, paradoxically, to provide that person sufficient autonomy to vitiate unwanted autonomy. Persons filling societal positions created behind a "veil of ignorance" would thus be granted the same wide latitude of personal choice required by the categorical imperative—choice with regard to all matters not impinging upon the right of others to choose.

The conclusion curiously parallels the utilitarian argument of John Stuart Mill that the only proper role of the state is to prevent one person from harming another.[13] Indeed, under Rawls's theory it would also seem unreasonable to agree in the "original position" to rules restricting harmless conduct, because *you* might end up in the position of wanting to engage in that conduct. Conversely, you would readily agree to rules governing every new position which would prohibit persons assigned to those positions from harming others.

The result is a state in which people are let alone to pursue their own ends except when those ends involve harm to others. This reasoning may support Justice Brandeis's claim that the "right to be let alone" is the right "most valued by civilized men."[14] This right to be let alone is at the core of all theories of personal autonomy.

For reasons such as these, a right of personal autonomy of the

13. *See* J. MILL, ON LIBERTY (1859).
14. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

sort recognized in *Griswold v. Connecticut*[15] might properly be regarded as fundamental—perhaps, indeed, the most fundamental of rights. The Connecticut statute prohibiting the use of contraceptive devices impinged profoundly on the right to be let alone by ruling out the choice to use birth control devices while expanding choice on the part of no one. The New York statute invalidated by the Court in *Lochner v. New York*[16] was, one might argue, *valid* for precisely the same reason: it enhanced the ability of New York bakery employees to be let alone by freeing them from economic coercion. Prior to the enactment of the statute their personal autonomy was undermined by a vast economic disparity in bargaining positions which reduced unacceptably the breadth of life-choices of which autonomy is comprised. (It is, I think, a frivolous objection to claim that the "personal autonomy" of the bakery *owners* was violated by denying them the opportunity to force workers to work more than 60 hours per week; among other things, the breadth of their life-choices would have remained essentially undiminished.) When *On Liberty* was written, the greatest threat to personal autonomy was posed by big government; big business as we know it today did not yet exist. After the industrial revolution, however, in an era of mega-businesses whose annual revenues rival most of the countries on the globe, governmental interposition is not only appropriate but necessary to redress the imbalance of power and to protect personal autonomy.

This is the wisdom, albeit unarticulated, of *Nebbia v. New York*.[17] Preservation of the right to be let alone—a right that subsists in choice-examination—is, in the end, the state's objective in much "social welfare" legislation, and it is entirely proper that the Supreme Court be solicitous of that objective by deferring, as it has, to the legislative will through use of the "rational basis" test. For the reasons stated, however, the Court arguably ought not defer to the legislative judgment embodied in a statute of the sort hypothesized by Harry Wellington—"a statute making it a crime for any person to remove another person's gall bladder, except to save that person's life."[18] It is not enough to say, as Ely does, that such a law simply couldn't be enacted. In Millian terms, the functional equivalent *was* enacted by the people of Connecticut, and a

15. 381 U.S. 479 (1965).
16. 198 U.S. 45 (1905).
17. 291 U.S. 502 (1934).
18. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 304-05 (1973), *quoted in* J. ELY, *supra* note 1, at 182.

number of other states as well—one need simply scan the list of "right to privacy" cases to see that Ely's improbabilities have captured the fancy of state legislator after state legislator, not to mention city councils and school boards. Ely's theory of participation reinforcement is thus not simply under-protective of personal autonomy; it ignores personal autonomy completely as a constitutionally legitimate value because it is not process-related.

This is a serious, and I think fatal, shortcoming in his theory. The intuitionist case for personal autonomy, summarily outlined above, is not without flaws, the most prominent being a measure of circularity. But it is not so patently specious as to be dismissable on the theory that the Constitution can't "keep up with the *New York Review of Books*,"[19] much less because "almost all the commentators on" someone's work have "expressed reservations about his conclusions."[20] Personal autonomy is one legal-political value—perhaps the only one—that arguably traces directly to intuitive sources. It is also the value most threatened by a high-technology, corporation-dominated society. Strict scrutiny of statutes impinging on the right to be let alone is needed if that right is to survive.

19. J. ELY, *supra* note 1, at 58.
20. *Id.* (referring to Rawls).