

THE ROLE OF GOVERNMENT IN SHAPING CULTURE

*Hadley P. Arkes**

Bill Eskridge reminds me of Mark Twain's line from Pudd'nhead Wilson's Calendar: that Adam ate the apple not because he wanted the apple, but because it was forbidden. And the great mistake was not forbidding the serpent; for then he would have eaten the serpent.

I find myself in a position where I am probably one of seven people here who thought that *Lochner*¹ was rightly decided, and I have to play the role of the moralist here. It is like that line from Tom Stoppard in *Jumpers*, that the moralist is bound to sound like a crank haranguing the bus queue with the demented certitude of one possessed of privileged information.² But I did something awkward: I prepared something to address the subject we were given. And so I may have to use an old device of mine and compress this talk hebraically—by omitting the vowels.

I understood that the problem here, at the core, was the question of whether the government should shape the culture. It is curious how people affect to be unaware of the classic understanding of the connection between the logic of morals and the logic of law, and then find themselves persistently backing into the same logic, and indeed relying upon it at every turn. Of course the government shapes the culture. It shapes our moral understanding because that was built into the very nature and logic of law. When we legislate, we override claims of personal choice and private freedom and replace them with a uniform rule and a public obligation. That move is coherent only as we appeal to some principle that defines what is just or unjust, more generally or universally. So, forgive me for being clinical, but when we move to a level of a moral judgment, we move away from statements of mere preference or private taste. We begin to speak about the things that are right or wrong, just or unjust, for others as well as ourselves. If we come to the judgment that it is wrong to own humans as slaves, we mean that it would be wrong for *everyone*, for *anyone*. And if we come to the judgment that it is wrong for parents to torture their infants, the logical

* Hadley P. Arkes is the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. Professor Arkes originally delivered these remarks during Showcase Panel IV, entitled *The Role of Government in Defining Our Culture*, at the Federalist Society's 2006 National Lawyers Convention, on Saturday, November 18, 2006, in Washington, D.C.

¹ *Lochner v. New York*, 198 U.S. 45 (1905).

² TOM STOPPARD, *JUMPERS* (1972).

response is not to say, "Ah, therefore, let us give a tax incentive to induce them to stop." The logical response is with the voice of a command, a command that forbids that torture. To whom? To anyone. To everyone. We forbid it with the force of law.

That is not to say that it is wise to reach with the law everything that is wrong. We may hold back in prudence. But the law finds its ground of coherence and its ground of justification only where the moral ground in principle has been established. So, when we restrict the freedom of people, remove their personal choice, we are obliged to say more than "Most of us don't like it." That is not good enough. And what people curiously overlook is that when we insist, in that way, on a demanding moral argument before we legislate, we raise the bar; we make it harder, not easier, to legislate. To get clear on the moral standards that must govern our judgment is not to legislate more; it is to legislate less. And so I, too, think that we have, right now, too much law.

The question was raised in the past: How does the law engage in moral teaching? The answer was that it teaches through the laws. When we legislate against racial discrimination in private inns and restaurants, we remove discrimination from the domain of private tastes and treat it as a matter of moral consequence. Between 1963 and 1966, opinion in the South came to be parallel with opinion in the North, with majorities in both sections holding to the wrongness of racial discrimination. We may ask: Why did the culture of the South change so strikingly in three years? Did it have something to do with new moral lessons being taught at the top of the state and taught dramatically with the laws?

In recent years, the most dramatic attempt to alter the culture, to shape a new moral understanding, has come through the efforts to impose, through the courts, a right to abortion and a notion of gay rights, including same-sex marriage. Clearly, those issues stand at the core of what we call today "the culture wars." In these cases, the project was to instruct the public gradually, persistently, that the things that elicited public recoil should now be tolerated, then accepted and approved, then regarded as rightful and desirable, as things to be promoted through the use of the laws. In Massachusetts, we have seen the move to teach even more emphatically in the schools, to proclaim in the land, the new ethic contained in the orders of the court on same-sex marriage. Some administrators have declared they are merely teaching the pupils to understand the moral lessons that the law is trying to impart. Surely the most risible thing these days is to hear both proponents of same-sex marriage and even libertarians profess to be appalled at the notion of using the law to reshape the culture, the moral understanding of the public.

No one can rightly deny that the law imparts a sense of what is rightful and wrongful. The libertarians would have us recede precisely because they wish to recede from moral judgment on certain things, perhaps racial discrimination or sexual matters. But even the libertarians are not willing to

overthrow the laws on marriage. They insist that the laws require two parties competent to contract, not the marriage of children or the marriage across species, as some people have recently sought—as in the case of Mr. Philip Buble in Maine and his 37-pound dog, Lady.³

Even if our libertarian friends are right—and the libertarians are right eighty percent of the time—well, what was Holmes’s line about Rufus Peckham? He said his major premise was “God damn it.”⁴ As the social scientists say, that line explains a large portion of the variance. Peckham got it right most of the time. Even the libertarians wish to instruct people in the moral rightness of a government that restrains itself and respects personal freedom.

The point here is that nothing can be settled by invoking some empty slogan that the law should not try to shape morality. The law has no business speaking in the first place, unless it is pronouncing on something of moral consequence. If we think it is seriously wrong for a parent to withhold medical care from a child, we move to have the law register a concern and intervene. There used to be signs saying “No Irish Need Apply” and “White Tenants Only.” They did not necessarily produce material harms. They denigrated, and they produced at times certain emotional wounding. And yet, the law came to bar those kinds of signs, even when the law had not barred the freedom to engage in the discrimination in hiring or renting. Stephen Douglas famously insisted that the government should not pronounce on the vexing *moral* questions like slavery⁵—people should be left to their personal choice. But if it was a matter of polygamy, say in Utah, well then he was willing to send in the troops because, now, this was serious stuff.⁶ And thus it is: If people take seriously a right to abortion, they want to see it protected and promoted into law; and they are not content with a federalist solution, for they are not content with the notion that people may be deprived of a right because they happen to live in South Dakota rather than in New York. And the party that professes such a deep concern about privacy has led the charge over the years in withholding the shelter of privacy for private business and clubs respecting their own private criteria.

In the case of gay rights, there has been an adamant opposition even to tolerating the right of people in their private enclaves, in their small businesses or rental of homes, to honor their own moral convictions on the rightness or wrongness of homosexuality. Surely, this would seem to be the place where the claims of private judgment could have been readily toler-

³ Animal Abuse Case Details, <http://www.pet-abuse.com/cases/854/ME/US/> (last visited Sept. 18, 2007).

⁴ Oyez: U.S. Supreme Court Media, Rufus Peckham, http://www.oyez.org/justices/rufus_peckham (last visited Sept. 18, 2007).

⁵ See, e.g., Stephen A. Douglas, Speech in Chicago (July 9, 1858), in *POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* 8, 9 (1895).

⁶ See JAMES W. SHEAHAN, *THE LIFE OF STEPHEN A. DOUGLAS* 456–69 (2006).

ated by people who have made privacy their anchoring slogan. Yet this does not even get us to the clamor for new measures on hate speech, to censure and punish even priests who might state the traditional teachings on homosexuality.

As Lincoln said, if slavery were right, all words against it would be wrong and could rightly be swept aside, and I can grant your request to censor the federal mails to screen out the Abolitionist literature.⁷ And so we could grant this point: If the people pressing this new ethic on same-sex marriage happen to be right, well, the course they have taken is quite warranted. But that is the substantive question, and that is the question on which everything must finally hinge, not some cliché about the law not shaping the culture. And so, like that character in Molière who discovers that he has been speaking prose all his life,⁸ some of our friends wringing their hands over the law shaping morality find that they have been doing precisely that at every turn.

⁷ Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 522, 549 (Roy P. Basler ed., 1953) (“If slavery is right, all words, acts, laws, and constitutions against it, are themselves wrong, and should be silenced, and swept away.”).

⁸ See MOLIÈRE, LE BOURGEOIS GENTILHOMME (Larousse 2003) (1670).