

embarrassing than that.

4 Thoughts

THE LIMITS OF STATE ACTION: WHY YOU'RE NOT THE BOSS OF ME

Posted on October 9, 2012 by Daniel Kelly

I LOVE THESE CONVERSATIONS. SOMETIMES, IN THE MIDDLE WATCH OF THE night, I'm still sifting through them, arranging fragments of thoughts and arguments to see if they are building towards a whole, and then arranging them again. It's deeply satisfying, but when the building blocks come from several different people, it is difficult. Each thought and argument has attached to it content that today we would call "metadata." That metadata, if we could see it, would tell us something about where in the grand scheme of things the person proposing the idea believes it belongs.

Trouble is, though, that the metadata is largely invisible – most often we have to intuit it from the substance of the discussion. And that leads to unnecessary misunderstandings. When we talk about rights, and morals, and law, and culture, we each have some understanding of how those are all supposed to fit together. But that doesn't necessarily come through when we talk about specific issues.

Perhaps we should each take a peek at the others' cards. Just a quick one, nothing comprehensive. But enough to give us a sense of the structure that supports the bits and pieces of our propositions.

I'll go first, and then by way of example of how it works (for me, at least) I'll respond to a prior post where my hidden metadata has raised some questions.

I start with a series of jurisdictional propositions (why? Because I'm a lawyer, that's why). In the beginning there was God, so the Bible tells us. And because everything has to come from somewhere, all authority must come from him by virtue of having existed before all else. But he did not stay alone – he made us. And in doing so he spread complexity throughout the world.

But we can tease out some of the complexity by observing how he delegated some of his authority. Those things he created, he created with a purpose, and authority followed the purpose. So we have, originally, individual authority. That is, man's right to do whatever he wishes so long as it does not contradict the boundaries established by his Author. Man, however, was not alone; he had, most immediately, a family. And that family had a purpose: Mutual love and support, and bringing the next generation into being and maturity. There simultaneously arose, therefore, familial authority: A couple's right and obligation to arrange their responsibilities in a way that will foster love and support for one another, and for their children (should there be any).

The families, of course, were not alone either. They combined to form societies, in which they inter-related in a variety of complex ways in pursuit of many different purposes. So, for example, they organized and employed their talents to create and exchange wealth in a way that could not be done alone (economics), coalesced around their faith in their Creator so that they might

better serve him and others (the church), formed co-operative undertakings with like-minded individuals (philanthropic and fraternal organizations), and so on.

But that is not all the families did when they came together in society. They did something else, something that, in its nature, differed profoundly from all the other associations they created. They institutionalized the use of force. But before we get there, I must digress briefly on the topic of where the legitimate use of force comes from.

Because we are each created in the image of God, we are each equal (as our Declaration of Independence proclaims). Not in talents or abilities of course. But in our essence, that which makes us humans as opposed to animals (for those uncomfortable with theological terms, you can derive these same principles from a close study of nature). That equality has consequences. It means no one may set himself up as superior to another, because to do so would deny that equality. So my neighbor may not legitimately substitute his decisions for mine because that would make me his inferior, not his equal. Thus, when he comes to take my horse against my will, I may actualize my equality by forcefully preventing his theft. So too with the protection of my life and the lives of those for whom I am responsible. And so on with respect to all of those decisions that I may make consistently with my obligations to my family, to God, and my duty to not cause another to become my inferior by substituting my will for his own. End of digression.

The institutionalization of force is a society's decision to delegate to a small number of people the authority to act in my stead in the protection of my essential equality. We call this small group of people the "state." Its legitimate scope of activity is defined by the purpose for its creation: The protection of

rights. It cannot properly go beyond that purpose because the state acts, always, coercively. And coercion will always do one of two things. It will maintain fundamental equality between individuals (formal equality, as some political philosophers would put it), or it will subjugate one to another. Because the latter would work in derogation of its purpose, it is illegitimate, and thus states its limit.

Now, as we start circling back to our conversations, you have a synopsis of the metadata underlying my thoughts. When I query whether the state ought to act in a particular sphere, or in a particular way, here is the analysis I conduct. First, I ask whether the purpose of the proposed intervention is to protect a right. If it is, then I consider what might be the most prudent manner of intervening. The first question is jurisdictional (may the state act?); the second is discretionary (how ought it to act?).

With that all perfectly clear (that's tongue-in-cheek, just so you know), I can now turn to some of the questions raised in a prior post.

Greg wants to talk about public nudity. I'll spend only a moment in these uncomfortable waters to minimize the danger of a *faux pas*. Specifically he's worried that my analysis may not account for the state's need to understand moral concepts. Responding to my statement that the state's interest in banning public nudity is in refereeing competing claims to the commons, not in sexuality *per se*, Greg asks:

“But how is the state to referee these conflicts if it doesn't know anything about the subject?”

The short answer is that it can't. Greg is correct when he says "[l]aw can't be legitimate if it's not grounded in a moral consensus. All law presupposes a moral framework. You can't ban public nudity without some implied judgment on the moral status of public nudity." But I've said nothing against the truth of this proposition.

Here's what I've said. An activity's immorality, without more, does not give us authority to legislate against it. It must satisfy the jurisdictional question: Does our coercive intervention against the immoral activity vindicate a right?

That does not suggest it is beyond the state's purview to account for the moral dimensions of public nudity. In fact, it requires it. Without such an accounting there is no way the state can accurately judge whether that activity violates the rights of others using the commons. After all, if "flap[ping] your bits around in the town square" (in Greg's felicitous phrasing) is the moral equivalent of eating a PB&J on a park bench, there is no sense in which we could conclude that someone's rights had been abridged. It is only because the state understands the immorality of public "bit flapping" that we can conclude that it interferes with a right.

I identified that right, by way of example only, as preventing the exhibitionists from interfering with the moral formation of my children as we perambulate around the town square. There could be other reasons for banning public nudity, but to justify the state's intervention any alternative reason must also satisfy the jurisdictional inquiry. If it does not, then we are simply legislating morality *qua* morality, which substitutes our will for that of our neighbor, and denies the equality God created between us.

Perhaps this will provide some measure of clarity to my specific propositions when the metadata goes missing. One other thing — everyone in future hypotheticals must wear clothes. If they don't, I'll supply the apparel. Fair warning: It might involve parachute pants and other 80's paraphernalia.



*Appropriate attire for a Hang
Together hypothetical*

2 Thoughts

AIN'T NO FUNCTIONALISM HERE

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