

The Improvidence of Disproportionality in Governmental Policy

The COVID-19 Coronavirus Pandemic has spawned many public and private avoidance efforts. It has also spawned many antagonistic perspectives and attitudes as a consequence.

The divergence between them, and the objectives that they propound, make it difficult to evaluate which should prevail. It is submitted that perhaps use of the Liberty-Freedom Dichotomy might assist in this effort.

As has been posited by this author, Liberty is the Prime Natural Right as it is affirmative and affords the right to initiate action. However, as the exercise of this right is most likely to affect others — whereas Freedom is passive and affords the right to refrain from action — it is the right with which a public body has the legitimate power to circumspectly constrain.¹ The question here then is not what actions a public body may require an individual to perform but what actions a public body may legitimately constrain an individual from performing.

In the context of various restrictions imposed by governments during this pandemic some may say the distinction is immaterial. I tender it is not.

All potential actions are impacted by various factors that necessitate assessment of the relative importance thereof in determining the beneficial or adverse consequence of the action. In addition, there are numerous possible consequences of each potential action, of which the likelihood and effect thereof (on future potential actions) has to be projected. Thus, all decisions to initiate or refrain from action are impressed with certain risks.

The author concurs that we are obliged to avoid needless risks, in order to optimize our time and hence opportunities for attaining further objectives, those beyond the objective envisioned by the immediate proposed action.² However, these should be *substantial, demonstrable* risks. We cannot eliminate all risks with which we may be confronted, and it

¹ Liberty is exercised, consisting of activity initiated by a person, and thus is anticipated to, and usually has, an effect beyond the person exercising it. Therefore, it normally will have some constraint upon the Liberty of another. Accordingly, certain constraints by government on Liberty are permissible.

Still, the imposition of constraints has to be circumspect, viz, only when this Liberty will either substantially and materially affect a sufficiently-substantial number of persons or will deprive an identifiable class of persons, even if not of a substantial number, of a Primary Natural Right; while deprivation of a Primary Natural Right from even a single person is to be regretted, this factor alone does not justify prohibition of a constraint *per se* since a magistracy of the size necessary to identify and prevent any abuse by a constraint would jeopardize all Liberty.

Freedom, though, is an absence of compulsion by another to initiate a specified action and thus its preservation will have no effect other than the failure of the effort to compel; the person who is the object of the inchoate compulsion will be unaffected though the person endeavoring to compel will be affected only by the failure of his effort and, thus, a negation of his activity. Therefore, since the preservation of Freedom will have no effect extending beyond the person asserting it, its orbit has a diameter shorter than the diameter of an orbit of Liberty. Accordingly, restriction of the orbit of Freedom is always unjustifiable.

² These further objectives may be of disparate quality, depending upon the framework of principles of each person. They may be, *inter alia*, to: enhance personal reward; benefit mankind or some segment thereof; or serve and glorify God.

would be perilous to even endeavor to do so.³ While there conceivably are numerous reasons, two of them are paramount.

First, it would promote an even-further deterioration in intellectual capabilities. We are endowed, by Nature or by God (as one's perspective chooses), with rational, abstract capacity, and it is our duty to preserve and deploy these capabilities whenever possible. As already observed, this process entails assessing various factors in each situation which we confront, and determining those most relevant to and beneficial for an intended course of action prior to formulation of the decision as to the choice to be made. Each situation has various nuances and requires intensive examination to identify and analyze these nuances in order to determine what action, if any, is appropriate to avoid and ameliorate the risks incident to alternative courses. Discouraging employment of this process would result in superficial and careless reasoning. All approaches constitute precedents that have the potential to be ingrained; an absence of meticulous consideration then has the potential to be a “foundation of sand”, to our future detriment — by failing and even refusing to make adjustments where circumstances warrant or even require them. Thus, retention of risks is beneficial, as providing challenges that require mental acuity.

Second, and most importantly, an extreme risk-aversion preoccupation deemphasizes the role and supremacy of both God and the Creature. The secular aspect of this proposition derives from the necessity of this preoccupation assigning to some corporate body the function and right of determination of the existence and degree of risks. Who would be this corporate body? Some discrete or obscure body of “experts”? Some singular governmental body? In any event, thereby would be established an oligarchy entitled to control decisions rightfully belonging to the individual; this is contradictory to and destructive of individual responsibility and moral choice. By being subjected to acute situations requiring critical decisions, the individual is compelled to experience moral growth and a sense of his responsibility for making these crucial decisions. This process leads to virtue and righteousness, the abandonment of which would only be at our peril.

The sacred aspect of this proposition derives from the absence of control by humanity, in contrast to the potential control by God, over conditions and events; while God has the power of absolute control, it is only periodically exercised and therefore potential. Scripture repeatedly acknowledges that retribution for vice is suffered by the offenders through their own actions, with rewards for righteousness being but occasional and not linear. It is only through the supplication of prayer that God's intervention can be enlisted. The world then is, by First Cause design, a deterioration into chaos; God created order as the natural condition, but also created other factors (including humanity) that permitted irretrievable devolution into corruption. Though humanity then is by nature of limited power and competency, yet some apparently perceive that virtual elimination, and not merely minimization, of risk is an attainable objective; they believe by their intervention they can remold the world, through the elimination of the risk incident to disorder, rather than seek God's intervention. By not trusting in God are we not treading on dangerous ground, by pretending to usurp His power?⁴

³ The peril would consist of constant inaction, as every action entails certain risks and their elimination is impossible. Concern about these risks then would paralyze all decisions and actions. But to avoid action, one then denies the very quality of life and existence — as it is a constant progression from one stage to another and, finally, to the ultimate stage of life.

⁴ It is my conclusion that the Church, in both its abstract and institutional sense, is theoretically and historically in an adversarial relationship with Government. I consider the Biblical authority to be

Government then should be cautious in the exertion of any power which is granted to it. It should only exercise this power when clearly necessary to protect vital interests. This then requires:

- First, assessment of the severity of a risk, and if it is deemed sufficiently-substantial the *gradual implementation* of restrictions to minimize it; and
- Second, if restrictions are deemed necessary, the tailoring of them so that there is a *reasonable fit* between the rules and the objectives thereof; this then requires recognizing the differences between the circumstances of the persons who will be affected thereby.

In most instances there was no compliance with the conditions of the posited first stage. Simply by virtue of its designation as a “novel coronavirus” it was established that there was no clinical data to determine its transmissibility or its virulence. While it appears to be undisputed that its transmissibility is greater than normal, it yet remains doubtful whether its virulence is such. Accordingly, no justification existed for initially imposing draconian measures as opposed to gradual implementation of them if proven necessary — particularly as experience and logic both confirm that it is more difficult to revise and remove restrictions than it is to expand them later.

The second stage implicates another basic principle of not only our jurisprudence but of core justice, viz, Equal Protection. Equal Treatment can be either a just requirement or an unjust burden, depending upon the circumstances. In many contexts it prevents unjust discriminatory treatment, as when its absence would deprive certain individuals or classes of persons of rights afforded to others. But in other contexts it will deprive certain individuals or classes of persons of liberty that the circumstances do not justify. The latter was the consequence of many of the governmental initiatives during this pandemic.

Those restrictions which imposed isolation, because of the circumstances of some classes of people, were *to their benefit*. The same restrictions, because of the circumstances of other classes of people, were unnecessary and therefore *to them a burden*. Thus was imposed unequal treatment.

Moreover, certain of these restrictions — a regime that was a burden upon **all** — were accompanied by benefits that redounded but to **some**.⁵ These benefits, designed to partially alleviate those burdens, were thus unequally distributed. This was further manifest error as awarding benefits to certain classes of persons but not others demonstrates (or at least implies) that the latter are disfavored and disadvantaged.⁶ Thereby was afflicted further injustice as governmental action should not burden but some and thereby require them to palpably suffer and experience inequity.

consistent. For example, compare: 1 Samuel 8:7; John 18:36; Acts 5:29; and Matthew 22:21.

⁵ These consisted, *inter alia*, of monetary benefits to replace lost income, paid leave to accommodate family circumstances, and adjustment of the working environment to allow telecommuting. Because not all classes of persons had regular income, were blessed with a family, or could perform their work in isolation, only certain classes were afflicted with substantial burdens.

⁶ Extending benefits to some may expand their liberty, but should it prejudice people to whom these are not awarded and whose liberty is thus not benefited?

Rather, burdens should be imposed only where the **substantial liberty** of some is being **directly threatened** by the liberty exercised by others, consisting of *clear jeopardy* to the former and not merely *speculation*. Thus, imposed restrictions on liberty are not justifiable but under circumstances of clear and present danger.⁷

The author does not dispute that there are certain situations that entailed increased risk, such as population density, frequency of circulation outside of the domicile, circulation outside of their community (community being capable of a flexible definition depending upon common characteristics of susceptibility or lack thereof), age, and preexisting health conditions. Application of restrictions to persons and areas subject to these conditions are justifiable. General restrictions applied to persons and areas not subject to these conditions, but rather composed of different characteristics, however are not; and the more persons or areas differ the greater the burden on a government to justify them. They are particularly unjustifiable when applied to institutions historically and by intrinsic nature antagonistic to government — the Church in particular.⁸

Justifiable measures restricting liberty ought then to have focused upon isolation of those most at risk. But does imposing protection measures on those at risk justify doing so on those not at risk? Is not this a case of the onerous, and thus erroneous, application of equal treatment? If classes of persons are unlikely to injure others, then no justification exists for imposition of restraints on their liberty, much less constraints on their freedom. Rather, if classes of persons are more likely to be injured by others, then it is proper only to devise protection measures to impose on those at risk of being injured. This then preserves the Freedom of those not at risk while only limiting the Liberty of those at risk and those persons in contact with them to the extent necessary.

But the regimes that have been imposed have been contrary to this principle. Rather they have yielded benefits to some and burdens to others.⁹ As a result those benefited acquire greater Liberty and hence more Power as the increased rewards yield greater opportunities for initiating activity, and these opportunities will enable, if rightly pursued, the acquisition of more power. Those without those opportunities will have little, if any capacity for acquiring power.

Increased, and hence inequality of, power is always malevolent. For Power is a variable in the equation of the amount of Liberty bestowed upon a person. One might devise the following formula:

$$\Lambda = ((\Sigma - \Delta) / \Sigma) \times ((\Omega) / (\Omega - \Pi))$$

⁷ The standard of “clear and present danger” admittedly originated in a different legal context. Nevertheless, the author posits that its application is appropriate here as only demonstrable and immediate substantial injury should be a justification for restricting Freedom.

⁸ In addition to these restrictions being antagonistic to the limited role that God has assigned to government, there is the additional protection afforded through our jurisprudence by virtue of the Free Exercise Clause. We are enjoined by Scripture to celebrate the Lord's Last Supper and to praise God through joyful song. Yet governmental restrictions in many jurisdictions restricted observance, and thereby enjoined the faithful to violate their sacred duties. To paraphrase Jesus' command, many were compelled to “Render to Caesar the things that are Caesar's, and to God the things that Caesar allows.” Thus, was God, in this core function of the life of many, subordinated to government rather than government subordinated to God.

⁹ Some of those disproportionate in benefits have already been mentioned. However here a different disproportion surfaces; this is the disproportion in burdens. For each if *gross* burdens on **all** are equivalent, **some** will be benefited thereby while others will not. Thus the *net* burdens are not equivalent.

where

- Λ = Liberty Coefficient
- Δ = Government Expenditures
- Σ = Gross Domestic Product
- Π = Median National Wealth
- Ω = Total National Wealth

or, alternatively,

$$\Lambda = ((\Phi - \Psi) / \Phi) \times ((\Omega / (\Omega - \Pi))$$

where

- Λ = Liberty Coefficient
- Ψ = Government Employees
- Φ = Total Population
- Π = Median National Wealth
- Ω = Total National Wealth

By these formulae a Liberty Coefficient is calculated with the greater the product of the calculation demonstrating a greater level of Liberty in a nation.¹⁰ While the author believes either formula is a valid demonstration of a level of Liberty, he apprehends that the first equation may be preferable.

In either event, assuming the validity thereof, the greater the intrusion of a government and the greater the wealth inequality, the greater the power afforded to only certain classes and the less the liberty afforded to the citizens in general. Either variable, viz, the dominance of government or the concentration of wealth, has egregious effects; when combined they are intolerable.¹¹

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To the author the current pandemic regime has disclosed all of these pernicious factors and effects. It has paralyzed many without reason, but with atrocious effects. It is an apt study of the obscene dangers of power in government and society. Whence has gone the ascendancy of the Individual and of Freedom?

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¹⁰ Other more refined and sophisticated formulae can be devised and likely are more demonstrable and better proof of this question. Yet, while the author only expended limited time in devising them, he still believes they are valid and can be legitimately applied in analysis.

¹¹ Preliminary calculations seem to indicate that these two variables have equivalent negative effects; thus submission to one while limiting the other is a Pyrrhic solution as it will still yield an equivalent loss of liberty. Rather, **both** are subjects for constraint.