

ETHICS AND ECONOMICS

Morality and Markets: The Ethics of Government Regulation

Edward Soule

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Let me first stipulate that, from my economist's perspective, a book like this is long overdue. While Edward Soule, a political philosopher, does not entirely reject the economist's theory of the state, he regards social welfare theory (SWT) and other "monistic projects" as "incomplete and unsatisfying" theories of government regulation. I agree. *Intendedly* value-free and institutionless, consequentialist SWT cannot accommodate the moral force of rights, ignores the complexities of postconstitutional politics, and regards efficiency as regulatory policy's ultimate desideratum. If it is increasingly clear that SWT is encumbered by serious logical, empirical, and ontological problems, it is also clear that it has been the dominant theory of government regulation for more than five decades.

Edward Soule's book is intended to alter this regulatory landscape. His *Regulatory Strategy* is intended to provide moral legitimacy to state intervention. On his account, two moral principles are justificatory of *commercial* regulation. One, "Commercial Liberty," justifies intervention to reduce the risk of certain varieties of commercial harm." The other, "Commercial Autonomy," justifies the removal or mitigation of obstacles to the realization of "reasonable commercial plans." Whereas Soule characterizes the former as roughly congruent with concepts of negative liberty or the minimalist regulatory state, the second is regarded as protective of positive liberty. Given that "it is not unusual to compromise someone's negative liberty when states act on the

basis of furthering someone else's positive liberty," Soule seeks to demonstrate that "at least in the context of commercial life," negative and positive liberty can *share* moral authority.

Chapter 1 advances the argument that elements of the thought of both John Locke and John Stuart Mill contemplate a commitment to both negative and positive liberty. While I find the argument compelling—particularly in the case of Mill—my interest centers on Soule's Commercial Autonomy construal.

Soule begins with two ideals of liberal democracies, which are assumed "to regulate the formulation of commercial policies." The first is a "heavily qualified version of [Ronald Dworkin's] principle of liberal neutrality." On Soule's account, the promotion of prosperity and stability does not violate the principle. While I reject Dworkin's notion that the state must be neutral with respect to interpretations of the good life and, *mutatis mutandis*, that rights may be regarded as nonabsolute trumps against persons' external preferences, I agree that Soule's interpretation is reconcilable with Dworkin's project. The second ideal to which Soule appeals may be understood as a version of Rawls's principle of equal political participation. Granting this, "Equality of interests ... can only be satisfied through a transparent process where the state's justificatory burden is on clear display."

While the principle of equal political participation seems to be unassailable, I do not see that Soule's "heavily qualified" neutrality construal addresses the fundamental problem with liberalism's neutrality project.

Soule's chapter 2 illustrates the problem. Reduced to its essentials, chapter 2 centers on a critical appraisal of the "Communitarian Challenge" to his Regulatory Strategy. The challenge contemplates the idea that "property or other commercial rights should not trump concerns for communities and the sort of people that are produced by them." Consistent with his commitment to a heavily qualified version of liberal autonomy, Soule concludes that, apart from "aesthetic values," "values are not morally justified reasons to intervene in markets."

The notion that community values may not be invoked to justify market interventions is an implicit invocation of Dworkin's interpretation of the Kantian transcendental first-person self. On this account, the first-person self, freed of contingent circumstance, is free to establish his own moral code. The difficulty, as Kant's "two points of view" suggest, is that the transcendental self has neither a motive to act, nor a reason to respect the moral law or the categorical imperative. For this, he requires an appeal to a third-person self. As Roger Scruton has suggested, it is this self, immersed in contingent circumstance, that takes account of the "institutions, customs, and local attachments through which the first-person perspective of the liberal is nurtured."

Consider, for example, a bill recently signed by New Jersey's governor. Characterized as a way to promote stem-cell research, the irremediable fact is that it is now possible "to create a human embryo through cloning, to pay a woman to allow it to be implanted in her womb, to let the clone develop for eight months, and then to sell

the cloned fetus or its parts to be used in research.” If the transcendental first-person self may find this unexceptionable, it is at least arguable that the third-person self—informed by “community values”—would wish to prohibit such activities.

If Soule rejects efforts to expand the reach of regulation beyond negative and positive liberty, in chapter 3, he considers efforts to limit “the range of legitimate regulatory goals to a single factor.” These “monistic Regulatory Strategies” include the libertarian’s negative liberty project, the economist’s consequentialist enterprise, and the contractarian argument embraced, among others, by James Buchanan and other economists.

I associate myself with Soule’s claims that neither property rights nor “pricing systems” are moral trumps against regulatory impulses. I agree, moreover, that economic efficiency “does not exhaust the universe of legitimate factors for market intervention.” Finally, it is, I suggest, tautological, that wealth maximization—the desideratum embraced by the law and economics project—is “not the only legitimate human aspiration deserving of legal attention.” That said, I find Soule’s conclusion, that the libertarian and consequentialist projects “[should] be recognized in an adequate Regulatory Strategy” to be less than compelling. Regulatory policies animated by consequentialist social welfare theory are encumbered by two brute facts. First, the theory cannot accommodate the moral force of rights. Second, it has been shown that the theory’s fundamental constructs are indeterminate.

For its part, Soule’s discussion invokes the contractarian enterprise only in passing. Given that he “discourages[s] appeals to justice in the regulation of markets” this is not surprising. The contractarian project is, after all, grounded in the Kantian/Rawlsian understanding of justice as impartiality. This idea, in turn, suggests the efficacy of what James Buchanan has called a generality or impartiality principle. In this account, generality-constrained regulatory and other policies are politically efficient in the sense that they minimize rent seeking.

I conclude by noting that chapters 4 and 5 discuss the sort of regulatory “hard cases” for which Soule’s pluralistic Regulatory Strategy is eminently well suited. I suggest only that an explicit accounting of negative and positive liberty does not exhaust the relevant dimensions of moral appraisal. An explicit accounting of “values” and of *political* efficiency seems also to be appropriate. Given that the services of Ronald Dworkin’s Judge Hercules are unavailable, the resolution of regulatory “hard cases” is not a straightforward matter. It could not be otherwise. As Roger Scruton has suggested, “most of our moral difficulties and ‘hard cases’ derive from the areas where [the moral law, the ethic of virtue, sympathy, and piety] deliver conflicting results.”

That said, this book is a valuable catalyst for thought and a welcome departure from the economist’s “monistic” regulatory strategy.

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