DISTINGUISHED LECTURE

JUSTICE: WHAT'S THE RIGHT THING TO DO?

MICHAEL J. SANDEL[*]

Thank you, Jim, and thank you Dean O'Rourke, for those warm words of introduction. I am deeply grateful to you and your colleagues for convening this Symposium on my book.

The book lays out three approaches to justice.[1] One is the utilitarian idea of maximizing welfare or happiness. The second is the idea that justice means respecting freedom and human dignity. The third says that justice has to do with honoring and recognizing virtues, and the goods implicit in social practices. The first two, the utilitarian and the freedom-based theories of justice, are most familiar in contemporary law and political theory. What I'd like to argue here today, and what I argue in the book, is that the first two conceptions of justice are inadequate. I'd like to defend a version of the third conception, the one that says justice has something to do with honoring, recognizing, promoting, and cultivating virtues and goods implicit in social practices. Another way of putting my claim is that we can't detach questions of justice and rights from debates about the nature of the good being distributed.

One way of summing up my claim is to say that justice is unavoidably judgmental. This idea is indebted to Aristotle in two respects.[2] First, the idea of justice as judgmental draws on the idea that justice has a teleological dimension. Defining rights requires us to figure out the *telos* – the purpose, or the end – of the thing being distributed. Closely connected to this idea is a second Aristotelian idea, which is that justice is honorific. To reason about the *telos* or end of a social practice, or to argue about it, is at least in part to reason or argue about what virtues the social practice should honor and reward. Justice as teleological and justice as honorific: these are the two philosophical ingredients of my claim that debates about justice and rights are unavoidably judgmental. I realize this goes against the grain; let me see if I can illustrate it with a few concrete examples.

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[*] Anne T. and Robert M. Bass Professor of Government, Harvard University. The following Lecture is derived from my recent book, *Justice: What's the Right Thing To Do?* (Farrar, Strauss and Giroux 2009).

[1] MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 19-21 (2009).

[2] *See* ARISTOTLE, POLITICS, at bk. III, 1282b (Richard McKeon ed., Benjamin Jowett trans., 1941) (c. 384 B.C.E.).

Suppose we're distributing flutes. Who should get the best ones? This is an example that Aristotle offers.[3] His answer, plausibly enough: the best flute players. Many people would agree. But why? Well, you might say because the best musicians will play the flutes well, and create music that everyone will enjoy. That would be a utilitarian reason. But it's not Aristotle's reason. He believes the best flutes should go to the best flute players because that's what flutes are for – to be played well. The purpose of flutes is to produce excellent music, and so those who can realize this purpose most fully ought to have the best ones.

And this idea works a little bit better if you think of a Stradivarius violin. Who should get the best Stradivarius? It would be wasted on someone who couldn't really bring out the depth, the resonance, the complexity of the sound. Notice how his appeal to the *telos* or end of musical performance is closely connected to the idea of honor. Aristotle thinks that the purpose, the point, of having musical performances is not just to make audiences happy, though it does that, but also to honor those who display and cultivate musical excellence. That's one of the reasons we have the Boston Symphony Orchestra, concert halls, and so on – not just to hear the music, but to honor an activity that's worthy of admiration and appreciation.

Some may think that the purpose of flutes and violins is too obvious to shed much light on more controversial cases of distributive justice. What about more complex social institutions, such as universities? How do the teleological and honorific aspects of justice inform arguments about admissions criteria, as in the affirmative action debate? On the surface, the debate about affirmative action might seem to be about utility and the general welfare on the one hand and individual rights on the other: Will racial, ethnic, and geographical diversity lead to a better educational experience for all students? Will it violate anybody's rights in the process? So, utility and rights dominate most arguments about affirmative action. But just beneath the surface of the debate is a question about what the point or the purpose or the *telos* of a law school or of a university consists in.

Some people say universities are for the sake of promoting scholarly excellence, and that academic promise should therefore be the sole criterion of admission. Other people say universities also exist to serve certain civic purposes, and that the ability to become a leader in a diverse society, for example, should be among the criteria of admission. So the disagreement about just criteria of admissions is very often a disagreement about the purpose of a university. And closely connected to the debate about the purpose of a university is a question about honor: what virtues or excellences should universities properly honor and reward? Those who believe universities exist to celebrate and reward scholarly excellence alone typically reject affirmative action, whereas those who believe universities also exist to promote certain civic ideals may well embrace it.

[3] *Id.*

I would now like to offer two further illustrations of the way arguments about justice and rights often rest on competing views of the purpose of social practices, and the virtues those practices honor and reward.

The first involves a dispute about access to a golf cart. Some of you will remember Casey Martin, a professional golfer with a bad leg. He had a circulatory disorder that made it very difficult for him to walk the course without pain and without risk of serious injury.[4] But he was otherwise an excellent golfer. He had played on the Stanford championship team with Tiger Woods when he was in college. Casey Martin asked the PGA, the Professional Golfers Association, for permission to use a golf cart in the tournaments. The PGA said no. Golf carts are against the rules. So he took his case to court. He cited the Americans with Disabilities Act, which required reasonable accommodations for people with disabilities, provided the change didn't fundamentally alter the nature of the activity.[5] Some of the biggest names in golf were called to testify in the trial. Arnold Palmer, Jack Nicklaus, and other renowned golfers were asked whether walking the course was an essential aspect of the game. They all said yes; the fatigue factor is an important element of tournament golf. Riding in a golf cart, rather than walking the course, would give Casey Martin an unfair advantage. The case, as some of you will remember, made it all the way to the United States Supreme Court, where the justices had to decide whether Casey Martin had a right to a golf cart.

In order to decide the case, they found themselves wrestling with the question: what is the essential nature of golf?[6] Is it hitting the ball, or also walking the course? The Court ruled, 7-2, in favor of Casey Martin. Justice Stevens wrote for the majority. His opinion analyzed the history of golf and concluded that the use of a cart was not inconsistent with the fundamental character of the game. "From early on," he wrote, "the essence of the game has been shot-making – using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible."[7]

He didn't think there was much weight to the claim that walking tests the physical stamina of golfers. He cited testimony by a physiology professor who calculated that only about 500 calories were expended in walking 18 holes, nutritionally less than a Big Mac.[8] Justice Scalia wrote a rather spirited dissent. It was not only spirited, but it is interesting for our purposes, because Scalia challenged the Aristotelian premise underlying the Court's opinion.

He disputed that it's possible to reason about the *telos* or the essential nature of a game. Here's how he put it:

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[4] PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001).

[5] *Id.* at 669.

[6] *Id.* at 682.

[7] *Id.* at 683.

[8] *Id.* at 687.

> To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential."[9]

And since the rules of golf, as in all games, are entirely arbitrary, he argued, there's no conceivable basis for critically assessing the rules laid down by the PGA.[10] If the fans don't like them, they can "withdraw their patronage."[11] That's all there is to it.

Scalia's argument is questionable on a couple of grounds. First, no real sports fan would talk that way. If you really believed that the rules governing your favorite sport were totally arbitrary, rather than designed to call forth and celebrate skills and talents worth admiring, it would be hard to care about the outcome of the game. Sports would become a kind of spectacle – a source of amusement, rather than a subject of appreciation. Second, Scalia, by denying that golf has a *telos*, misses altogether the honorific aspect of the dispute.

What was this dispute really about? On the surface, it seemed to be a disagreement about fairness. Would riding in a cart give Casey Martin an unfair advantage? Or would it simply level the playing field, make things fair? But if fairness were the only thing at stake, there would have been an easy and obvious solution: let everyone ride in a golf cart if he or she wants to. But I suspect that this solution would have been even more anathema to the golfing greats and to the PGA than carving out an exception for Casey Martin. Why? Because the dispute was not only about fairness, it was also about honor and recognition – specifically, the desire of the PGA and the top golfers that their sport be respected and honored as an *athletic* event.

Let me put this point as delicately as possible. Golfers are a little bit sensitive about the athletic status of their game. There is no running or jumping, and the ball stands still. Nobody doubts that golf is a game of skill. But the honor and recognition accorded golfing greats depends on their sport as being seen as more than just a game of skill. Billiards is also a game of skill, but compare the honor and recognition accorded excellent billiard players – such as Minnesota Fats – with the honor and recognition accorded great athletes, such as Michael Jordan, for example. Great golfers want to be in the company of great athletes, not great billiard players. It's about honor and recognition. If the game at which they excel can be played riding around in a cart, their recognition as athletes, already a bit precarious, could be questioned or diminished. This, I think, explains the vehemence with which the retired professional golfers, who are not even competing with Casey Martin, wanted the court to reject his claim. The golf case is analogous in this respect to the case of the flute or the Stradivarius violin. To make sense of what was at

[9] *Id.* at 700-01 (Scalia, J., dissenting).

[10] *Id.* at 701.

[11] *Id.* at 700.

stake, and to resolve the question of rights, it was necessary for the court to enter into an inquiry about the *telos* of golf; and to resolve that question required them to adjudicate the question of honor and recognition.

I would now like to turn to a final example of the judgmental way, this Aristotle-indebted way, of thinking about rights. Consider the debate over same sex marriage. Can you decide whether the state should recognize same sex marriage without entering into the moral and sometimes religious controversies about the purpose of marriage and the moral status of homosexuality? Many people say yes, especially people at law schools. And many of them argue for same sex marriage on liberal, non-judgmental grounds. Whether one personally approves or disapproves of gay and lesbian relationships, they argue, individuals should be free to choose their marital partners for themselves. According to this argument, allowing heterosexual but not homosexual couples to get married wrongly discriminates against gay men and lesbians, and denies them equality before the law. That's the standard liberal, non-judgmental argument for same sex marriage.

If this argument is a sufficient basis for according state recognition to same sex marriage, then I'm wrong, and the issue can be resolved within the bounds of what might be called liberal public reason, without recourse to controversial conceptions about the purpose of marriage and the goods that it honors. But I would like to suggest that the case for same sex marriage can't be made on non-judgmental grounds. It depends on a certain conception of the *telos* of marriage, its purpose or point. And to argue about the purpose of a social institution like marriage, is to argue about the virtues it properly honors and rewards. The debate over same sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state sanctioned marriage confers. So the underlying moral question can't be avoided.

To see why this is so, it's important to remember that there are not two, but three possible positions that the state could take toward marriage.[12] It could adopt the traditional policy and recognize only marriage as between a man and a woman. Call that policy one. Or, it could do what several states have done, including Massachusetts,[13] and recognize same sex marriage in the same way it recognizes marriage between a man and a woman. Or, there's a third possibility. It could decline to recognize marriage of any kind and leave this role to private associations – churches, synagogues, mosques, or secular private organizations. The third policy might be called the abolition of marriage as a state function, or, more precisely, the disestablishment of marriage.[14]

[12] SANDEL, *supra* note 1, at 254.

[13] Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[14] *See* Tamara Metz, *Why We Should Disestablish Marriage*, *in* JUST MARRIAGE 99, 101 (2004).

Now, this third policy is purely hypothetical, at least in the United States. No state has thus far renounced the recognition of marriage as a governmental function. But it's worth examining this third possibility because it sheds some light on the arguments for and against same sex marriage. One of the people who has proposed this third, disestablishment proposal is the opinion writer Michael Kinsley. He describes it as privatizing marriage.[15] He puts it this way:

> Let churches and other religious institutions continue to offer marriage ceremonies. Let department stores and casinos get into the act if they want. . . . Let couples celebrate their union in any way they choose and consider themselves married whenever they want. . . . And yes, if three people want to get married, or one person wants to marry herself, and someone else wants to conduct a ceremony and declare them married, let 'em.[16]

This is the perfect libertarian solution to the controversy over same sex marriage. One of the things that's interesting about it is that relatively few people on either side of the same sex marriage debate have embraced it. But it does shed light on what's at stake in the debate we actually have about marriage, and it helps us see why both proponents and opponents of same sex marriage have to contend with the substantive moral and religious controversy about the purpose of marriage and the goods that define it. Neither of the two standard positions can be defended within the bounds of liberal public reason. Neither can be defended on purely non-judgmental grounds. The attempt to find a non-judgmental case for same sex marriage draws heavily on the ideas of nondiscrimination and freedom of choice. But these ideas can't by themselves justify a right to state recognized same sex marriage.

To see how this is so, we can look at the well-known opinion by Margaret Marshall, Chief Justice of the Massachusetts Supreme Judicial Court, in the *Goodridge* case. She begins by recognizing the deep moral and religious disagreement, and she implies that the court should not take sides in that fraught moral dispute.[17] But, she doesn't rest her argument on neutrality and freedom of choice alone; she recognizes that if government were truly neutral on the moral worth of all voluntary intimate relationships, then the state would have no grounds for limiting marriage to two persons – consensual polygamous partnerships would also qualify.[18] In fact, if the state really wanted to be neutral and respect whatever choices individuals wish to make, it would have to adopt something like the disestablishment proposal, and get out of the business of conferring recognition on any marriages. Marshall's opinion therefore enters into the dispute about what the purpose of marriage, properly

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[15] Michael Kinsley, *Abolish Marriage*, WASH. POST, July 3, 2003, at A23.

[16] *Id*.

[17] *Goodridge*, 798 N.E.2d at 948.

[18] *See id.* at 969 n.34.

understood, is. And this requires her to make a teleological argument. If marriage is an honorific institution, what virtues does it honor?

Many opponents of same sex marriage claim – and this is the most powerful argument for the traditional view – that the primary purpose of marriage is procreation. According to this argument, since same sex couples can't procreate on their own, they shouldn't have the right to marry. They lack, so to speak, the relevant virtue. Marshall takes on this argument directly. She doesn't pretend to be neutral on the purpose of marriage. She offers a rival account of the *telos* of marriage. The essence of marriage, she argues, is not procreation, but an exclusive loving commitment between two partners, straight or gay.[19]

At this point one might ask how, given two rival accounts of the purpose of marriage, is it possible to adjudicate between them? Marshall's opinion offers a good illustration of how such arguments can proceed. First, she disputes the claim that procreation is the primary purpose of marriage. She does so by showing that marriage, as currently practiced and regulated by the state, does not require the ability to procreate. Heterosexual couples who apply for marriage licenses are not asked about their ability or intention to conceive children. Fertility is not a condition of marriage, she points out. People who have never consummated their marriage may stay married. People who cannot stir from their deathbed may marry. And so, she concludes, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[20] So part of Marshall's argument against one view of the purpose of marriage and for another consists of an interpretation of the purpose or essence of marriage as it currently exists. If we are faced with two rival accounts of the purpose of the social practice, one way to adjudicate between them is to ask which account makes better sense of existing marriage laws taken as a whole.

Another is to ask which interpretation of marriage celebrates virtues worth honoring. What counts as the purpose of marriage partly depends on what qualities we think marriage should celebrate and affirm. This makes the underlying moral and religious controversy unavoidable. What is the moral status of gay and lesbian relations? Marshall is not neutral on this question. She argues that same sex relationships are as worthy of respect as heterosexual ones. Restricting marriage to heterosexuals, "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite sex relationships and not worthy of respect."[21]

So, when we look closely at the case for same sex marriage, we find that it can't rest only on the ideas of nondiscrimination and freedom of choice. In order to decide who should qualify for marriage, we have to think through the

[19] *Id*. at 959.

[20] *Id*. at 961.

[21] *Id*. at 962.

purpose of marriage and the virtues it honors. And this carries us, as citizens and as judges, onto contested moral terrain where we can't remain neutral toward competing conceptions of the good life.

Whether we are deciding the just distribution of musical instruments, university admission, golf carts, or marriage, we can't avoid entering into substantive moral and (sometimes) religious disagreements about the purpose of the social practice, and the virtues and goods the social practice celebrates and rewards.

By these examples, I want to illustrate my general point, which is that justice is not simply a matter of maximizing utility or of securing freedom of choice and nondiscrimination. To achieve a just society, we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that inevitably arise. It is tempting to seek a principle or a procedure that could justify once and for all whatever distribution of income or power or opportunity resulted from it. Such a principle, if we could find it, would enable us to avoid the tumult and contention that arguments about the good life and the *telos* of social practices invariably arouse. But my argument is that these disagreements are impossible to avoid. Justice is inescapably judgmental. This is because justice is not only about the right way to distribute things; it is also about the right way to value things. We cannot define or defend principles of justice without taking up hard questions about the meaning of the good life.