Review of “Practices and Principles: Approaches to Ethical and Legal Judgment”

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Mark Tunick teaches Political Science at Florida Atlantic University. That may explain why in addition to an extensive Bibliography, and a General Index, this book has an Index of Cases. The author seems well versed in legal thought as well as philosophy. The book reads well, despite the constant citing of cases. The book has one central thesis which is stated early, and argued, illustrated, etc., throughout the book. The question is: how do we, or on what basis (or bases), do we make moral and/or legal decisions? Some philosophers, as well as some legal theorists, would say we need to act on principles, presumably universal truths discovered by reason (or intuition, perhaps). Others claim such decisions have to be based on existing practices, or cultural patterns of behavior. It may not be to the point, but one thinks of Wittgenstein’s saying, when other justifications fail us, “This is what I do…” Tunick’s thesis is that in fact we do, and we should, use both principles and practices. That is, we should act, and make our decisions, on principles, but we also – and maybe we can’t avoid it! – refer to practices, to the way things are done, or “understood,” in our society.

The book has six chapters. In chapter One, the author briefly sets forth the problem, states his thesis, and announces that Kant and Hegel will be used as paradigm cases of philosophers who emphasize acting on principle (Kant) and those who emphasize acting on the basis of recognized social practices (Hegel).

Chapter Two, “Kant versus Hegel,” sets out this contrast in detail. Kant, in the Grundlegung, argued that ethics is not based on empiricism. That is, we do not learn what is right or wrong by observing instances. We are obliged to obey the moral law, even if there does not exist a single instance of anyone who has done so. Hegel, on the other hand, was critical of Kant because he felt the moral law, thus understood, had no content, no direction. And he thought we could find this direction through our social practices, or shared “understandings.” Here, two points should be made. First, in fairness, Kant did try to give content to the moral law in his later Metaphysics of Morals; whether or not he succeeded is another matter. Second, and perhaps more important, Tunick is clear that this difference is actually a matter of emphasis. He cites a number of instances in which Kant referred to practices, and moral “understandings,” or social conventions. And though Hegel sought to find moral and legal direction in the ethical life of the community, he also sometimes defended these conventions by reference to principles.

At this point, there are, clearly, other directions this discussion might have fruitfully pursued. As only one example, Tunick lists Alasdair MacIntyre’s book, Whose Justice? Which Rationality?, in
his Bibliography, but says little about it beyond that. It might have been interesting to contrast (as MacIntyre does in his Chapter XII, on “The Augustinian and Aristotelian Background of the Scottish Enlightenment”) the English legal system, based on common law and precedent, with the Scottish legal system, which tends to be more philosophical (and thus based on principles). The classical works are, of course, Blackstone’s *Commentaries on the Laws of England*, and Lord Stair’s *Institutions of the Law of Scotland*. It’s a story that cannot be told here, but isn’t it curious that Americans, before 1867, seemed completely absorbed (I think that’s the word I want.. ) by the Scottish philosophy and…Blackstone’s *Commentaries*! Why did we accept the Scottish philosophy, and the English legal system?

Chapter Three of Tunick’s work deals with Promises, Chapter Four with Contracts. If it is granted that we are obliged to keep our promises, what is the source of this obligation? As Tunick notes, Locke thought we have such obligations even in the “state of nature,” and we know this by the clear light of reason. Other philosophers, notably Hume, and, more recently, H.L.A. Hart, trace this obligation to “prior procedures,” or “antecedent social practices.” Again, Tunick argues for a mediating position; both principles and practices are needed. Contracts are important to this discussion, because they are the sorts of promises that we think should be enforced by law.

One of the more interesting chapters in the book is Chapter Five on Privacy. We speak of having a “right to privacy.” We think, for example, that sex acts, and elimination, etc., are not to be put on public view. But how far does our right to privacy extend? This whole area of ethics and law is interesting, in part because, to use Wittgenstein’s language again, this is an area in which “…we do not know our way about.” Tunick notes that though we still have some of the old “low-tech” problems (e. g., is it proper for law enforcement agents to ask garbage collectors to send them my trash, so that they may rummage through it in search of illegal drugs?) But the new technology has brought new problem areas. How about random urine tests for athletes, DNA tests, aerial surveillance, or heat detection by what are called FLIR (forward-looking infrared) devices? When are invasions of privacy by these means (and a thousand others we know not of…) justified? We simply do not have social practices in place to cover such cases, nor do we know what principles could reasonably be applied to them.

Perhaps this is only one reviewer’s reading, but this chapter seem curiously “dated.” Remember that this book was first published in 1998, with the paperback edition published in 2001, but clearly before September 11 of that year. And that changes everything. It often seems our “right to privacy” is based on the widespread view that our deviant sex acts, and our use of “hard,” illegal, drugs, are after all, harmful only to us. And therefore we should be safe from over-zealous prying eyes. But terrorist threats are a different matter. Here national security is involved. We want to prevent further terrorist attacks, by any means at our disposal, even if this means that our citizens will have less privacy than before.

In his final chapter, “Practices, Principles, and Contemporary Political Theory,” Tunick brings the discussion a bit more up to date. Curiously, he begins the chapter by citing another not so up to date pair of political philosophers, Burke and Bentham. Burke was the great conservative, arguing against change and reform. Bentham was, as Tunick says, (p. 191), “disgusted with blind deference to the past.” This was, of course, also a reason Bentham was so opposed to Blackstone.

One of the major issues discussed in this last chapter is the “universalist-relativist” debate. Clearly,
Tunick opts for a form of relativism; his “practices” are culturally and socially relative. But he insists that this does not mean subjectivism. And it is also noted often that “…this does not mean we can’t criticize a society’s practices or judgments (p. 219).” We are free to use our mental powers to find principles that challenge the customs of our culture, or of our country.

At the end of the day, Tunick refuses to give easy answers to difficult and complex problems. He refuses to choose; we need both principles and practices (practices understood, perhaps, as the accumulated wisdom of ages past) to guide us.

To sum up, it may be appropriate to paraphrase Kant, concluding that principles without practices are empty; practices without principles are blind.

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