

## THE ENFORCEMENT OF MORALITY AS A FUNCTION OF LAW

In considering the functions of criminal law Lord Patrick Devlin in *The Enforcement of Morality* (1968) argues a number of propositions, including the claim that «law must base itself on Christian morals and to the limit of its ability enforce them» (p. 25). This, as well as some of his other claims, have been contested by critics, H. L. A. Hart's criticism being the best known. The debate is far from finished, however, and this paper is an attempt to clarify some of the issues and to push them a little further toward their solution.

All parties to the debate seem to be more or less agreed that one justifiable reason for making conduct criminal is that such conduct would lead to harm toward others. There is less general agreement on whether another justifiable reason is that such conduct would lead to harm to the agent himself. But to raise question of whether the legal enforcement of the popular or conventional morality of a society is yet another justifiable reason for making conduct criminal is to introduce confusion into the discussion. For any action which either causes harm to another or to oneself (assuming that such harm is not necessary and is in some way unjust) is on most understandings of morality a *prima facie* immoral action. Hence a proper question is not whether morality should be enforced by the criminal law; rather we should ask how legislators are to determine which portions of morality are to be so enforced.

Lord Devlin is concerned with the judgment of the «reasonable man» in the jury box (p. 15). Hart argues cogently that reason as well as moral feeling should be considered in reaching any decision on the morality of an action. Yet while the legislator should considerer reasoned argument, Lord Devlin's point that the moral consciousness of the citizens of a society must be considered for law to be effective cannot be totally dismissed. For the legislator neither receives the moral law from on high in a privileged way, nor can he hand it on in a privileged way. His conclusion concerning the morality of an action should be rationally defensi-

ble and defended and should represent the enlightened thinking of at least some significant portion of the community. Otherwise it would be difficult to distinguish his conclusion from a personal prejudice or an idiosyncratic moral position. Furthermore, if the thinking he attempts to enforce is too far removed from the thinking of the people to whom the law is to apply, it is likely that the law will be ineffective.

If we were to proceed on the premise that the moral law is one for all mankind, then it would seem appropriate that the criminal law be one for all mankind. The fact that it varies in part from society to society is reflective of something other than the failure of right thinking in certain societies. Murder is generally a criminal offense; there is obviously less agreement from society to society on the status of infanticide, abortion, racial or sexual discrimination, adultery, divorce, homosexuality, and the possession and use of alcoholic beverages or of marijuana. The reason for the differences is not necessarily that only some societies have correctly discovered that these latter are or are not immoral; nor is it that the legislators in only some of these societies have correctly discovered the truth about the moral status of these actions. What seems more plausible is that though the morality of an action is a relevant consideration in the determination of its criminality, it is not the only relevant consideration. As a consequence it may be justifiable for a society at one stage of its development to tolerate actions which at another stage of its development it justifiably considers criminal, and the same thing is true cross-culturally from society to society at the same period in time.

I am inclined to agree with Lord Devlin that a sharp line cannot be drawn between private morality and immorality and the realm which is properly the law's business, while at the same time agreeing with Hart that there is a realm of private morality and immorality which is «not the law's business.» It is not the case, however, that we need either an unchanging principle or the emotional reaction of the reasonable man; rather what we need are the principles —botch changing and unchanging— by which the reasonable man comes to accept or reject the reasoned justification of certain laws. Thus the degree to which morality should be enforced by law is not to be decided by a priori reasoning; it is a practical question which should be decided by considering a great many factors, including the reasoned applicable moral principles, the pertinent fact (e.g., whether any harm is done to society, and if any how much a calculation which may vary from time to time and from society to society for apparently similar actions), the moral feelings of the peo-

ple, the likelihood of various types of reaction by the people, the amount of education or reeducation necessary to convince people of the reasonableness of the law, the kind and amount of authority the legislators possess, the amount and kind of paternalism—if any—the people desire and are willing to tolerate and the legislators are empowered and competent to provide, the amount of individual liberty the people of the society desire and the amount of protection and security that is compatible with it, and so on.

The claims which are implicitly rejected in this approach are 1) that there is one best society or model which all societies must follow if they are to approach the ideal, and 2) that there is one and only one set formula concerning the correct relationship between morality and criminal legislation. It is entirely appropriate for a given society to attempt to draw some vague line, to attempt to justify certain legislation by appeal to certain principles, and to attempt to reach a consensus among the people about what is proper legislation for their society at a given time, without thereby implying that any other alternative is necessarily mistaken or that other societies to the extent that they fail to act in a similar way are therefore necessarily morally deficient and are either over—or under—legislating.

Not everything that is immoral can be legally forbidden, nor can everything that is morally praiseworthy be legally required. In what follows I shall offer a few broad principles within the framework outlined above which I think can be generally applied, though they obviously do not cover all aspects of the proper relation of criminal law and morality.

1. Whatever is seriously harmful to society should be prohibited by law. What is seriously harmful to society is usually at least *prima facie immoral*. There is little dispute, therefore, over whether murder should be a legal offense, or theft, or perjury, or the willful destruction of public property. These are legal crimes because they seriously harm society and the peace and security of its members, which is to say they are morally wrong. In these instances the legal enforcement of morality is right and proper.

2. What is immoral cannot legitimately be commanded by law. This is a negative restraint upon law. If segregation by race or sex or creed is in certain contexts unjust and hence immoral, any law which imposes such segregation, though passed in the normal way and so perhaps legal in this sense, is illegitimate.

3. The legislature should prohibit by law social practices which involve injustice being practiced against any of its citizens taken as a class. This means that the state may require by law what is required by morality though not currently practiced in a society and so not part of its «conventional morality».

Thus if illegitimate discrimination and segregation are *de facto* conditions of a society, it is legitimate to pass laws making such discrimination and segregation illegal. But unless one lives in a police state, laws are unlikely to be effective unless supported by a large portion of the people. One reason is that it is unlikely that a jury will return a guilty verdict if its members do not support the law in question. For a long period of time juries in the American South hardly ever returned a guilty verdict against a white man accused of harming a black man. Anti-discrimination laws were legitimately passed and have begun to take effect; but the people had first to be educated to them and a large number had to come to support them before the laws took practical effect. The process of education included public protests, marches, civil disobedience, publicity campaigns, public debates, court decisions, and so on. Discriminatory laws were always illegitimate; unjust discrimination as a social practice was always immoral; but it is at least plausible to maintain that anti-discrimination laws would not have been effective unless popular consciousness had become appropriately interested, educable, and aroused.

Legislation, however, may, as this instance illustrates, sometimes be appropriately used to help raise the level of conventional morality.

4. In order to prevent the predilections of a majority from being forced upon a minority, there should be safeguards of the basic rights of all members of a society and proper procedures applicable to all. This is a counterweight to the possibility of certain moral views held by the majority and not covered by the above principles from being imposed on the minority.

5. Where the morality of an action is a matter of dispute within a society, the morality of the action cannot serve as an adequate basis for legislative decisions. In such cases principles of procedure are especially important, both to guarantee the rights of the minority and to make some rational decision possible. The question of abortion in many states in the U. S. is a case in point. In the abortion issue if, as some claim, abortion is in fact the murder of an innocent person, then such persons deserve the protection of law; if, as others claim, abortion is the

removal of a parasite, then the right of the woman to decide whether or not to have an abortion is justifiable. It is because the conventional moral view has broken down that both the morality of abortion and the propriety of legislation against it are being questioned, with varying results in several states. Pertinent to the debate is not only the morality of abortion but also the possible human misery and other social evils which might stem from the prohibition of abortion, the support or lack of support for the prohibition, and the arguments in defense of permitting and of prohibiting abortion.

6. There is a basic difference, however, between prohibiting by law an action which causes harm primarily to someone other than the agent, and prohibiting an action which does harm primarily to the agent. Is legal paternalism a proper function of law?

The answer depends in part on the type of society, its system of laws, and the basis of its legitimacy. In a democracy where all adult citizens are considered responsible for their actions, and where the authority to pass laws is thought to come from the people, the case may be different from a society which is thoroughly governed from above and in which authority is seen not as coming from the people but as rightly vested in leaders who are believed to know better than the masses what is right or wrong and what is good for the people. Also pertinent is whether there is an accepted common end of society toward which all its members must work or whether the end of government is rather to facilitate the achievement of individual ends by the members of the society. Equally important is whether in the society the individual is considered primary in value or whether man taken collectively is the primary locus of value.

7. If the authority to make laws comes from the people, then the authority to make paternalistic laws also comes from them, if it is forthcoming at all. The attempt at legislation prohibiting the sale of alcoholic beverages in the United States was not tolerated by large numbers of people and the evils brought about as a result made the legislation more productive of evil than of good and led to its repeal.

8. The minimal requirements of morality vary from society to society, and law can be seen as helping to push those below the norm up to it, and as helping to maintain the norm already achieved. Law by itself will not raise the moral level; it requires acceptance by a significant number in a society (though not necessarily by the majority) which means

that for them it must already be seen as part of morality. But the law should not be used to force people to do what is beyond the minimal requirements for cooperative social life. It should not be used, for example, to force people to be courteous, or to require that everyone help a neighbor in need. In the first place what cannot be effectively enforced should not be made the subject of law, for it lessens the respect for law. In the second place where no harm is done to society it is improper to make criminal the failure to produce the good one might.

9. Law therefore should not be considered *in abstracto* with consideration given only to the morality of the question involved. Consideration must also be given to the public resistance or support and to the overall good which is likely to result. Education, and in particular the constant reciprocal moral education by which society as a whole continues to educate itself, is necessary in order to have a properly responsive population and properly responsive legislators and judges, since the latter are not especially moral simply by virtue of their office.

Though morality may be legally enforced, there are clearly limits; the limits, however, vary considerably from society to society, and the changing limits within any society are an indication of changing circumstances and changing moral insight, among other things. No sharp dividing line can be drawn once and for all; but none is necessary. \*

PROFESSOR RICHARD T. DE GEORGE  
*Department of Philosophy The Uni-*  
*versity of Kansas. Lawrence,*  
*Kansas, 66044, U. S. A.*

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