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## IDEOLOGICAL PLURALISM AND GOVERNMENT REGULATION OF PRIVATE MORALITY

RAYMOND B. MARCIN\*

"You can't legislate morality!"—so says someone, somewhere every day. It is our conventional wisdom. It is a truism that is often heard in crassly political advocacy, and yet it both antedates and transcends traditional American politics. It has often been used by both liberal and conservative advocates. One recalls its use by President Eisenhower in the Little Rock, Arkansas, school desegregation crisis in the 1950's, as well as its use by more recent advocates of change in anti-abortion laws. Today it is most often heard in contexts similar to the subject of this symposium: laws prohibiting the dissemination of obscene materials, homosexual acts, fornication, prostitution, and a host of others the reader can doubtless supply.

What does the truism mean? Is it jurisprudentially demonstrable that morality cannot be legislated into effect? It seems doubtful that any such jurisprudential demonstration can be made. One recalls that the civil rights struggle of the past generation, seen by most as a battle over minds and hearts and attitudes in a moral arena, was waged in large part with legislative sanctions as prime weapons. It seems difficult, contrasting the interracial attitudes of a generation ago with those of today, to avoid concluding that those legislative sanctions had much to do with a profound moral change. It may not be inaccurate to say that a morality of racial tolerance has to some extent at least been legislated. What, then, does the truism mean?

An advocate who voices that truism usually does not intend to convey the idea that the state *cannot* legislate morality. Examples of effective legislations of morality abound (along of course, with ineffective attempts, such as alcohol prohibition laws). What the advocate usually means is that the state has no *moral right* to criminally punish purely private acts of immorality.<sup>1</sup> The advocate of the truism would argue that, although the civil rights laws do indeed criminally (as well as civilly) punish private acts of immorality, those acts are not *purely* private. They involve harm to others. The state may, they would argue, certainly legislate away that harm.

Some may pause at this point to conclude that the truism has been resurrected. The doubt we cast upon it has been swept away, and its validity is once again clear: a state may not legislate morality itself,

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1. H.L.A. Hart certainly recognized that as the question "[T]he question is one . . . of morality. It is the question whether the enforcement of morality is morally justified." H. HART, LAW, LIBERTY, AND MORALITY 17 (1963).

but it may legislate against the harm to others occasioned by immorality. This more extended version of the truism perhaps is more jurisprudentially accurate, but it too suffers from the simplicity of the original. Despite the Civil Rights Act of 1964's technical hook-up with harm to interstate commerce, it can scarcely be doubted that most, if not all lawmakers who voted in favor of civil rights legislation did so out of a moral posture and with an intent to end a moral outrage which had long been and was then being committed on an entire race of our citizenry. The harm and the morality are, in other words, inextricably bound together. We seem forced to conclude that a more accurate version of the truism is: a state may legislate morality itself as long as, in doing so, it confines itself to removal of the harm to others occasioned by present immorality.

This perhaps is the closest we can come to a statement of the conventional (though not unanimous) Anglo-American wisdom. Two centuries ago William Blackstone, with little analysis or development, voiced the "gut-feeling" that many contemporary jurists have:

All crimes ought . . . to be estimated merely according to the mischiefs which they produce in civil society: and of consequence, private vices or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes.<sup>2</sup>

There is, of course, a counterview to this conventional libertarianism. The counterpoint to libertarianism is usually referred to as paternalism. The paternalist's thesis is that the state may legitimately interfere with an individual's liberty of action for reasons having solely to do with that individual's own good. Paternalism writ large is, of course, Orwell's 1984 big-brotherism, but lest visions of paternalistic excess send us scurrying too far in the other direction, we ought to note that its total jettisoning would take over the side with it mandatory minimum-wage laws, mandatory maximum-hours laws, and compulsory time-and-a-half-for-overtime laws. Somewhere there may be a totally consistent libertarian and somewhere (else, it is hoped) a totally consistent paternalist, but most of us probably fall somewhere in between. Consequently most of us are saddled with the discomfort of inconsistency.

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2. 4 W. BLACKSTONE, COMMENTARIES\* 40. As with many a conventional wisdom, however, Blackstone's view was probably more honored in the breach than in the observance, for he himself elsewhere noted the propriety of criminally punishing various forms of sodomy. *Id.* at \*215, \*241.

How, then, do we go about trying to answer the question we have posed? How, then, can we assess whether the state has a *moral* right to legislate morality? The question itself is one of morality—of ethics. When is it ethical for a state to criminally punish acts which it believes to be immoral solely for that reason? Whenever, we, or a majority of us are in agreement with that belief? There may be some logic to the statement that a state may morally do whatever a majority of its members believe is moral, but tyranny of the majority is hardly a satisfactory solution to the problems and sensibilities of minority members. No, what is needed is a moral criterion itself—an ethical standard—by which we can assess the moral propriety of a state's decision to act in a moral context.

With confident vigor, John Stuart Mill, the quintessential English libertarian of a century ago, provided an ethical standard of sorts which has controlled debate on state morality regulation ever since:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.<sup>3</sup>

In Mill's ethical standard, the sovereign of individual human liberty looms large indeed. Under his formula of "harm to others" it bows only to a co-equal sovereign. Within its own domain, where it touches none other, the sovereign is supreme. The free development of the individual human personality may be interfered with but only to prevent harm to others.

Mill's ethical standard of liberty and harm is so compelling in its simplicity that it seems to have been presumed by both proponents and opponents of anti-obscenity legislation—indeed it seems to have been assumed by Mill's critics as well as his friends.<sup>4</sup> Yet, as attractive as the

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3. J. MILL, ON LIBERTY ch. 1 (1859), *reprinted in* THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL 135 (1963).

4. Mill's principal 20th century critic, Lord Patrick Devlin, whose arguments (discussed more fully *infra*) focus on social harm and social self-defense, certainly accepts it. But Mill's contemporary Sir James Fitzjames Stephen did dismiss the Mill ethical standard: "To me, the question of whether liberty is a good or a bad thing appears as irrational as the question whether fire is a good or a bad thing. It is both good and bad according to time, place and circumstance." J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 48 (1973).

Mill criterion is, it is certainly not the only plausible approach to decisions as to the propriety of state activity in the moral sphere. Others who prize individual human liberty may not have assigned that factor as high a priority as Mill did or may view competing considerations as of equal importance. Mill's own contemporary, Sir James Fitzjames Stephen, suggested a criterion for state action which was, if anything, more faithfully utilitarian than that of Mill, a balance not between liberty and harm, but between goodness and convenience: "If . . . the object aimed at is good, if the compulsion employed such as to attain it, and if the good obtained overbalances the inconvenience of the compulsion itself, I do not understand how, upon utilitarian principles, the compulsion can be bad."<sup>5</sup> It is seen at once that Stephen's ethical standard has two problems: it permits an alarmingly large degree of state paternalism and it begs the question somewhat. How are we to judge the moral propriety of the state's decision that a particular end or object is good?

Withal, Mill's balancing of liberty and harm and Stephen's balancing of goodness and inconvenience seem to be the polar criteria. How much relative importance one assigns to individual human liberty on the one hand and to social or individual good as one perceives it on the other will determine one's judgment as to the ethical propriety of the state's using its compulsive power to restrain obscenity, homosexuality, fornication, and the like. The views of two commentators in particular serve as fitting examples.

Lord Patrick Devlin entered the law and morality fray in the late 1950's in response to the recommendation of a legislative committee in England that homosexual practices in private between consenting adults should no longer be crimes. Devlin, a mild Millian libertarian at the time, had supported the report's recommendation and the Mill ethical standard on which it was based. But then Devlin, a year after the report was issued, was called upon to deliver the second Maccabaean Lecture in Jurisprudence of the British Academy. It was in the course of preparing for that lecture that he became persuaded by study that the legislative committee's recommendation was wrong. The result was a defense of the propriety of state criminal sanctions against private immorality. Devlin had not read Stephen's attack on the Millian methaethic at the time, but on reading it later, he declared his own views to be remarkably in accord with Stephen's.<sup>6</sup> Curiously, however, Devlin, although totally in accord with Stephen's result, seemed much more in accord with Mill in the use of an ethical standard. Devlin seemed to wish to tackle Mill on his own field, that is, the harm-to-others criterion. Even private acts of immorality harm others

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5. *Id.* at 50.

6. P. DEVLIN, *THE ENFORCEMENT OF MORALS* vii (1965).

in the sense that and insofar as they "are capable in their nature of threatening the existence of society. . . ." This is so because a society is not only made up of a community of political ideas but of a community of moral ideas as well. Consequently, although admittedly not every deviation from society's shared morals threatens its existence, every such deviation is at least *capable* of such a threat, and so cannot be put beyond the law.<sup>7</sup>

Devlin did have a quarrel with the degree of importance Mill attached to individual liberty, and in that sense he was in accord with Stephen:

Mill believed that diversity in morals and the removal of restraint on what was traditionally held to be immorality would liberate men to prove what they thought to be good . . . . He conceived of an old morality being replaced by a new and perhaps better morality. . . . But he did not really grapple with the fact that along the paths that depart from traditional morals, pimps leading the weak astray far outnumber spiritual explorers at the head of the strong.<sup>8</sup>

Devlin's critique of Mill was quickly answered by Oxford's H.L.A. Hart. Hart found what he felt were major weaknesses in Devlin's "threat-to-society" justification for morality regulation. While a "consensus of moral opinion on certain matters is essential if society is to be worth living in," nonetheless "we have ample evidence for believing that people will not abandon morality, will not think any better of

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7. *Id.* at 13, n.1.

8. *Id.* Devlin's thesis concerning the potential social harm of private acts of immorality has its analogues in other contexts. One such involves the federal commerce power. The criterion of propriety for the federal commerce power is that the federal government has no constitutional right to regulate any commerce save interstate commerce or commerce having a substantial effect on interstate commerce. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the United States Supreme Court sustained Congress' extension of federal regulation to farm production not intended in any part for interstate commerce but wholly for purely private consumption on the farm. The Court agreed that the impact of the home grown and home consumed wheat in question on interstate commerce was trivial, but noted that trivial impact could become substantial when taken with many others similarly situated. It is this very phenomenon that Devlin seems to portray. Certainly, the doings of two lone homosexuals in private do not threaten society. But multiply those two and the effect of them on the moral tone of society in terms of the acceptability of homosexual practices can be substantial. Further multiply that effect by reason of the state's adopting the view that such conduct is beyond its concern and we have a potential threat to the existence of that society. Whether that threat, if realized, would lead to a morally good society with an increase in social tolerance and understanding or to a morally evil society with lustful debauchery commonplace is beyond the scope of this paper.

9. *Id.* at 108.

murder, cruelty, and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."<sup>10</sup> Hart, having doubted the premise of Devlin's "threat-to-society" argument went on to assume *arguendo* that the threat was real. If it were it would not lead to "the overthrow of ordered government, but a peaceful change in its form."<sup>11</sup>

Perhaps Hart's strongest contribution to the libertarian side of the argument was his deft introduction of a burden-of-justification issue. Devlin seemed to have assumed that if a state does see fit to regulate morality, opponents must, if they are to prevail, convince the legal community of the impropriety of the state's action. Not so, said Hart. The state, when it criminally punishes offenders, is doing "things which, if they are not justified as sanctions, are delicts or wrongs."<sup>12</sup> In addition, "[T]he use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good."<sup>13</sup> If jurisprudence accepts Hart's burden-of-justification argument,<sup>14</sup> then Devlin and Stephen's position is in grave jeopardy. As should be evident by now, the arguments supporting both the paternalist and the libertarian positions are logical, and whether one views either as being sound and persuasive will probably depend on whether one views humankind as the fallible victim of original sin or as the nobly evolving master of its own destiny. If the views of some of us fall in between those two extremes, we may find neither position totally persuasive and perhaps both totally sound—the discomfort of inconsistency. Yet if paternalism must measure itself against libertarianism and establish not merely its soundness but its superiority whenever it wishes to criminally sanction immoral conduct, then it is almost certainly fighting a losing battle.

Hart's rhetorical victory, however, if that is what it is, hardly ends the dispute. On the contrary, it merely serves to refocus attention, this time more specifically on the nature of the moral question at hand. The problem is one of justification. How does the libertarian or the paternalist go about convincing us that his or her position is justified, or more justified than the other? The question suggests the need of a two-pronged answer. First, to justify implies an appeal to justice. An

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10. H. HART, IMMORALITY AND TREASON, *reprinted in* MORALITY AND THE LAW 53 (R. Wasserstrom 1971).

11. *Id.*

12. H. HART, *supra* note 1, at 21.

13. *Id.* at 20.

14. Ronald Dworkin, H.L.A. Hart's successor at Oxford, has certainly accepted Hart's burden-of-justification argument and has used it to suggest and relentlessly destroy what he felt were all possible justifications for Devlin's position. See Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L. J. 986 (1966).

advocate and an audience must have a unified concept of what justice is for an appeal to justice to have its proper effect. Secondly, to justify implies the use of a process, that of justification. Similarly, an advocate and an audience must have a unified concept of the process of justification for its use to have its proper effect. The trouble, as we shall see, is the lack in our society of an unified concept either of justice or of justification.

1. *Justice*. What is justice? Is it something which functions as a standard for law, a norm by which law is to be measured and expressed? If it is a standard or a norm, we must then describe its content. Is it a norm of suitability, that being the inherent suitability of the various relationships prescribed by laws? If so, suitability for what? For the improvement of the human condition? For workability? For utility? For order? For the development of the human potential?

If justice is a norm or standard, is it a pre-established norm or standard? Does it antedate the laws which it judges? Or does it possibly derive some or all of its content from those laws? Is justice nothing more than the existential actuality which laws acquire? Is constitutionality the ultimate content of justice, as Hans Kelsen seems to suppose?<sup>15</sup> Is there an "ultrastandard" of justice beyond a nation's written constitution? Anglo-American common law can be viewed as an effectuation of that "ultrastandard," as perhaps can contemporary judicial appeals to "public policy." But if there is an "ultrastandard," what is it? Some have seen it in a philosophical analysis of the nature of the human being.<sup>16</sup> Some, agreeing, saw an "ultra-ultrastandard" in the divine essence.<sup>17</sup> Others would find justice's ultimate existential reality in sociology or in psychoanalytic theory.<sup>18</sup> The reader can, perhaps, supply even more versions of ultranorms.

We are a pluralist society, not merely ethnically, but also philosophically and idealistically. We differ in our concepts of the nature of humankind, the meaning of human existence, and the point of human relationships. As long as we continue to differ, we will have to content ourselves with what might be called "adjectival justice." It is, as

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15. H. KELSEN, *THE PURE THEORY OF LAW* (1970). Kelsen's theory is that laws derive their legitimacy (are justified?) from superior laws which serve as norms. Above all subsidiary and intermediate norms exists the "grundnorm" or basic norm. Either the basic norm is seen as needing no justification or a quest for its ultranorm is seen as useless or impossible. Kelsen's basic norm is, of course, the will of a monarch in council or a written constitution. His refusal to go beyond that norm, while heavily criticized by some, is perhaps a quite realistic recognition by him of the basic point of our discussion: beyond the grundnorm, pluralist ideas of the nature of humankind and human relationships make agreement on the content of justice impossible.

16. The natural law theory. See, e.g., B. BROWN, *THE NATURAL LAW READER* (1960).

17. See, e.g., T. AQUINAS, *SUMMA THEOLOGIAE, TREATISE ON LAW* q. 90-97 (1970).

18. A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1971).



Kelsen perhaps thought, pointless to appeal to one single ultimate concept of justice. We appeal, instead, to *social* justice, *individual* justice, *natural* justice, *existential* justice, *distributive* justice, and *compensatory* justice.<sup>19</sup> This phenomenon of adjectival justice caused by philosophical pluralism was noticed by three German theologians amid the chaos which burdened western Europe in the decade after World War II:

The special cause for alarm comes into view when it appears that the same thing can be legitimized at one point and deemed utterly illegal at another. There is little disquiet about this extreme relativity of law because justice is now generally regarded as "*une opinion de l'homme*," something which has to be qualified and reinforced by an adjective (e.g. 'social' justice) or evaluated as 'bourgeois' justice, 'British' justice, and even (if one is not careful) 'Christian' justice. Justice thus relativized and degraded, cannot be taken seriously as a basis for law. And law, in its turn, begins to lose its direct connection with the truth of human existence.<sup>20</sup>

The theologians' immediate fear had to do with the possibility of this flawed, adjectival "justice" leading to more totalitarian excesses. Appeals to "justice" become rhetorical devices, and justice is just another means to another end.

Given this cultural and philosophic pluralism and the consequent relativism of our concepts of justice, it may not be a copout to suggest that the question of a unified concept of justice must be a theological one, and further given our religious, nonreligious, and antireligious pluralism, an unresolvable one. Unresolvable though the question may be on the social level, the quest for its solution does provide a framework for *individual* decisions as to the propriety of morality regulation in a more healthy, tolerant setting. Each of us predictably believes his or her concept of justice to be the correct one, but this recognition of our pluralism cannot but serve to blunt the tendency to regard one's own view as infallible.

2. *Justification.* The thought that the elusiveness of a unified concept of justice can perhaps be overcome by a unanimity of approach in

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19. Perhaps a clear contemporary example of this phenomenon is the "benign" racial preference or reverse discrimination debate. Advocates of special treatment for minority-group applicants for employment or graduate school positions typically argue *social* justice, whereas opponents of that special treatment typically argue *individual* justice. This, of course, suggests that, empirically at least, the ultimate norm is the will of any five justices of the United States Supreme Court.

20. H. SCHREY, H. WALZ, & W. WHITEHOUSE, *THE BIBLICAL DOCTRINE OF JUSTICE AND LAW* 22 (1955).

the process of justification, however attractive, is as one might suspect, naive. The dilemma caused by philosophical pluralism has infected the approaches we use in making ethical decisions as well. We are not in agreement at all on how to justify. Two great decisional modes, the deontological and the teleological, with their numerous derivatives, insure that persons trying to decide on the moral propriety of morality regulation will not even agree on a method of justifying. Deontological modes judge a measure on the basis of its intrinsic nature. Certain phenomena are seen as intrinsically evil, for example, lying and cheating. Teleological modes judge a measure on the basis of its end, its final cause, its consequences. Certain actions which a deontological ethicist might regard as evil can be justified by the teleological ethicist, for example, lying to save a life. Further sub-categorizations of these schools of thought abound.<sup>21</sup> One whose basic ethical orientation is deontological will obviously have little difficulty justifying the regulating of acts which are understood as intrinsically immoral. One whose basic ethical orientation is teleological will probably experience great difficulty in conceiving a statute which satisfactorily covers such topics as obscenity or homosexual acts from an end or consequences perspective. That the two ethicists could ever come to an agreement on the question seems a ridiculously sanguine hope.<sup>22</sup>

Beyond the two great ethical decisional modes lie the great theories of justification. They too have a determining effect on how we decide. Some may prefer the natural-law theory. It can be seen as giving the deontologist a frame of reference for decisions as to intrinsic moral worth. But within that great school of jurisprudence, will one prefer the theistic approach of Saint Thomas Aquinas,<sup>23</sup> the rationalist approach of Cicero and Hugo Grotius,<sup>24</sup> the procedural natural-law approach of Lon Fuller?<sup>25</sup> Others may be positivist in orientation.<sup>26</sup> Still others may eschew all forms of natural-law jurisprudence and the classical forms of positivism, and view themselves as legal realists.<sup>27</sup>

21. See W. FRANKENA, *ETHICS* (1973).

22. One commentator, however, may have provided the groundwork for an eventual agreement. Virginia Held, writing in *ETHICS*, has argued that the deontological approach seems more appropriate to legal decisions, the teleological to political decisions. Held, *Justification: Legal and Political*, 86 *ETHICS: INT'L J. SOC. POL. & LEGAL PHILOSOPHY* 1 (1975). Whether to enact an anti-obscenity law is, of course, a political question.

23. See, e.g., T. AQUINAS, *supra* note 17.

24. See, e.g., H. GROTIUS, *DE JURE BELLI AC PACIS* (Classics of International Law ed. 1925).

25. See, e.g., L. FULLER, *THE MORALITY OF LAW* (1969).

26. See, e.g., J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832); J. BENTHAM, *THE PRINCIPLES AND MORALS OF LEGISLATION* (Hafner ed. 1948).

27. See, e.g., Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897).

Within those great traditions will one's approach be utilitarian,<sup>28</sup> social-contract,<sup>29</sup> or some other? If social-contract, will it be Rousseauian<sup>30</sup> or Rawlsian?<sup>31</sup>

#### CONCLUSION

There is a purpose to the just concluded inundation of the reader. It is to soften the apparent cynicism of the writer's conclusion that the grand debate between the libertarian and the paternalist over the moral propriety of regulating morality may well be unresolvable on the philosophical level. Our ideological pluralism will easily justify the position of each ten times over. That is not, however, to say that the grand debate is unresolvable on other levels. In the realistic world of power politics, it is easily resolved in the ayes and nays of the legislative assembly. That solution may seem question-begging and therefore simplistic. But it is in the social process of enacting, enforcing, and then rethinking laws that the natural process of consensus formation occurs. If ideological pluralism disables philosophy as a resolving agent, then naught is left but the established legislative process and the march of human events. Perhaps it is that very paralysis of modern philosophical pluralism that saves us from the anarchy of absolute libertarianism and the slavery of absolute paternalism, and that serves as the trump card for those who hope that neither side wins the debate outright.

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28. See, e.g., J. BENTHAM, *supra* note 26.

29. See, e.g., Symposium, *John Rawls's, A Theory of Justice*, 40 U. CHI. L. REV. 486 (1973).

30. See, e.g., J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (1950).

31. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971).