

WHEN ARE IMMORALITIES CRIMES?

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Simple theses are usually mistaken. But I wish to see how far I can carry a simple thesis which, if it were to turn out to be justified, would provide an important simplification to one segment of our thinking about the relationship of law to morality. I want to maintain that the only justification we have for treating what is generally taken to be an immorality as a crime punishable by the criminal law is that 1) there is a rational consensus concerning its immorality and 2) it either causes harm or it violates the moral principle that people must be treated as persons, and 3) its prohibition is enforceable law and enforceable without greater harm resulting than would result from its non-enforcement. Where an alleged immorality does not hurt people (other than the person—assuming that he is adult and sane—engaging in the immorality) or other forms of sentient life or show lack of respect for people by running over their legitimate interests, we cannot justifiably treat that putative immorality as a crime and use the criminal law to punish those who act in this allegedly immoral way. That the alleged immorality has these features may be a necessary, but it is not a sufficient condition, for something's being a crime. What I wish to maintain is that the only purpose for which power—legal coercion—can rightfully be exercised over any human being is to prevent harm to or exploitation of others or, where he is not an adult or mentally competent, to protect his own well being. Where such conditions do not obtain, ‘for his own moral good’ is never a legitimate ground for legal coercion. Beyond this, the law should not play the role of the custodian of morals.

It is often thought by people who have written insightfully about the enforcement of morality that criteria such as these are too limiting, that there are many things that are treated as crimes and should continue to be treated as crimes which do not, at least in any straightforward sense of these terms, cause harm or violate the principle that people should be treated as persons.¹ I agree that, *given the law as it is*, things are taken as crimes which do not cause harm, but, unless we are prepared, as I am not, to argue that we can make no moral assessment of the law—that we can never reasonably argue about how the law ought to be the fact that certain nonharmful acts are presently regarded as crimes is not sufficient reason for continuing to regard them as crimes. In short, I am arguing that where nonharmful acts and nonexploitative acts are treated as crimes, the law should be changed and that they should no longer be treated as crimes.

In any society anywhere and anywhen, there is a core cluster of moral beliefs which are necessary for the very existence of societal life. Without them, life would, indeed, be nasty, brutish and short. Given survival as an aim, there must be prohibitions against indiscriminate killing and the infliction of bodily harm. Furthermore, there will be in any society the need of at least a minimal amount of cooperation and mutual forbearance between people. Without that, there would be no societal life at all. Moreover, it must remain the *norm*—the thing to be expected—that people generally speaking tell the truth, keep their promises and the like. If such norms are not generally operative, life in society would be impossible and thus, given survival as an aim and given that human life is dependent on a societal framework, these general norms are indispensable to human life.² Their being in force is plainly not enough to constitute a truly human society, but if they do not obtain there will be no society at all either truly human or brutalitarian. These are indeed commonplaces. But it is not always taken to heart that these, if you will, rather plitudinous norms are necessary to insure a society's existence. Where the society is complex enough to need legal institutions the society will need the criminal law to reinforce behaviour supportive of these norms and to enforce compliance

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with such norms where the norms are such that they can be reasonably legally enforced. This qualification is necessary, for while both indiscriminate killing and (generally speaking) lying cannot be the thing to do in any viable society, only the former can and should be a crime. It is not against the law (except under oath) to lie and it plainly should not be. Such a law would be quite unenforceable and any attempt to enforce it would cause more harm than good. But norms essential for the survival of any societal life at all should be protected; enforceable behaviour which quite definitely would undermine such protection should be treated as criminal where the agents in question are responsible agents; and in any case the law should prohibit such behaviour where the law can make its prohibitions stick. But what must not be forgotten is that what stands in need of such protection are norms essential for the existence of societal life. Thus they are norms which have an evident utilitarian justification. The claim that the criminal law exists to prohibit harm to sentient life has considerable force in this context.

However, it is also about as evident as anything can be, that there are societies in which such protections and benefits are not extended to all the people in the society. Genocide is an all too familiar phenomena and certain classes and races have been and are now treated in such a manner that little or no provision is made for their well being. For them it is almost as if they lived in a state of nature. They are not afforded the most minimal protections. They are often just more or less kept alive. Yet these injustices can exist in a society which in many respects at least is flourishing. South Africa and Rhodesia are cases in point. And I would add, though this is controversial, so is the United States.

This is why I added to the utilitarian concept of harm the rather vague Kantian condition of respect for persons. But what is it that I am talking about when I say that those practices and acts which violate the moral principle 'People must be treated as persons' should also be crimes in those cases where they are reasonably enforceable and sufficiently determinate to be subject to penal sanctions? I am saying that from a moral point of view,

everyone's interests are to be considered and a just legal system must be structured to the end that the morally legitimate interests of everyone in the society and everyone who comes into the society be protected. We are not treating someone as a person when we ignore his interests and needs.³

However, just as acting on certain rights may in a specific situation be outweighed by other more stringent moral considerations, so too a man's interests may in a determinate circumstance have to give way to more inclusive interests. It may indeed be in my quite legitimate interest to keep a certain trout pond which I own far from any highway but there may be a pressing need to build a highway which goes through my property and so my interests will have in justice to be subordinate to a larger set of interests.⁴ But, where we are reasoning morally, my interests will still have to be considered in any decision about what is to be done. Each person's interests, so to say, goes into the hopper and are to have due consideration in moral deliberations. In minimizing harm and maximizing satisfactions, we cannot from a moral point of view simply ignore anyone's interests. Where this is not being observed—where people's interests are being ignored—people are not being treated as persons. When this is so and the other conditions mentioned above hold then, such immoralities are to be treated as crimes.

The rationale for this is as follows. Not to treat someone as a person will almost surely cause him harm, but he may have developed such a slavish mentality or such a hard shell that he will not feel hurt. However, whether he does or not, it is immoral to treat human beings in this manner. And this is so, independently of any tangible harm that may or may not be done to him. But where we do not treat a person as a human being, this immorality also should be made a crime, where the type of behaviour in question is sufficiently determinate to make definite laws about certain clearly specifiable actions capable of carrying penal sanctions.

There are indeed practices, homosexuality and polygamy for example, which are thought by many people to be immoral but they are also taken to be crimes in certain societies and yet these crimes may not be rightly held to be crimes under the prin-

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ciples I have stated. However, I would not accept this as a refutation of my theory. If they do not violate either of the conditions I have set out, then I should say that, given their *problematical* immorality, they should not be treated as crimes. I agree that morality, though indeed not positive morality *per se*, should under certain circumstances be legally enforced. Where the conditions I described obtain and where we have good grounds for believing that we can without still greater harm all around enforce our prohibitions of the immoral behaviour in question, the immoralities should be legally prohibited, but these are the only immoralities which should be prohibited.

There are several reasons for saying these other 'immoralities' should not be prohibited. The core moral beliefs enforceable by the criminal law, which I have discussed above, have at least a universal or near universal verbal acceptance. Jews, Christians, humanists, liberals, conservatives, radicals all accept them. The conflict concerning them between these differing ideological postures is in two general areas. First it concerns what they would add to this core, for they do add to it in different ways and treat as essential other moral beliefs as well. Here there is often deep conflict between them as to what is essential. Secondly, they give a different moral weighting to these various core moral beliefs. In other words, there is no agreed on hierarchy of values. But it remains true that there is with these core beliefs a *de facto* consensus, which is accepted by all normal members of all societies everywhere and everywhen. (I am not engaging in any subterfuge with 'normal'. I am treating it as a statistical concept.) Moreover, if any moral beliefs are justifiable or rational, these core moral beliefs are justifiable. Given this and given their universal *de facto* acceptance, if it is rational to enforce any moral views, it is rational to enforce them. Apart from the principle of justice articulated above, the other general moral principles are ones which all societies need for their very continued existence. And even societies that in practice ignore that principle of justice and show little respect for certain persons do pay lip service to this principle indicating that even for them it has a rather special position in the moral firmament.

However, this still does not get to the heart of the matter, for it does not explain why only these immoralities should be prohibited by legal sanctions. A central reason why only these moral beliefs should be legally enforced is that there is no near rational consensus about the other immoralities or alleged immoralities, but with the above moral commonplaces, we have a common core of moral norms which all but the extreme moral sceptic or nihilist will accept and most of those who accept them will take it that there are reasonable grounds for abiding by them. But there is no such agreement about the other moral beliefs and even Devlin contends that where there is any hesitation at all the law should stay its hand. Moreover, human liberty, i.e., the freedom to do what you want to do is acknowledged to be one of the greatest human goods. Where it is pervasively restricted life becomes intolerable. It is now evident that in the economic sphere it must be severely restricted in order to protect others. But, it remains the case that freedom is a great good and thus a strong case must always be made out for restricting freedom, though indeed sometimes this strong case can be made out. Yet, beyond the moral consensus concerning that core of universally held moral beliefs that I have described, people—honest, reflective, informed people—differ about what is desirable, what styles of life are best and, still more importantly, they differ about what things are properly criticizable, detestable, intolerable and what things are obligatory. I, for example, do not see anything wrong with pre-marital intercourse or with unmarried people living together but some others think such behaviour is immoral while still others think it somewhat undesirable though not positively immoral. Moreover, to continue with that sort of example, it isn't even evident to me that polyandry is evil or in certain circumstances at all undesirable, but I am well aware that many others (including Devlin) find it intolerable. But I am also aware that I am hardly in a minority of one in holding what in our culture are these somewhat eccentric moral beliefs. Since this is so, such contestable matters are plainly matters that should not be made crimes, unless it could be shown by hard empirical research not only that such behaviour does cause harm or shows lack of respect

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for persons but that it causes more harm and/or disrespect for persons than its prohibition would cause. But then the grounds for its legal enforcement are already fixed by my theory.

Given that freedom—that is human liberty—is a very great good, where palpable harm or disregard of person does not result from allowing a person freedom of action in a certain disputed sphere (say to practice homosexuality or masochism in private), the very value of freedom is such that we should not legally coerce someone into conformity, e.g., prevent or try to prevent his homosexual or masochistic practice. We should always operate on the principle that we should not attempt to prohibit activities which do not cause manifest social harm or injustice just because we morally disapprove of them. If we override this principle, we will produce human misery by curbing freedom. But by *not* curbing this freedom, we will not cause or even start the disintegration of society, for the practices which we, as far as the criminal law is concerned, would allow people to engage in are not unjust or harmful or at least not palpably harmful, i.e., we cannot get wide agreement among informed people that they are harmful. It may, however, undermine what is in some quarters and often rather pervasively taken to be the ‘integrity of the society’ or ‘the essential institutions of the society’. But, I would say that a society does not have, morally speaking, the right to legally enforce what it takes to be its own essential institutions where alternatives to them do not cause manifest harm or injustice. I should think this should be particularly evident to anyone who regards freedom as a great good.

More generally I contend that society does not have the right legally to enforce those practices or institutions which certain members but not all members of the society regard as essential *simply because*, even by an overwhelming majority, they are felt to be essential. I say this for two reasons: 1) There does not exist a rational moral consensus about what is the right course of action where the acts or practices in question do not cause harm or violate the principle that people must be treated as persons. Since this is so, it has not been rationally made out that the so-called essential institutions or practices which do not

have such effects but are disapproved of should be regarded as criminal. That something is *felt* by many people to be essential does not establish that it is essential. 2) Where people are forced to accept (act in accordance with) a certain practice rather than being rationally persuaded to accept it and where the alternative practices or non-practices are not harmful or unjust, being forced to adopt that practice would have greater disvalue, be morally speaking worse, than the disvalue accruing to not acting in accordance with the practice in question. This is so because such coercion where effective helps undermine one's ability to act as a moral agent, for to be a moral agent is to be a person who makes his own moral decisions and acts according to the dictates of his own conscience. To be simply *coerced* into accepting a non-harmful practice on someone's *authority* is to violate a man's conscience and to weaken, where the practice is widespread, his capacity to act as a moral agent. This would in turn hurt any society, if it became a widespread practice, because the society would have fewer people who knew what it was like to act as moral agents and thus as fully social beings. There is a plain utility value in principled behaviour even when it is dissident behaviour.

It is natural to object that here I have in effect shifted my ground, for isn't it now evident that my actual ultimate governing criteria for whether what is taken to be an immorality should also be taken to be a crime are that there is actually a rational, moral consensus that the immoral practice causes harm and/or is grossly unjust because the basic principle of respect for persons has been violated or is being violated. But, the objector could continue, suppose there was a rational moral consensus with thorough cross-cultural assent that some other practices were also morally depraved or so undesirable that they made social life intolerable, then wouldn't you or at least shouldn't you, be prepared to say that these practices should also be treated as criminal? And the answer is that *if* there were such a moral consensus, I would indeed regard these immoralities as crimes. But this is purely hypothetical, for there is no such consensus. And remember it must be a *moral* consensus: that is something,

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which, as Dworkin has pointed out, could be sustained as a *moral* position and not merely as a prejudice or class bias.⁵ However, what we do have a moral consensus on is on the demands to prevent harm and to treat persons as persons. When these demands are ignored then such immoralities, when clearly specifiable and reasonably prohibitable by legal means, should also be said to be crimes.

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NOTES

¹ Patrick Devlin, *The Enforcement of Morals* and in his "Law and Morality", *Manitoba Law School Journal*, Vol. I, No. 3 (1964–65). Devlin's work has been searchingly criticized by H. L. A. Hart in his *Law, Liberty and Morality*, his *The Morality of the Criminal Law*, pp. 31–54 and in his "Social Solidarity and the Enforcement of Morality", *The University of Chicago Law Review*, Vol. 35, No. I (Autumn, 1967). Note also Basil Mitchell's discussion of this literature in his *Law, Morality and Religion in a Secular Society*, Stephen Wexler's "Mitchell: Law, Morality and Religion in a Secular Society", *New York University Law Review*, Vol. 43, No. 6 (December, 1968), Ernest Nagel "The Enforcement of Morals" in *Moral Problems in Contemporary Society*, Paul Kurtz (ed.) and Antony M. Honoré, "Law, Morals and Rescue" in James M. Ratcliffe (ed.), *The Good Samaritan and the Law*.

² This is clearly argued in Chapters VIII and IX of H. L. A. Hart's *The Concept of Law* and in my "Ethics and Anthropological Understanding", *The Journal of Value Inquiry*, forthcoming.

³ It could be argued that my Kantian principle here is not needed and that I could get along simply with my concept of harm. The cases I give are in reality all cases in which people are in one way or another being harmed. Are there, it might be asked, any cases where behaviour would be exploitative or a neglecting of another's interests but not harm-producing? I doubt that there are, but I add my Kantian principle to make it plain that the interests of everyone must be considered and that the criminal law should be used to enforce this. It may be true that this Kantian principle is actually redundant and we could get along here with a purely utilitarian one, but redundant or not, it is a useful principle, for it brings to our attention certain immoralities that should be crimes.

⁴ The conception of justice I am operating with has been brilliantly elucidated by John Rawls in "Justice as Fairness", *Philosophical Review*, Vol. 67 (1958),

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“Distributive Justice” in *Philosophy, Politics and Society*, (third series), W. G. Runciman and Peter Laslett (eds.) and “Distributive Justice: Some Addenda”, *Natural Law Forum*, Vol. 13 (1968).

- ⁵ Ronald Dworkin, “Lord Devlin and the Enforcement of Morals”, *The Yale Law Journal*, Vol. 75, No. 6 (May, 1966). I would like to thank Brenda Baker, John Baker, James Rachels and Robert Ware for their perceptive criticism of an earlier version of my essay.