BOOK REVIEWS

Edited by

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LAW, LIBERTY, AND MORALITY. By *H. L. A. Hart.* Stanford: Stanford University Press, 1963. Pp. 88. $3.00.

> "In the matter of just and unjust, fair and foul, good and evil . . . ought we to follow the opinion of the many and to fear them; or the opinion of the man who has understanding . . .? Tell me then, whether I am right in saying that some opinions, and the opinion of some men only, are to be valued and other opinions, and the opinions of other men, are not to be valued. I ask you whether I was right in maintaining this?" [1]

Since the publication of the *Wolfenden Report* in 1957 there has been a public debate in England over whether or not immorality alone is a sufficient reason for a criminal sanction or whether criminality should not be imposed unless in addition to sinfulness the proscribed act inflicts social harm. The collateral question, if the above is answered in favor of the sanction, is how do we determine morality and immorality?

Both the *Wolfenden Report* and the *Model Penal Code* start out with the premise that law is but one means of social control and there are some areas of private morals that are the distinct concern of religious authority (and perhaps of one's neighbors) and that for utilitarian reasons should not be the additional concern of the criminal law. The case in point most frequently cited is private homosexual conduct between consenting adults. Utilitarians argue that such conduct is not a social harm, enforcement is impracticable if not impossible, and such laws are bound to be administered unfairly, afford an opportunity for blackmail, and tend to become dead letters.[2]

Lord Devlin, the principal spokesman for the moral activists, argues that immorality jeopardizes a society's existence, that the function of the criminal law is "to enforce a moral principle and nothing else," and that the breach of a moral principle is an offense against society as a whole.[3] He assumes that there is a considerable degree of moral solidarity and the public is deeply disturbed by infringements of its moral code. Lord Devlin, as distinguished from James Fitzjames Stephens, who took a more extreme position,[4] concedes that a criminal sanction in the name of morality alone is justified only where there is an overwhelming majority sentiment, identifiable by the triple marks of intolerance, indignation, and disgust as felt by the "man in the Clapham omnibus," the "right-minded man," or the "man in the jury box." One may assume that this anonymous entity will be deemed to share the value judgments of Lord Devlin.

The problem of how we should ascertain the moral sentiment of the community has been a vexacious one for able judges and competent scholars.[5] Mr. Justice Jackson once pointed out that judges who attempt to reflect a public judgment must "usually end by condemning all that we personally disapprove and for no better reason than we disapprove it."[6] Edmond Cahn has distinguished three sets of moral standards by which we pass judgment: the standard we require;

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[1] Crito, DIALOGUES OF PLATO.

[2] For a summary of the utilitarian arguments advanced by Professor Hart in *Law, Liberty, and Morality*, see Summers, Book Review, 38 N.Y.U.L. REV. 1201 (1963).

[3] DEVLIN, THE ENFORCEMENT OF MORALS (1959). See also Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635 (1962).

[4] LIBERTY, EQUALITY, FRATERNITY (2d ed. 1874), written as a reply to John Stuart Mill's essay *On Liberty* (1863).

[5] According to Judge Learned Hand, the test for determining moral turpitude is whether or not the conduct conforms to generally accepted moral conventions current at the time, without regard to the judge's personal view or conscience. He admitted that there was no scientific way to determine a community consensus. Judge Jerome Frank, however, insisted that the trial judge should take evidence as to what the community thinks in order to ascertain the "attitude of our ethical leaders." John Chipman Gray took the position that the judge should follow his own notions as to moral turpitude. See CAHN, THE MORAL DECISION 300–12 (1955).

[6] Dissenting in Jordan v. DeGeorge, 341 U.S. 223, 242 (1951). See also Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575 (1959), where Professor Carrington takes the position that prohibition in the name of public morality impairs private morality, interferes with rehabilitation, and impairs freedom of the individual unnecessarily. He would eradicate the moral element from criminal law.

the standard we desire; and the standard we revere.[7] Infractions of the first we punish, we preach about and praise the second, and the third is for saints and heroes. It also has been demonstrated that there may be a wide gap between the public morality assumed to exist by legislators and judges and the true *vox populi*.[8]

The latest contribution to the debate is H. L. A. Hart's *Law, Liberty, and Morality*, a small volume which consists of lectures delivered at Stanford University in 1962. Mr. Hart is a professor of jurisprudence at Oxford, a distinguished legal philosopher and former Chancery barrister, and an author of note.[9] In his most recent book, Professor Hart sides with Plato, John Stuart Mill, Jeremy Bentham,[10] and Learned Hand[11] and attempts to refute James Fitzjames Stephen, Lord Devlin, and lesser activist guardians of *bones mores et decorum*.[12] In addition to answering Lord Devlin's prior lectures, Professor Hart also criticizes *Shaw v. Director of Public Prosecutions*[13] and the revival of legal moralism.

Although he does not go so far as John Stuart Mill, who asserted that the *only* purpose for which criminal sanctions can rightfully be imposed is to prevent harm to others, and concedes there may be other legitimate purposes, Professor Hart does insist upon demonstrable justification for the imposition of criminal penalties and challenges the moralists to produce empirical evidence as to why sin should be made criminal. He doubts Lord Devlin's assumption that immorality jeopardizes society's existence and calls for supporting proof. In the case of sexual misconduct, he would punish public indecency but not private immorality.

As has been pointed out, from the standpoint of the orthodox theory of criminal law, Professor Hart is on solid ground.[14] The *Shaw* case, although a triumph for the legal moralists, did violence to the principle of legality in that the count on conspiring to corrupt public morals was applied *ex post facto*, and the offense was not stated with precision. From the time of Bentham it had been assumed that the nature and function of the criminal law was utilitarian in accordance with the theory of pain and pleasure, and that there should be rational debate about public decision making. Moreover, such pragmatic criteria as efficaciousness as a deterrent, whether a sanction would do more social harm than good, or whether it was needless, implemented the principle of utility. On the contrary, Lord Devlin's position becomes irrational, the reprobation of the common man becoming decisive, instead of a mere factor to be considered.

Although logic supports the argument that the principle of legality is offended by loose common law nuisance or conspiracy statutes, vagrancy ordinances, and obscenity laws, it must be conceded that popular sentiment may support the proposition that "there ought to be a law against it." It may be both easy and popular to legislate against and to condemn sin. And there may be a folk feeling that not to do so may provoke the wrath of the gods. After all, the Emperor Justinian claimed homosexuality was the cause of earthquakes!

In fact, the most forceful argument for the legal moralists is the reprobative theory that it is one of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts and that it is vain to preach that any society must repress its feelings.[15] Lord Devlin failed to make the most of this argument, and Professor Hart tried to side step it by shifting the burden of proof, i.e., he conceded that justification might exist but called for proof.

[7] THE MORAL DECISION 40–41 (1955).

[8] One of the few empirical studies into community consensus is that of COHEN, ROBSON & BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958).

[9] Professor Hart is co-author of CAUSATION AND THE LAW (1959), and author of THE CONCEPT OF LAW (1963), PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY (1962), and numerous significant articles.

[10] PRINCIPLES OF MORALS AND LEGISLATION 281–88 (Harrison ed. 1948).

[11] The reference is to the arguments of Judge Hand which are reflected in the *Comments* to article 207 (Sexual Offenses), MODEL PENAL CODE (Tent. Draft No. 4, 1955).

[12] See Rostow, *The Enforcement of Morals*, 1960 CAMB. L.J. 174, where the good dean supports Lord Devlin by adopting an esoteric definition of "morality" and extending it to include a whole host of things. See Summers, *supra* note 2, at 1209.

[13] [1961] 2 A.E.R. 446. Reliance is placed upon the dictum of Lord Mansfield in Jones v. Randall, (1774), Lofft. at p. 385, that "Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish." Lord Simonds in *Shaw* contends there is a "residual power" in the King's Bench "where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare." Compare Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955).

[14] See Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

[15] Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1017 (1940).

After asserting that interference with individual liberty is a harm requiring justification, and insisting that not only punishment but the inhibition of freedom of choice is such an interference, in a spirited passage Professor Hart claims that there is "no evidence . . . to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is much against it."[16] Following this assault on Lord Devlin's major premise, the concession is made that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality *may* change in a permissive direction, even though such has not been the case in those European countries where homosexuality is not a crime and although "there is very little evidence to support the idea that morality is best taught and sustained without it."[17]

The concession that if deviations are tolerated by the law, conventional morality may change in reaction to such permissiveness, is an interesting one. It constitutes half-hearted recognition that law influences social change rather than merely reacts to it, and that there may be an educational function which law serves. The importance of preserving the moral (and educational) quality of the criminal law has been stressed and disputed by other recent writings.[18] As a practical matter, it may be doubted whether the penal code is often consulted as a guide to morality, and it has been said that to equate legality with morality is to accept the morals of a scoundrel.[19] Criminal law at best reflects a minimum ethic, and as a deterrent or influence there must be some certainty as to enforcement.

In the United States it has been estimated that at least 95 percent of the population have committed sex offenses. One study contends that there are only 20 convictions for every 6,000,000 homosexual acts per year.[20] In 1948, there were 6,000 divorces granted for adultery in New York City but not a single arrest for the misdemeanor of adultery.[21] Current statistics show that in each year of the past four years (1959–1963) there were 1,000–1,200 men arrested in New York City for homosexual activity, of which about two-thirds were charged with "disorderly conduct" (solicitation), 250 with felonious sodomy (involving force or a minor), and 120 with the misdemeanor of sodomy (consenting adults but public acts).[22] About 40–70 of the above arrests involved homosexual relations between adults and teenage boys. Such fragmentary statistics beyond doubt show that the attempt to enforce sexual morality by criminal sanctions fails the utilitarian test of efficaciousness. We may also say, with some assurance, that it is unprofitable, i.e., it does more harm than good to make sin a crime when it involves private acts by freely consenting adults.[23] Whether it is needless, or the deviation may be effectively discouraged or prevented without punishment, is a moot point,[24] but to the extent that subconscious drives are involved, a vague fear of uncertain punishment would seem to be relatively insignificant, at least when compared with other sanctions such as the esteem of one's fellow man.[25]

We agree with Hart's instance as to the importance of keeping in mind that the question of morality vis à vis the law enters the picture twice[26]—first as a source and critique of the law, and second in connection with the problem here discussed, namely, whether the enforcement of

[16] LAW, LIBERTY, AND MORALITY at 50.

[17] *Id.* at 58.

[18] See Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958), which article provoked the comment from Professor Carrington that it was the position of Harvard's Hart that modern criminology in mitigating the vengeful features of the law may have achieved much the same result as the dentist who pulled too hard and extracted his patient's entire skeleton. See Carrington, *supra* note 6, at 575.

[19] The felicitous phrase is that of Gerald W. Johnson in the March 1, 1954, issue of the *New Republic*.

[20] See PLOSCOWE, SEX AND THE LAW 209 (1951).

[21] *Id.* at 156.

[22] As reported in the December 17, 1963, issue of *The New York Times*. The article also quoted a psychiatrist as stating he had "cured" only 27 per cent of the 106 male homosexuals he had treated, that 83 per cent of them said they would not want their sons to be homosexuals, but that 97 per cent said they would not change their own homosexuality.

[23] For general criticisms of the criminal law as applied to sex offenses, see MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 14–23 (1961), and Foster & Freed, *Offenses Against the Family*, 32 U. KAN. CITY L. REV. 33 (1964).

[24] Obviously, it cannot be known whether or not some deviation is deterred by the threat of criminal penalty.

[25] We may accept Max Rheinstein's postulate that there are four norm systems which have different sanctions: *etiquette*, which employs the sanctions of ridicule and ostracism; *morality*, normally furthered by conscience or super-ego; *religion*, backed up by supernatural penalties; and *government*, which imposes sanctions by the civil and criminal law. In many ways the law provides the crudest of sanctions, for as pointed out by Bentham, the law teaches us right conduct the same way we instruct a dog: we beat him when he does wrong.

[26] At p. 17.

morality by the criminal processes is itself morally justified. To pose the question another way, how high a price should we be willing to pay for making sin illegal? The common law, with its attitude towards nonfeasance, long has been willing to tolerate human frailty.[27] Moreover, some who feel that secularization of the law was a great historic achievement will concur with James Bryce, who argued that "the effort to base legal rules on moral and religious principles leads naturally to casuistry, and away from that common-sense view of human transactions and recognition of practical consequences which ought to be the basis for law."[28]

The common sense conclusion to be gathered from the great debate over the *Wolfenden Report* is that (1) criminal statutes probably will be kept on the books as long as they reflect a popular sense of reprobation, but (2) such statutes will not be effectively enforced and may occasion more social harm than good unless backed up by a clear consensus of the community.[29] In New York, for example, at the present time there may be no clear cut consensus that adultery laws should be enforced, and in England and elsewhere there may have been a change of attitude regarding homosexuality. The homosexual, along with the addict and the alcoholic, today may be regarded as a medical problem, as long as public decency is not affronted and no overt harm is done to others.

Thus, it would seem, the debate ends in a draw. The moralists usually will secure the retention of statutes against sin that they regard as essential for the preservation of society, but will be frustrated by ineffectual enforcement. The skeptics and Professor Hart will not ordinarily secure statutory repeal, but they will have the satisfaction of knowing that desuetude will set in. Perhaps Lord Devlin should ponder the warning of Spinoza that "He who tries to fix and determine everything by law will inflame rather than correct the vices of the world,"[30] and perhaps Professor Hart should harken to Holmes' warning that the first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.[31] Until we get a science of sanctions, the debate probably will continue on a philosophical level, and "living law" will continue to be at odds with the morality we profess on the statute books.[32] That way we can have our cake and eat it too! And, apparently, we are willing to pay the price.

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[27] I have in mind such cases as Rex v. Smith, [1826] 2 C. & P. 449, Regina v. Shepard, [1862] 9 Cox C.C. 123, and Rex v. Russell, [1933] Vict. L.R. 59, all supporting the proposition that there is no affirmative legal duty to aid another in distress unless a special relationship exists.

[28] 3 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 421–22 (1909).

[29] See HUTCHINS, THE TWO FACES OF FEDERALISM (1961), published by the Center for the Study of Democratic Institutions, where there is a provocative discussion of how "consensus" is ascertained.

[30] TRACTATUS THEOL. POLIT., ch. 20.

[31] THE COMMON LAW 41–42 (1938 ed.).

[32] See Rose, *Sociological Factors in the Effectiveness of Projected Legislative Remedies*, 11 J. LEGAL ED. 470 (1959).

THE MURDERERS: THE SHOCKING STORY OF THE NARCOTIC GANGS. By *Harry J. Anslinger* and *Will Oursler*. New York: Farrar, Straus, and Cudahy, 1961. Pp. 308. $4.95.

It is quite difficult to be The Hero in a world strangely intransigent and insensitive to its own best interests as these are determined and administered by You. But former Commissioner Harry J. Anslinger of the Federal Bureau of Narcotics, despite the obstacles, carried on valiantly for more than 30 years and provides a partial accounting of his efforts in *The Murderers*. It is hardly a subtle book, as put together by journalist Will Oursler, but rather is filled with numerous timeworn clichés about narcotics, a running barrage of coy prurience (the book is filled with nude female corpses which, when less moribund, had been engaged in "perverse" activities and "unprintable sex rituals"), and some reasonably interesting stories of courage and intelligence by government agents devoted to the duty of apprehending narcotic peddlers and smugglers.

Mostly, *The Murderers* will be remembered for two extraordinarily indiscrete disclosures by its author. After a comment to the effect that he is not "a believer . . . in 'ambulatory treatment'," Anslinger proceeds to report a pair of cases in which on his personal initiative he saw to it that addicts were provided with drugs. Curiously, in both instances procedures equivalent to those employed in Great Britain were used. In the first case, Anslinger arranged for a pharmacist to reduce gradually the dosage of demerol being purchased by "a society matron, a beautiful, gracious lady." By this ruse, the addict reportedly was weaned from dependence on the drug.

In the second instance, a case that has been cited