

LEGISLATING MORALITY

John Stuart Mill's *On Liberty* initiated a controversy concerning the legislation of morality which has raged ever since. One would expect that by now at least the issues would be clear. However, several recent discussions indicate a difference of opinion even about what the issues are. The first three sections of this paper primarily aim to clarify the issues and the last three sections show that, properly understood, Mill is correct in maintaining that the state ought not legislate morality. In particular, three main arguments for legislating morality will be shown to be inadequate.

THE GENERAL ISSUE

Mill wrote that "the 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."¹ This assertion involves two distinct claims: (1) preventing harm to others is a purpose for which a person's liberty may be limited, and (2) there is no other purpose for which a person's liberty may be limited. The concern herein is with the second claim, in particular, its denial that preventing immorality is a proper purpose for limiting liberty. While Mill did not restrict himself to legal limits on liberty, the issue is so restricted in this paper.

Some writers, especially those who disagree with Mill, take the second claim as asserting that there is some conduct which is not the law's business. For example, Martin P. Golding has recently written that Mill's statement is "the *locus classicus* of the position that there are spheres of conduct which are 'not the law's business'"² There are two possible interpretations of the second claim as thus stated. First, one may interpret it as meaning that there is conduct which does not fall within the purposes for limiting liberty. This interpretation has given rise to the criticism of Mill that there is no self-regarding conduct, conduct which does not affect others.³ But, it is clear that there is such conduct. For example, when I put

¹J.S. MILL, *ON LIBERTY* 13 (C. Shields ed. 1956).

²M. GOLDING, *PHILOSOPHY OF LAW* 55-56 (1974).

³Mill does not deny that self-regarding conduct frequently affects others in some manner or other, only that it affects them in any manner which gives them a legitimate basis for possibly interfering with the liberty to engage in it. J.S. MILL, *supra* note 1, at 98-99. See also J. FEINBERG, *SOCIAL PHILOSOPHY* 31-32 (1973).

on my socks this morning, I did not affect others. However, so interpreted, the claim is trivial. For no matter what purposes one takes to be acceptable for limiting people's liberty, there will be conduct which is not the law's business, namely, that which does not fall within any of those purposes. Thus, even if one believes that one purpose for legally limiting liberty is to prevent immorality, there is conduct which is not the law's business, namely, that which is neither immoral nor harmful to others. Surely this trivial claim cannot be what Mill meant to assert and his critics to deny.

The second interpretation of the claim that there is conduct which is not the law's business requires description of the conduct in a way which is neutral with respect to the purposes for limiting liberty. For example, the conduct might be described as that which occurs in private rather than public. Indeed, critics of the Millian position frequently interpret its defenders as making just this distinction. Lord Devlin interprets the *Wolfenden Report*⁴ in this manner⁵ and Golding believes this is a basic criterion of H.L.A. Hart.⁶ Of course, the critics have little difficulty showing that some neutrally described conduct is the law's business. Furthermore, the critics would not be satisfied with a showing that as a matter of fact conduct described in a certain manner was never the law's business; they insist that there must be no conceivable circumstances in which such conduct would be the law's business. As Devlin puts it, "You have to show that the vice is not of its nature one that is capable of injuring society. Only then can society safely sign away its power of control."⁷ Since he does not think this showing can be made, Devlin concludes that there are "no theoretical limits to legislation against immorality."⁸

However, this interpretation makes an impossible demand of Mill and his defenders, one which Mill never attempted to meet. The demand is that one describe conduct without reference to its producing harm (or falling within any other purpose for limiting liberty) and show that it is logically impossible for such conduct to cause harm because there are no conceivable circumstances in which the conduct would cause harm. This requirement cannot be met, because it is always logically possible for two logically independent conditions to be causally related. Moreover, Mill did

⁴REPORT ON THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957).

⁵P. DEVLIN, *THE ENFORCEMENT OF MORALS* 9 (1965).

⁶M. GOLDING, *supra* note 2, at 61.

⁷P. DEVLIN, *supra* note 5, at 110.

⁸*Id.* 14.

not claim that neutrally described conduct could never cause harm. He allowed that even speech, which he thought was entitled to the widest liberty, could be limited in some circumstances. That is, he admitted that even speech could cause harm.⁹ Thus, one does not disagree with Mill if one asserts, as Golding does, that the limits of permissible legal interference with conduct have to be settled on a case by case basis.¹⁰ That does not deny theoretical limits on legislation in any sense which Mill asserted. Thus, Golding must put forth some other argument in order to establish Devlin's claim, with which he agrees, that there are no theoretical limits on legislation.¹¹

Mill was concerned with the ends or purposes which would warrant legal interference with liberty. Preventing harm to others, he claimed, is the "sole end" or "purpose" for which society is "warranted" in limiting liberty.¹² A person's own good or the opinion of others that it would be right for him to do or forbear are "good reasons" for trying to persuade a person to do or forbear, but not for legally limiting his liberty to act.¹³ In short, Mill was concerned with reasons for limiting liberty or conduct. He denied that reasons other than harm to others are good ones for limiting conduct; he did not claim that there is a neutrally describable type of conduct which could never be limited. A reason for or against legislation which limits liberty is neither necessary nor sufficient. It is not sufficient, because even the prevention of harm to others is not a sufficient reason for legislation if it will cause more harm than it will prevent. It is not necessary, because there might be another reason which would be sufficient to justify legislation.

What Mill and other opponents of the legislation of morality deny is the legal moralist principle. Roughly, the legal moralist principle states that a good reason for legislation is that it will prevent immoral conduct. Mill and his defenders deny that the immorality of conduct, in and of itself, is ever a good reason for legislation limiting liberty. Supporters of the legal moralist principle claim the opposite. But, of course, since the reason is not sufficient, they do not claim that any conduct which is immoral should be legally limited. There may be reasons against legislating morality, *e.g.*, that it would involve invasion of privacy.

⁹J.S. MILL, *supra* note 1, at 67-68. See also Feinberg, *Limits to the Free Expression of Opinion*, in PHILOSOPHY OF LAW 135 (J. Feinberg & Gross eds. 1975).

¹⁰M. GOLDING, *supra* note 2, at 67.

¹¹*Id.*; P. DEVLIN, *supra* note 5, at 14.

¹²J.S. MILL, *supra* note 1, at 13.

¹³*Id.*

A crucial problem which cannot be discussed herein is the proper method for establishing that a reason for limiting liberty is a good one. The method which will be followed here is to ask whether the legal moralist principle would be acceptable to a reasonable person¹⁴ contemplating its use by others in enacting legislation to which he would be subject.

THE MORALITY TO BE LEGISLATED

The chief question concerning the meaning of legal moralism is which standard of morality is to be used. The first distinction to be made is between the use of popular and critical morality as the standard. Popular morality, sometimes called positive morality by writers on jurisprudence, is the generally accepted morality of a society. Critical morality is what one believes to be the correct morality.

It is sometimes claimed that the entire dispute between Mill and his defenders on the one side, and their critics on the other, is simply which critical morality is to be legislated. For example, Rolf E. Sartorius contends that both sides agree that other things being equal, wrong ought to be prevented.¹⁵ H.L.A. Hart, Sartorius claims, must allow society to limit liberty to engage in conduct which morally harms an actor, since Hart allows society to do so if the conduct physically harms the actor. Thus, Sartorius believes there is no principled basis for distinguishing between wrongful conduct which can and cannot be legally limited. Sartorius consequently claims the issue may only be resolved by taking a stand on the morality of conduct.¹⁶

This interpretation of the issue, however, is incorrect. First, Sartorius is wrong in thinking that if one allows some paternalism (limiting liberty to prevent an actor harming himself), one must adopt legal

¹⁴A reasonable person is one who is open to evidence and persuasion by argument, and not mentally ill or unintelligent. A reasonable person makes decisions on the basis of all relevant readily obtainable information. Moreover, he can be persuaded by arguments pro and con. While not every psychological abnormality, *e.g.*, a mild neurosis, prevents a person from being reasonable, severe abnormalities involving reality distortion do. Finally, a reasonable person is intelligent in the sense of being able to understand principles and the types of legislation for which they provide reasons in various circumstances. Of course, it is assumed that the reader is a reasonable person. Bayles, *Comments: Offensive Conduct and the Law*, in *ISSUES IN LAW AND MORALITY* 120 (N. Care & T. Trelogan eds. 1973).

¹⁵Sartorius, *The Enforcement of Morality*, 81 *YALE L.J.* 891, 908 (1972).

¹⁶*Id.* 899-900.

moralism. Legal moralism does not require that conduct cause even moral harm to the actor, while paternalism does.¹⁷ Second, morality and law differ with respect to the “sanction” normally used to secure compliance. Morality is normally “sanctioned” by appeals to respect for the rules, admonitions, etc. The law normally uses punishment and other coercive measures as sanctions.¹⁸ Even if one must believe the immorality of conduct is a good reason for the imposition of moral “sanctions,” one need not think it is a good reason for the imposition of legal sanctions. Thus, thinking conduct is immoral does not entail thinking there is a good reason for legally prohibiting it. Third, these reasons are used by others to justify legislation. The question is not whether one’s belief that conduct is immoral is a good reason for limiting liberty, but whether one can assent to *others* legally limiting liberty to engage in conduct which *they* believe to be immoral. Thus, the issue is not which critical morality to legislate, but whether anyone’s critical morality ought to be legislated.

Few contemporary writers defend the legislation of critical morality. An exception is H.J. McCloskey,¹⁹ who contends that a stable society requires a shared morality. Moreover, McCloskey contends, if one is to legislate moral beliefs, then surely one must legislate those which one believes to be correct.

McCloskey fails to see the tension in his argument. If a shared morality is needed for stability, then the morality to be legislated will have to be generally accepted or its enforcement will lead to instability. Yet the point of legislating one’s own critical rather than the popular one is to avoid having a morality with which one disagrees enforced. Moreover, the critical morality to be legislated is not one’s own but that of the political authorities. On McCloskey’s own grounds, he could not expect authorities to legislate a morality they did not believe to be correct, yet the political authorities may be elected representatives, corrupt tyrants, or Plato’s philosopher kings.

A reasonable person would not accept the legal moralist principle based upon critical morality. If the critical morality adopted by the political authorities differs greatly from that generally accepted in society, then the legal moralist principle would support much legislation preventing citizens from acting in ways they think morally permissible or even obligatory or requiring them to act in ways they think morally wrong. Given the variations in people’s views as to the correct morality, a reasonable person

¹⁷Bayles, *Criminal Paternalism*, in *THE LIMITS OF LAW: NOMOS XV* 178-79 (J. Pennock & J. Chapman eds. 1974).

¹⁸H.L.A. HART, *THE CONCEPT OF LAW* 175-76 (1961).

¹⁹McCloskey, *Liberalism*, 49 *PHILOSOPHY* 13, 18-21 (1974).



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