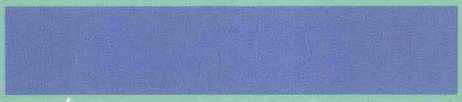
MORALITY, HARM, and the LAW



edited by
GERALD DWORKIN

MORALITY, HARM, and the LAW

edited by
GERALD DWORKIN
UNIVERSITY OF ILLINOIS AT CHICAGO

Westview Press
BOULDER • SAN FRANCISCO • OXFORD

Published in 1994 in the United States of America by Westview Press, Inc., 5500 Central Avenue, Boulder, Colorado 80301-2877, and in the United Kingdom by Westview Press, 36 Lonsdale Road, Summertown, Oxford OX2 7EW

Library of Congress Cataloging-in-Publication Data
Dworkin, Gerald.
Morality, harm, and the law / Gerald Dworkin.
p. cm.
ISBN 0-8133-8710-8. —ISBN 0-8133-8711-6 (pbk.)
1. Law—Philosophy. 2. Law and ethics. I. Title.
K235.D96 1994
340'.1—dc20 93-38471
CIP

Printed and bound in the United States of America

The paper used in this publication meets the requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1984.

10 9 8 7 6 5 4 3 2 1

Credits

Liberal Community, Ronald Dworkin (p. 36) is copyright © 1989 by California Law Review Inc. Reprinted from *California Law Review,* vol. 77, no. 3 (May 1989), pp. 479–487, by permission.

Rights and Equality of Concern and Respect, John Finnis (p. 43) is reprinted from John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1986), pp. 221–223, by permission of Oxford University Press.

Pornography, Obscenity, and the Case for Censorship, Irving Kristol (p. 46) is reprinted from the *New York Times Magazine,* March 28, 1971, pp. 246–247, by permission of the author.

Harmless Wrongdoing, Joel Feinberg (p. 49) is taken from pp. 126–133 and 328–331 of *Harmless Wrongdoing* (The Moral Limits of the Criminal Law, Volume IV) by Joel Feinberg. Copyright © 1988 by Oxford University Press, Inc. Reprinted by permission.

Moral Conflict and Political Legitimacy, Thomas Nagel (p. 60) is reprinted by permission from *Philosophy and Public Affairs Journal,* vol. 16, no. 3 (Summer 1987), pp. 215–234.

Public Faces—Private Places, Gerald J. Postema (p. 76) is reprinted by permission from Musschenga, Voorzanger, and Soeteman, eds., *Morality, Worldview, and Law* (Assen, The Netherlands: Van Gorcum and Co., 1992), sections 1 and 2.

Moral Argument and Liberal Toleration, Michael J. Sandel (p. 109) is reprinted from *California Law Review,* vol. 77 (1989), pp. 521–530 and 533–538. Copyright © 1989, Michael J. Sandel. All rights reserved. Reprinted by permission.

Men Only, John Garvey (p. 123) is an original work by John Garvey.

Duty to Rescue, Ernest J. Weinrib (p. 134) is reprinted by permission of The Yale Law Journal Company and Fred B. Rothman & Company from *The Yale Law Journal,* vol. 90 (1980), pp. 280–292.

Market-Inalienability, Margaret Jane Radin (p. 146) is reprinted by permission from Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review,* vol. 100 (1987), pp. 1925–1936. Copyright © 1987 by the Harvard Law Review Association.

Markets and Morals: The Case for Organ Sales, Gerald Dworkin (p. 155) is reprinted by permission from *The Mount Sinai Journal of Medicine,* vol. 60, no. 1 (January 1993), pp. 66–69.

Unconstitutional Conditions, Kathleen Sullivan (p. 165), copyright © 1989 by the Harvard Law Review Association, is reprinted by permission from Kathleen Sullivan, "Unconstitutional Conditions," *Harvard Law Review,* vol. 102, no. 7 (May 1989), pp. 1444–1450.

Democratic Community, Robert C. Post (p. 193), copyright © New York University Press, is excerpted from Robert C. Post, "Between Democracy and Community: The Legal Constitution of Social Form," pp. 163–190 in John W. Chapman and Ian Shapiro, eds., *Democratic Community* (volume 35 of NOMOS) (New York: New York University Press for American Society for Political and Legal Philosophy, 1993) and is reprinted by permission.

Contents

1 Introduction

In the state of Vermont it is illegal to refuse to aid someone who is in serious danger, if the cost to the rescuer is relatively minor.

In the state of Georgia it is illegal for two men to engage in homosexual sex.

In the state of New Jersey one woman cannot contractually obligate herself to bear a child for another couple.

It is legal in the United States to burn or deface the American flag.

It is legal in the United States to insult people by using racial epithets. However, recently some states have passed statutes providing greater punishment for racially motivated assaults than for other assaults.

Thus speaks the law on certain controversial moral issues. But knowing what the law says does not answer the question of whether the state has a *right* to enforce a standard of morality. The readings in this book are addressed to this issue.

One or another claim about the legitimacy or illegitimacy of the enforcement of morality has attracted much attention in the philosophy of law and political philosophy ever since the publication in 1859 of John Stuart Mill's classical defense of liberalism, *On Liberty*. One finds such statements in the philosophical literature as the following:

> The only purpose for which power can be rightfully exercised over any member of a civilized society against his will is to prevent harm to others.[1]

> It is not the duty of the law to concern itself with immorality as such. It should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious.[2]

> The harm principle is a principle of toleration. The common way of stating its point is to regard it as excluding consideration of private morality from politics. It restrains both individuals and the state from coercing people . . . on the ground that those activities are morally either repugnant or desirable.[3]

> Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such be a crime? . . . To this question John Stuart Mill gave an emphatic answer in his essay *On Liberty* one hundred years ago.[4]

Much ink, and perhaps even some blood, has been spilled in debates concerning the views expressed in these propositions. But a clear formulation

of the intuitive idea underlying these claims is not easy. As usually stated, either the claims fail to express any precise thesis, or the thesis expressed is so clearly false that it could not plausibly be defended.

To understand in an intuitive way what the controversy is about it is useful to set out specific laws that are favored or opposed by the contending parties. Consider the following legal restrictions that are very likely to be favored by all parties to the debate (category A):

Laws against murder
Laws against theft
Laws against income tax evasion
Laws against public sex
Laws against sexual abuse of children
Laws against perjury

The following are legal restrictions likely to be opposed by all parties to the debate (category B):

Laws forbidding members of racial minorities from living in geographical proximity to racial majorities
Laws regulating the type of music that people can listen to in their homes
Laws restricting the type of religion one may profess

Perhaps the most crucial category is of laws that are often favored by those wishing to enforce morality and rejected by their opponents. Examples include (category C):

Laws against the private consumption of pornography
Laws against consensual homosexual acts between adults
Laws forbidding defacement of the flag
Laws against bigamy
Laws forbidding the sale of bodily organs such as kidneys
Laws forbidding the use of racial or sexual epithets

Over some laws, even within each camp there will be variations of opinion as to their legitimacy. These laws will include various paternalistic laws (laws against suicide), laws where it is not clear if there is harm (laws forbidding brother-sister incest), laws that require forms of positive aid to others (good samaritan laws), and so forth. Even within the category of laws favored by all, or the category of laws that is supposed to define the dispute (category C), there may be variations of opinion produced by something other than the question of the legitimacy of state power. For example, even someone who favors the enforcement of morality may think, like Devlin, that the costs of enforcing, say, laws about the consumption of pornography in the

home may make it unwise to have such laws. The difference then could be expressed in terms of why one favors or opposes a given law. Is the objection to a particular law that it is merely unwise or that it violates some principled restriction on the powers of the state? The latter point is the one at issue, and I shall begin by supposing that those who oppose the enforcement of morality are prepared to produce a plausible principle that would justify passing the laws in category A and that would forbid passing the laws in category C.

However, it is not obvious how they will do this. Consider how opponents of the enforcement of morality might try to distinguish between the laws they defend and those they consider illegitimate. Suppose the thesis is stated as follows: The law ought not to enforce moral values. Then, since they believe that the law ought to prohibit murder and theft, they must claim that in doing so the law is not enforcing moral values. But if, say, murder is not forbidden because, at least in part, it is regarded as wrong or unjust or wicked, then what justifies its being made illegal?

One response is to assert that *another* reason can be used to justify such laws; one that does not rely on a moral judgment about the conduct in question. The most prominent candidate for such a reason is that the conduct is harmful to the interests of others. Murder and theft are legitimately made illegal because they are harmful, not because they are wrong.

If, however, one examines the concept of *harm* it is obvious that this notion is itself, directly or indirectly, linked to a judgment about the wrongness of the conduct in question. The most thoughtful and developed notion of harm, that of Joel Feinberg, explicitly distinguishes between a "non-normative sense of 'harm' as set-back to interest, and a normative sense of 'harm' as a *wrong,* that is a violation of a person's rights."[5] (italics orig.) It is only the latter sense of harm that figures in the harm principle as developed and clarified by Feinberg.

It is fairly clear that there is no way to avoid this interjection of normative content into the analysis of harm. For if the idea is that harm is merely a setback to interest, and if interest is purely a descriptive notion, such as that which a person has, or takes, an interest in, then those who propose to prohibit, say, the private consumption of pornography may, correctly, claim that they have an interest in not living in a society that allows such consumption and, hence, that such behavior harms them. For that matter, as Mill pointed out, do not the rejected applicants for a job have an interest that is damaged? The argument against criminalization in these cases must take the form of arguing that the mere setback to interests, or harm in its nonnormative sense, is not something that individuals ought to be protected against.

That individuals do not deserve such protection is a moral judgment, and when we decide the other way—to protect certain interests against invasion—that is equally a moral decision.

There is another line of argument in support of the same conclusion.

Consider laws against theft. Are such laws justified by reference to a nonnormative sense of harm or are values built in here as well?

The concept of theft presupposes a definition of property. Protecting against theft assumes certain views about exclusive rights to ownership. In the absence, for example, of copyright and patent laws one cannot be accused of stealing someone's ideas. Recently, in the *Winans* decision the courts had to decide when a reporter's information could be considered to belong to the newspaper and hence be misappropriated. These definitions and conceptions of ownership are conventions of the society and differ from one society to another. Although they are conventional they are not arbitrary and are defended or opposed in terms of moral and political (as well as economic) arguments. Consider, for example, recent legal discussion about whether living organisms may be patented. Laws against theft, therefore, presuppose prior moral determinations and are another way in which moral values are enforced.

So the nonenforcement thesis cannot be formulated in terms of a simple distinction between laws designed to prevent harm and those used to enforce moral values. Some other way of making the distinction must be found. At the very least one would want to distinguish between the moral judgments involved in making assertions about harm and other moral judgments.

One way to clarify the thesis is to distinguish between that part of morality having to do with rights and that having to do with ideals. This is the tack that Joel Feinberg takes in his book, *Harmless Wrongdoing*. For Feinberg the law should be limited to the protection of *particular* values, namely personal autonomy and respect for persons.

> The harm principle mediated by the *Volenti* maxim protects personal autonomy and the moral value of "respect for persons" that is associated with it. . . . But there are other moral principles, other normative judgments, other ideals, other values—some well-founded, some not—that the harm principle does not enforce, since its aim is only to protect personal autonomy and protect human rights, not to vindicate correct evaluative judgments of any and all kinds.[6]

This, in essence, is Feinberg's solution to the definitional problem. Of course the law enforces morality: The interesting question is what parts of morality it ought to enforce. Now we have a substantive claim that needs to be argued. Feinberg's solution is that the law should protect only rights. This contention, however, requires some justification. Why should we protect rights and not ideals? Why should we protect personal and not group autonomy? Why shouldn't a community be able to use the law to defend its moral ideals?

The readings in this book are designed to help us to think about these

important questions. They are divided into two parts. Part 1 includes various theoretical reflections, both for and against the legitimacy of the legal enforcement of morality. Mill and Fitzjames Stephen represent the classical division on this issue and I have tried to bring the discussion up to date by including the most recent philosophical contributions to the debate.

Part 2 represents a body of statutory and case materials that illustrate in a concrete fashion the kinds of issues that are at stake and how courts have reasoned about them. In addition, I have included theoretical material that is directly relevant to the cases and controversies. The order in which the readings are presented reflects my philosophical prejudice for going from the general to the particular. You may want to proceed in the opposite direction.

Notes

1. J. S. Mill, *On Liberty* (London: n.p., 1859), Chapter I.
2. Report of the Committee on Homosexual Offenses and Prostitution (CMD 247), 1957 (Wolfenden Report) (New York: Stein and Day, 1963), para. 257.
3. J. Raz, "Autonomy, Toleration, and the Harm Principle," in R. Gavison, *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), p. 327.
4. H.L.A. Hart, *Law, Liberty and Morality* (Stanford, Calif.: Stanford University Press, 1963), p. 4.
5. J. Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), p. x.
6. J. Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988), p. 12.

Part One

Principles

2 Classical Theories

JOHN STUART MILL

On Liberty

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the 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. 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. 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 opinions of others, to do so would be wise, or even right. There are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great, that there is seldom any choice of means for

overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end, perhaps otherwise unattainable. Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one. But as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion (a period long since reached in all nations with whom we need here concern ourselves), compulsion, either in the direct form or in that of pains and penalties for non-compliance, is no longer admissible as a means to their own good, and justifiable only for the security of others.

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a *primâ facie* case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation. There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow creature's life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception. In all things which regard the external relations of the individual, he is *de jure* amenable to those whose interests are concerned, and if need be, to society as their protector. There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: either because it is a kind of case in which he is on