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Law, Liberty, And Morality. By H. L. A. Hart.

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BOOK REVIEWS

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

Professor Hart presents three lectures first delivered at Stanford University as one of the series of Harry Camp Lectures, established in 1959 to elicit discussion of "topics bearing on the dignity and worth of the human individual." The quoted phrase, however awkward, should be mentioned here, as well as the denotation of lectures, because both will bear upon appraisal. Such lectures not infrequently offer scholars an opportunity to stand aside from their usual preoccupations and pursue a more reflective vein.

In fact, however, this particular offering is simply the most recent installment in the continuing controversy between Professor Hart and Lord Devlin over the enforcement of morals by means of the criminal law.[1] Their disputation has not remained a private one, nor is it confined to Englishmen. Dean Rostow and Professor Henkin most recently have also entered the lists,[2] the first on the side of Devlin, the latter favoring Hart, but there has been no real joinder of issue on this side of the Atlantic, if indeed on the other. This means that the anticipations one may have reasonably entertained in approaching Professor Hart's lectures are not in order.

Professor Hart's concern here is to question society's justification for the enforcement of private morality as such. The question itself is a moral one, in his terms to be considered according to principles of "critical morality," *i.e.*, the mere fact that a morality is being enforced does not provide the necessary justification; witness such moralities as South Africa is struggling to enforce. And justification there must be if we are to sacrifice the liberty of those who are the subject of the enforcement. We should be quite sure what such a price will purchase for society. The price is a very real one to Hart, because of the many statutes in America, and England to a lesser degree, which prohibit private sexual immorality on pain of criminal sanction. He also is much disturbed by a recent, much mooted decision of the House of Lords which broadly reasserts the existence of a common law offence of "conspiring to corrupt public morals."[3]

The author's position is clear and straightforward. He believes that no adequate justification can presently be shown for legally enforcing morality for its own sake. He generally follows the view of John Stuart Mill, whose essay, *On Liberty*, is cited frequently. Mill would require a showing of harm

1. See Lord Devlin, "The Enforcement of Morals," the Maccabaean lecture in Jurisprudence of the British Academy, 1959 (Oxford University Press, 1959); Prof. H.L.A. Hart, *Immorality and Treason*, The Listener, July 30, 1959, pp. 162-63; Lord Devlin, *Law, Democracy, and Morality*, 110 U. Pa. L. Rev. 635 (1962).

2. Rostow, *The Enforcement of Morals*, 174 Cambridge L.J. (1960) at p. 190; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

3. Shaw v. Director of Public Prosecutions 2 A.E.R. 446 (1961).

to others before society could apply sanctions. Professor Hart also takes sustenance from the report of the Wolfenden Committee. This eminent group, in recommending that the law against private homosexual practices between consenting adults be relaxed, stated: "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." Lord Devlin's position is of course to the contrary, as was that of the 18th Century judge and writer, James Fitzjames Stephen, whom Hart summons to join the fray.[4]

The second lecture deals for the most part with examples from Anglo-American law that are said to represent enforcement of morality as such. Although Hart's concern is with sexual problems, the examples taken from Devlin and others unfortunately are not. The author shows that many of the rules in question (*e.g.*, the victim's consent is no defense to a charge of murder.) do not exist solely to enforce morality; rather they are examples of paternalism. Hart agrees that in punishing criminals judges do weigh the relative wickedness of persons being sentenced, applying morality directly so to speak, but he correctly shows that this fact has no logical relevance to the issue of what acts may be punished. In discussing the crime of bigamy, the author stresses the peculiar fact that in most common law jurisdictions only the second marriage ceremony, the *public* act, is proscribed, not the private immorality of the resulting cohabitation. The crime is in the nature of a nuisance, to be condemned by reason of its affront to others, and not by reason alone of the moral problem involved. Turning from examples, the author concludes this lecture with a consideration of the more positive grounds offered by Lord Devlin for his conclusion that "the suppression of vice is as much the law's business as the suppression of subversive activities." Devlin's position in substance is that a shared morality is essential to society's existence and that immorality jeopardizes or weakens society. Professor Hart, while agreeing with the first assertion, shows that there is no evidence on which to base the latter, certainly at least with respect to private deviations from accepted sexual morality.

In his final lecture, the best of the three, the author deals with clarity and insight with a variety of topics. He is essentially concerned with identifying what he terms an extreme thesis for enforcing morality, attributed to Stephen, the view that such enforcement "is justified not by its consequences but as a value in itself." Considering enforcement in the form of coercion, Hart concludes that coerced conformity with a moral code, as distinguished from voluntary compliance, can have no moral value. Considering the punitive aspect of enforcement, especially in the case of sexual violations where there is no victim, Hart finds such retributive sanctions wholly without justification. Adding the evil of suffering "to the evil of immorality as its punishment" can

4. Stephen's book, Liberty, Equality, Fraternity, was written in the last century, so Hart states, as a direct reply to Mill's essay, On Liberty.

serve no moral end. Stephen's strong theme of retribution is identified by Hart with a supposed need for denunciation: moral condemnation of the offender and ratification of the violated morality. Hart would employ words, rather than punishment, for any necessary denunciation, the latter being ineffective in his view to preserve morality. Professor Hart next distinguishes between the need to preserve morality and moral conservatism, there being no justification for the latter, while the former can as well be achieved by means other than legal sanctions. The lecture concludes with a reminder that commitment to democratic principles does not entail what Professor Hart terms "moral populism: the view that the majority have a moral right to dictate how all shall live."

The lectures certainly show Professor Hart scoring a fair share of points in the controversy with Lord Devlin. But somehow his work strikes one as being old-fashioned and missing the point; not the point presented by his opponent, but the general problem of the relation of private morality as such to the law. This despite the author's evident dedication to liberty and the many insights he affords us. His logic is exemplary, but we seem to end up with most of the juice squeezed out, with the life of the problem missing. To point out the *non sequitur* in the example of the judges' gradation of sentences may be a service and add a score against Devlin; however, it does not meet the problems, and opportunities perhaps, for law and morality which inhere in the judges' practice.

Our author is not the only contestant who leaves us unsatisfied. Louis Henkin's discussion of the "sin of obscenity," noted earlier, presents the most recent case. His fine essay explores the origins of morals legislation, and I believe, establishes the fact that the lawmaker's impulse is directed against immorality as such. His treatment is in terms of our Constitution, and by that approach the rather frightening conclusion is reached that there is no basis for morals legislation: legislators can constitutionally deal only with the reasonable, the rational, and in a reasonable way; private morality is not in the rational order; therefore, etc. Accordingly, Henkin would place America in the Hart camp, if only because of our special constitutional situation.

If our existing morals legislation is largely based upon the irrational, we are not forced thereby to discard it out of hand with Professor Henkin,[5] or fail to see its implications with Professor Hart, resolving to do better in the future. Nor can we expect much help from Lord Devlin in light of Hart's analysis of Devlin's arguments. Rather it would seem in order to examine anew what we now take to be irrational, to explore the possibilities of rationalizing morals, particularly in relation to law.[6] 'Their' claim to the effort would

5. It should be noted that Professor Henkin neither advocates nor predicts revolutionary progress in this direction.

6. This task of the centuries is perhaps the most formidable that can be imagined, but we cannot fairly be said to be without hope of finding some hint of order or rhyme or reason in "the common condition of mankind." In fact our law contemplates such, and

seem to be a weighty one, if only because of their embodiment in so much of our law. Of course morality can make no claims; persons, human beings have claims and wants and needs. And in society they should be able to ask of the law a commitment to meet many of them. As we come to know more of the irrational, we may hardly decide that much of our morals legislation can be securely justified. But we may well find that such laws are much more than religious relics and may in fact be expressive of proper needs of our citizens.[7]

The basic problem of having the law enforce private morality as such, as we are confronted with it, arose as Lord Devlin stated when the state recognized freedom of worship and conscience. Professor Hart in these lectures does not seek a means of evaluating the claims of morality as such on the law; rather, he successfully disposes of some of the justifications offered by others for the enforcement of morals. If these grounds are admittedly unsatisfactory, it remains true that Professor Hart has broken no new ground in dealing with the larger problem. His impressive contribution is to clarify the situation, to enable us to get on thus with the main task ever present: to maximize the good our best moral perceptions and thought can add to the law.

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CIVIL JUSTICE AND THE JURY. By Charles W. Joiner. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1962. Pp. 238. $6.95 (Under the Auspices of and in Collaboration with the International Academy of Trial Lawyers).

Delay in the courts, mounting jury verdicts and the increased cost of administering civil justice have converged in the last decade to question anew the value of the jury in civil cases. Although our Federal Constitution requires a jury trial in the Federal Courts in certain "suits at common law," it does not require a trial by jury in civil cases in state courts. Most state constitutions and statutes require it, but these provisions are subject to change. Hence, the question arises whether the several states should follow the lead of Great Britain, some European and most South American countries in limiting jury trials to

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we all generally do the same in facing our lives; the newer sciences, particularly psychiatry, daily yield more insights to help us.

7. Consider, *e.g.*, the work of Robert Rodes, *A Prospectus for a Symbolist Jurisprudence*, 2 Natural L. Forum 88 (1957). In this original and provocative essay Professor Rodes effectively argues for a symbolic role of the law as fulfilling vital human needs. In doing so, he (rationally) makes deep inroads upon what Professor Henkin and others would seem to consider irrational beyond hope. Of the participants in the controversy discussed herein, Stephen, if he can be considered such, is the only one who shows much appreciation for the role of symbolism in the law. This should not be overlooked, however much his harshness repels us.