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ETHICS, MORALITY, AND LAW. Morality concerns how one ought to live one's life, and ethics refers to the codes of conduct governing social interactions. To live morally or ethically is to adhere to standards of right conduct, to act well, to be a good person. Law is also a code of conduct. Ethics, morality, and law constrain what individuals may do, but in different ways. That an act is immoral or unethical is for many people sufficient reason not to commit it. For others, only the threat of legal punishment is sufficient. Laws are enforced by punishment or *damage awards, executed after a judicial determination according to procedures laid out by an authoritative governing body. Moral laws or principles have no similar enforcement mechanism, relying instead on individual conscience, social pressure, or perhaps the fear of God, although the philosopher Immanuel Kant (*Groundwork of the Metaphysics of Morals*, 1785) held that if you refrain from acting badly because you fear God or legal punishment, you are not really acting morally—a moral act must be done for the sake of morality.

The relation between morality and law is complex and a matter of considerable disagreement. To what extent do or should they coincide? Some have argued that law properly targets immoral or unethical conduct. For example, in 1977 the United States enacted the Foreign Corrupt Practices Act, making illegal the bribery of foreign officials. Recently the United States has urged other nations to follow suit. But many resist the view that government should use law to coerce people into being moral, and argue that law and morality must be separate and distinct; if we believe abortions are immoral, it does not necessarily follow that they should be illegal.

*Natural law theorists regard law and morality as connected; law is not simply whatever legislatures enact in statutes. If what is called a law fails to meet the features that all morally proper laws should have, then it is called law only by mistake, and has no authority. For St. Thomas Aquinas (1226–1274), insofar as human law deviates from the law of nature, or reason, it is no law at all, but a perversion of law (*Summa Theologica*, Question 95).

Appeal to a higher moral law, or a sense of fundamental fairness, has been used in American law to override enacted legislation, following the example of Justice Samuel *Chase, who wrote in *Calder* v. *Bull* (1798) that "[t]here are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An act

of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." Appeal to a higher, natural law has been strongly criticized, however, on the ground that reasonable people disagree about which moral principles are valid; lacking objective means of resolving this disagreement, whether something truly accords with a higher moral law is a subjective judgment.

Another criticism of natural law theory is that law seems distinct from morality. Not everything that is illegal, for example, driving a few miles above the speed limit in sparse traffic, is immoral; not everything that is immoral, for example, breaking a promise to pick up a friend at the airport, is or should be illegal. An alternative theory of law, called "legal positivism," emphasizes the separation between law and morality. According to legal positivists, law is manmade and defined, or "posited," by the legislature or law-creating authority; one cannot say, with natural law theorists, that there is a law against *X* but you may still do *X* with impunity. We can challenge laws by appealing to moral or religious principles, but until a duly enacted law is changed, it remains law.

How does the positivist distinguish commands that count as law from commands that do not, without appealing to morality? The British theorist John Austin argues that law is distinguished from other commands by being the command of the sovereign; the gunman's command lacks this pedigree (see *The Province of Jurisprudence Determined* (1832) and *Lectures on Jurisprudence* (1869)). Who is sovereign? Not someone who has a right to rule, or who rules legitimately, for this would interject morality into the law. Rather, it is someone who *is* sovereign, who is in fact obeyed.

But this makes the legal system nothing more than a gunman writ large, responds H. L. A. Hart, who answers the question of how we distinguish laws from other commands by viewing law as a union of primary and secondary rules (*The Concept of Law*, 1961). Laws consist largely of primary rules, or basic commands that impose duties: keep off the grass, do not steal, drive within the speed limit. But why is a society bound by these rules and not others? The natural law theorist explains this by appealing to a natural moral order. Hart rejects this position, and appeals instead to what he calls "secondary rules": "While primary rules are concerned with the actions that individuals must or must not do, secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." Primary rules are valid even if they are not obeyed, insofar as they are duly created through the system of secondary rules. How do we know the secondary rules are the right ones? Here Hart, much like Austin, must appeal to the fact that they are regarded as such.

Legal positivism regards law as a system of clearly defined rules. But this view of law seemed misguided to many lawyers, judges, and social scientists who have studied or worked within the American legal system. For *legal realists such as Oliver Wendell *Holmes (*The Common Law*, 1923), if the law were merely a system of rules, we would not need lawyers doing battle, for judges could just apply the rules. In fact judges have discretion with which they can decide a case in a number of ways, and factors such as the judge's temperament, or social class, or political ideology, may determine the outcome.

On another theory, called purposive adjudication, defended by Ronald Dworkin (*Law's Empire*, 1986), law is not merely a set of rules, but of rules as well as underlying principles, and judges should appeal to these principles—to the spirit or purpose of the law—not just narrowly to the law's letter. This is different from appealing to a natural moral order. The judge appeals to moral values, but these values must inhere in the law which the judge is authorized to interpret, and as such, these values are not entirely subjective.

Skepticism as to a natural moral order that regulates all human beings, and the fact that reasonable people disagree about what morality requires, raise the concern that law not be used to impose one conception of morality on those with a different but reasonable conception. According to the political theory of liberalism, which seeks to promote as much individual *liberty as is compatible with everyone else having the same liberty, the state should not use the criminal law to prevent immoral conduct that does not cause harm or offense to others. (See John Stuart Mill, *On Liberty* (1859) and Joel Feinberg, *The Moral Limits of the Criminal Law* (4 vols. 1984–88)). The theory of legal moralism, in contrast, holds that the law reflects society's moral standards and can be used to coerce people into conforming with these standards. The Supreme Court, in *Bowers* v. *Hardwick* (1986), upheld a Georgia criminal statute prohibiting homosexual sodomy. In dissent, Justice Blackmun criticized the decision, rejecting legal moralism. He acknowledged that government may legitimately ban public sexual activity to protect

people from unwilling exposure to the sexual activities of others. But, he added, "The mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places." Liberalism demands that so long as individuals do not harm others, they be free to make their own choices about how to live their lives, even if their choices are at odds with the moral sensibilities of a majority: "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others," Blackmun writes, "suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."

Those who defend the liberal view that law should not be used to prohibit immoral conduct that does not harm others need not be legal positivists. While liberals want to restrict the law from forcing certain moral or religious codes of conduct on citizens, they do support the use of law to impose one particular moral conception that holds that all individuals have liberty interests and rights and that it is wrong to violate these rights by causing harm to others.

There is a genuine tension between the desire not to use the law to impose a particular moral code on everyone and the desire that law accord with *justice. Many defenders of punishment, often labeled retributivists, argue that the primary purpose of punishing those who break the law is not to deter crime or rehabilitate the offender, but to mete out justice; the criminal has violated society's conception of right, and punishment vindicates right and expresses society's condemnation. Sentences generally are set to match the culpability of the criminal, and American law allows defenses that excuse defendants or mitigate their punishment if we feel they are not fully blameworthy or morally accountable. If the law is separate from morality, as some positivists contend, many versions of retribution, and many features of the *criminal law, may be incoherent.

The argument of those who believe there is a separation between law and morality, that not everything that is illegal is immoral, assumes that it is not always immoral to break the law. Yet some philosophers argue that breaking the law, even pointless laws, is morally wrong, and that in doing so one acts badly; the law presents itself as a seamless web, and its subjects are not permitted to select which ones they ought to obey. A number of reasons have been offered as to why one is morally obligated to obey law. One reason appeals to the contagion argument: if we allowed some violations of law, lawbreaking could spread, resulting in social disorder. One problem with this argument is that widespread disobedience does occur in some cases, such as speeding on highways, without leading to social unrest. A second argument is that people who benefit from laws have an obligation, of fairness or gratitude, to contribute to the cooperative venture providing the benefits by obeying the law. Still another argument is that we are morally obligated to obey laws because by consenting to government we have promised that we will; violating a law is immoral in the way breaking a promise is.

A number of philosophers, rejecting these arguments, have defended selective disobedience. M. B. E. Smith, for example, says that "[f]or most people, violation of the law becomes a matter for moral concern only when it involves an act which is believed to be wrong on grounds apart from its illegality" ("Is there a prima facie obligation to obey the law?" *Yale Law Journal* 82 (1973): 950–76).

The demands of morality and ethics create tensions for professionals practicing law. For example, a criminal lawyer is bound to defend a client known to be guilty, and doing this effectively may require saying things in court that ordinarily are regarded as misleading. The adversarial system functions well only when individuals adhere to their roles, and this requires the defense attorney to present the strongest case, even if it entails defending immoral conduct. The *American Bar Association's Model Rules of Professional Conduct however, clearly oppose legal argument based on a knowingly false representation of law or fact.

[*See also* Culture and Law]

• H. L. A. Hart, *The Concept of Law*, 1961. Lon Fuller, *The Morality of Law*, 1969. Monroe Freedman, *Lawyers' Ethics in an Adversary System*, 1975. A. J. Simmons, *Moral Principles and Political Obligations*, 1979. P. S. Atiyah, *Promises, Morals, and Law*, 1981. Charles Fried, *Contract as Promise*, 1981. Joel Feinberg, *The Moral Limits of the Criminal Law*, 4 vols., 1984–88. Kenneth Kipnis, *Legal Ethics*, 1986. Mark Tunick, *Practices and Principles: Approaches to Ethical and Legal Judgment*, 1998.