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Moral legislation

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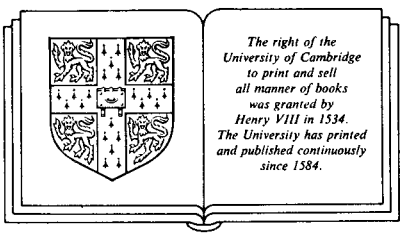
Moral legislation

A LEGAL-POLITICAL MODEL FOR INDIRECT CONSEQUENTIALIST REASONING

Conrad D. Johnson

University of Maryland



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To the memory of my father and mother
Conrad C. Johnson
and
Catherine M. Johnson

Another man, or perhaps the same man (it's no matter) says, that there are certain practices conformable, and others repugnant, to the Fitness of Things; and then he tells you, at his leisure, what practices are conformable and what repugnant: just as he happens to like a practice or dislike it.

The mischief common to all these ways of thinking and arguing (which, in truth, as we have seen, are but one and the same method, couched in different forms of words) is serving as a cloke, and pretence, and aliment, to despotism: if not a despotism in practice, a despotism however in disposition: which is but too apt, when pretence and power offer, to show itself in practice.

Jeremy Bentham

We entirely repudiated a personal liability on us to obey general rules. We claimed the right to judge every individual case on its merits, and the wisdom, experience and self-control to do so successfully. This was a very important part of our faith, violently and aggressively held, and for the outer world, it was our most obvious and dangerous characteristic. We repudiated entirely customary morals, conventions and traditional wisdom. We were, that is to say, in the strict sense of the term, immoralists. The consequences of being found out had, of course, to be considered for what they were worth. But we recognized no moral obligation on us, no inner sanction, to conform or to obey. Before heaven we claimed to be our own judge in our own case.

John Maynard Keynes

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Preface

The particular version of indirect consequentialism defended in this book represents the most recent stage in a rather long period of thinking about morality and its legal analogues. It may make no sense to attempt to mark the beginning of such a long evolution, but I am tempted to do so anyway. It seems that it all began in my first year in graduate school, when I ran across a comment of H. L. A. Hart's on Hare's characterization of morality, saying that it represented "an excessively Protestant approach," taking morality "as *primarily* a matter of the application to conduct of those ultimate principles which the individual accepts or to which he commits himself for the conduct of his life."[1] This remark intrigued me, partly because it seemed to contain a very important kernel of truth usually missed by contemporary moral philosophy; but also partly because it was not clear how the idea of a social rule could be incorporated into moral theory in any nontrivial way without endangering the autonomy of critical moral thinking. I was impressed also with G. E. M. Anscombe's remark – itself an echo of J. S. Mill, among others – that the concepts of guilt and sin and injustice are at bottom juridical notions depending for their full-blooded sense on the idea of law. That at least the core of morality could be likened to law would seem to be an antidote for that (act) consequentialism through which, as Anscombe put it, "the kind of consideration which would formerly have been regarded as a temptation, the kind of consideration urged upon men by wives and flattering friends, was given a status by moral philosophers in their theories."[2] Yet, once we remember how bad existing social rules can be, it is not obvious how we can make use of this idea.

Reading the great legal philosophers, as well as those moral philosophers influenced by legal ideas, ranging from St. Thomas Aqui-

1 Hart, 1958, p. 100.
2 Anscombe, 1958, p. 225.

nas to Hume, Kant, and John Stuart Mill, my thinking has thus been influenced – some will no doubt think overly so – by seeing the ways in which moral reasoning has benefited, and might be made more consciously and explicitly to benefit, from ideas that are at root essentially legal in character. Thinking of the probable charge that morality is not like law, that it is a mistake to allow moral theory to be guided by legal analogies, I take comfort in the fact that many classic conceptions of morality have been modeled in significant ways on legal ideas.

It is of course impossible to mention all the people whose encouragement or intellectual influence somehow figure into this book. Indeed, the identities of some of these people remain unknown to me. Perhaps they will read this resulting work and recognize their influence in what I have written. Among the many to whom I know I am indebted in some way or other, the following deserve special mention: Richard Brandt, whose empirical, utilitarian approach to morality, and whose philosophical advice over the years have exercised a considerable influence on my thinking; Stephen Darwall, who has, on and off over the years, been a stimulating partner in philosophical conversation on these topics, and who suggested the title of the book to me (I must, however, accept full responsibility for the subtitle); and Michael Slote, who read and helpfully commented upon earlier versions of the present work.

Thanks are due to the Graduate Research Board of the University of Maryland for providing me on more than one occasion with the time off from teaching to enable more intensive work on this book. I must also note here my appreciation of the helpfulness and intelligent professionalism of my editor, Terence Moore, and his assistant, Nick Alpers. Finally, the painstaking care and sensible advice of my copy editor, Herbert Gilbert, saved me from the consequences of some unexamined habits common to professional philosophers.

Conrad D. Johnson