Philosophy:

MORALITY AND THE LAW

Should legal restraints on gambling, prostitution, pornography, and other traditional vices be eased? American voters and legislators seem increasingly disposed to answer "yes." Since the early 1960s, "You can't legislate morality" has become a cliché in public discussion of such matters. Political scientist Hadley Arkes takes issue with this notion, arguing that one may justifiably legislate *nothing but* morality. Arkes reaffirms Aristotle's conception of the polity as a "moral association." Above all, he says, the law must be principled. Otherwise, we risk the "corruption of the people."

by Hadley Arkes

All about us today urban life is celebrated, but largely for the wrong reasons. When the city is valued, it is valued as a theater of diversity, the center of a cosmopolitan culture, the breeding ground of freedom and tolerance. It is a place of specialty, movement, and color, of services tailored to the rarest tastes.

But these virtues are the virtues of the marketplace, or of the city as "hotel." What is lost in this vision of the city is the sense of a people joined together in a perception of common ends; who base their common life on procedures they regard, by and large, as just; and who cultivate an understanding of justice and morals in one another through the things they hold up to the community with the force of law. What is lost, in a word, is the Aristotelian sense of the city as *polity*.

It may be rather unsettling, even to members of an older generation, to regard the city as a source of moral instruction.

But the discomfort with that notion in our own day is a measure of how far we have drifted from the original understanding of the connection between morals and law. There is a tendency in our public discourse to equate moral judgments with matters of religious belief, or to reduce them to questions of the most subjective personal taste.

This confusion has been reflected in many of the college students I have known during the past decade. It was important to them to insist, for example, that the war in Vietnam not be regarded merely as an enterprise plagued by poor management and bad luck but as a thoroughly *immoral* venture. Yet as these students came to consider many of the problems that arose in the city—problems of drugs, abortion, the censorship of literature and the arts—they became liberals in a rather old sense that they usually disdained. Their tendency then was to argue that the state of anyone's morals was not the business of the government—that morals were essentially matters of the most personal taste or the most subjective, private belief.

The curious thing about this understanding of morals was that it reduced the indictment of the Vietnam war to the level of the utterly trivial. To say that the Vietnam War was "immoral"

Courtesy of Stephen Longstreet.

San Francisco during the Gold Rush. Gambling, Arkes writes, is a "traditional vice" but not a "categorical wrong." It cannot be distinguished from such legitimate ventures as investing in the stock market.

was to say, in effect, that it was simply not to one's taste, much as one might profess an aversion to cabbage or squid.

But moral propositions are distinguished sharply from statements of merely personal taste or private belief. They claim to speak, rather, about the things that are *universally* right or wrong, just or unjust, for others as well as oneself. When we say that it is "wrong" to "kill without justification," we do in fact imply that it is wrong, even if the assailant happens to enjoy what he is doing. In that sense, there was a recognition in the past that it was the logic of morals which made necessary the existence of law: When we recognize that any act stands in the class of a wrong, we can no longer leave it, with indifference, to the domain of personal taste or private choice. We are compelled to forbid that act generally; to forbid it, in other words, with the force of law.

This connection between morals and law has rarely been made with more clarity than by Abraham Lincoln in his celebrated debates in 1858 with Stephen Douglas. Douglas professed that he regarded slavery as wrong, but he preferred to leave it to popular majorities in the separate territories of the United States to decide whether slavery should be voted up or down. As Lincoln pointed out,

> When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong.

Philosophers of law may have succeeded over the years in rendering this point obscure, but most people of ordinary intellect seem to recognize that it is the awareness of a "wrong" that usually precedes the insistence that "there ought to be a law." When we consider our laws on murder, theft, and assault, it is plain even to the most committed libertarians that the laws embody perspectives that are authentically moral. But moral judgments of one kind or another—large or small, valid or arguable—underlie almost every kind of law on the books, from

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copyrights and embezzlement to the regulation of insurance. If the law has a claim to bind everyone, it is only because it claims to rest on something more than the personal tastes or opinions of those who rule.

Libertarians will concede that the law may coincide, at different points, with moral understandings, but they will insist, nevertheless, that the law ought to be limited in its reach to the relief of *material* harms or injuries. This perspective has become, of course, part of the orthodoxy of modern liberal jurisprudence, but it can be preserved only by forgetting the strict meaning of "moral principles" and the connection between morals and law. For that reason, this perspective fails to account for the most significant parts of our current laws.

Race and Social Science

A notable case in point would be the law that forbids discrimination on the basis of race in restaurants, inns, and other places of "public accommodation." When American lawyers and jurists are asked to explain the ground on which that law is justified, their disposition has been to say that the end of the law is to protect blacks against the deprivation of material goods and services: in this case, the deprivation of food or lodging.

And yet it would be hard to demonstrate that black people would be deprived of food simply because they were turned away from a particular restaurant. We would never assume that the same injury was being threatened in the case of a man who was turned away from a restaurant because he was not wearing a necktie. We recognize that he might well have access to food in establishments nearby, and the same possibilities may also be present for blacks. In fact, in the case in which this issue was argued before the Supreme Court in 1965, Ollie's Barbecue in Birmingham, Alabama, had a take-out counter serving blacks, even though blacks were not permitted in the main dining room. We accept the exclusion of the man who is improperly dressed, but we do not accept the exclusion of blacks; and our reasons have nothing to do with the denial of food.

We are brought back here to the recognition that the root of "injury" is in the Latin *in jus:* literally, not according to right or justice. Many hurts may be inflicted by dentists and lovers and Offices of Admission, but unless they are animated by unjust ends, we would not say that an "injury" had been done. Before we can define an injury, then, we must understand the nature of the principle that marks an act as "wrong."

But lawyers and judges have deflected themselves from the

task of articulating those principles that form the proper ground of law. They have sought instead to divine the material injury that defines the wrong of each case, even if that injury must remain rather speculative or tenuous. Instead of basing their decisions on real principles—on propositions that hold true categorically, as a matter of necessity—they take, as the foundation of their judgments, calculations or predictions about the likelihood of material harms. In this tendency, the courts have sought reinforcement in the findings of modern social science, as though these findings could supply the moral axioms or principles that are missing from their judgments.

But it is in the nature of social science that it can never be more than statistical and contingent. What social science "knows," at best, are averages and aggregates within "confidence intervals," bounded by circumstances that may be highly mutable. Even when correlations and probabilities run very high, there is a serious question as to whether they may ever supply a proper foundation in the law for ordering the conduct (or restricting the freedom) of any person in particular.

It could be shown, for example, on the basis of aggregate data, that single males in America are threatened with serious injuries by remaining single. They are 22 times more likely than married men to be committed to hospitals for mental disease; they have nearly double the mortality rate of married men. And yet no one would think of using these findings as the foundation of a law that would save single men from these injuries by assigning any one of them, in particular, to a bride. In instances of this kind, the law would have drifted far from those principles or categorical propositions that alone can supply its proper foundation.

What Are Vices?

Altogether, then, these requirements of law would be quite demanding. If they had been applied in a strict way over the years, many statutes that have been on our books would have been swept away, and among these would have been many of the laws that have regulated certain traditional "vices."

It is one of the ironies of our time that the domain of morals has been reduced, in our public discourse, to cover matters such as gambling, drinking, and prostitution. But these occupations represent only a truncated part of those moral concerns that are addressed through the law, and oddly enough they do not represent, in all cases, the kinds of problems that represent categorical wrongs. It is doubtful, for example, that gambling coud be

Women in a Parisian brothel (1894), by Toulouse-Lautrec. Experiments with licensed prostitution in 19th-century Europe were short lived.

distinguished from many other legitimate ventures in risk-taking, whether in business or politics, and there is no ground on which it could be said that the taking of alcoholic drinks would be injurious or wrong in all cases, regardless of whether it was done in excess or moderation.

When it comes to matters like prostitution and pornography, I think the traditional perspective turns out to be justified: These occupations or entertainments cannot be regarded on the same plane of legitimacy as occupations like nursing, carpentry, or tailoring. But the nature of the argument that will be required here may be easier to understand once we have become clear on the point that the law does not require evidence of *material injuries before it becomes justified in acting*.

Once that point has been established, the question of "vices" is no longer framed in the terms defined by liberal jurisprudence. As with discrimination based on race, the question turns not on proof of material injuries but on our understanding of the grounds on which prostitution and pornography can be regarded, in principle, as wrong.*

*I would refer the reader to Chapter 14 of *The Philosopher in the City*, where this question is taken up in detail.

With a proper consistency, our jurists have confronted such issues in the same way they have faced other serious moral questions in the law. Instead of defining the principled grounds of the offense, their inclination has been to define the crime through its ancillary effects or its outward manifestations. But unless the authorities are willing to face directly the grounds on which they regard prostitution as a wrong, the result tends to be a series of vacuous regulations.

The "Prime Minister of Sin"

In New York City, for example, the authorities have sought to deal with the bogus "massage parlors" that are brothels in disguise by requiring massage parlors to add swimming pools and squash courts (as though the presence of these facilities insured the legitimacy of the enterprise). Beyond that, they have required massage parlors to be 1,000 feet apart and no closer than 500 feet to churches and schools. But if the businesses in question had been law firms, no one would have thought it necessary to keep them distant from churches and schools. The measure becomes plausible only when it is assumed that there is something illegitimate about the enterprises themselves. But if one could explain the grounds of principle on which these establishments could be regarded as offensive, there would be no need for such legal charades in the first place.

As I have suggested, those grounds of principle would be very exacting. There are many projects inspired by the tenderest regard for the public good that are not founded on any categorical propositions, and that should not be invested with the force of law. A political community that takes itself seriously as a moral association need not be driven then to extend its reach until it governs almost everything. A government that understands the moral grounds on which its own authority rests may actually end up, in many cases, doing less rather than more.

As Aristotle understood it, the possibility for government and law arose from the capacity of human beings to reason over matters of right and wrong. For animals, government would have been useless, since they were cut off from the possibilities for moral teaching that were implicit in the law. But if men were higher than animals, they also stood lower than gods in the order of nature, and for that reason they required the restraint of the law. The same understanding that established the responsibility of the government to teach through the laws also counseled a certain moderation in the burdens that might be placed on creatures that were notably less than angels.

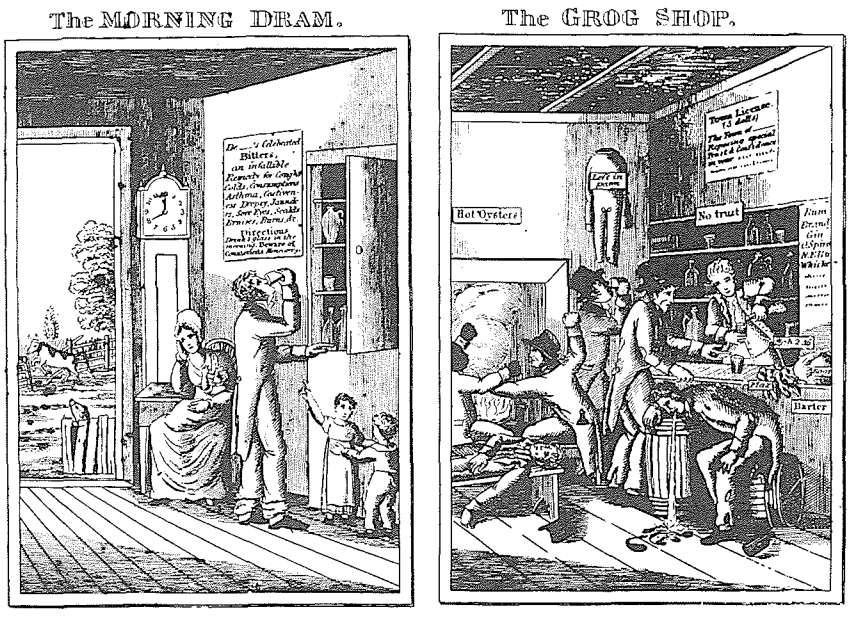
It was never assumed, in the traditional understanding, that the aim of the law was to eradicate all vice. What the law sought to do, with a proper modesty, was to contain vices within tolerable limits. This view of the matter was reflected, for example, in the statutes established in Florence in 1415:

> Desiring to eliminate a worse evil by means of a lesser one, the lord priors . . . [and their colleges] have decreed that . . . the priors . . . [and their colleges] may authorize the establishment of two public brothels in the city of Florence, in addition to the one which already exists: one in the quarter of S. Spirito and the other in the quarter of S. Croce. [They are to be located] in suitable places or in places where the exercise of such scandalous activity can best be concealed, for the honor of the city and of those who live in the neighborhood in which these prostitutes must stay to hire their bodies for lucre. . . .

The understanding that lay behind statutes of this kind may be set forth rather simply. It was thought, with considerable reason, that if certain vices were made fully legal, if all legal inhibitions were removed, those vices would expand far beyond their present dimensions. At the same time, it was anticipated that activities of a correlative nature would develop, as one form of vice feeds upon another. This growth of the illegal network is the most ironic feature in the experience of "legalization." It is the feature that rarely fails to surprise nowadays, for it cuts against the assumption that legalized vices breed their own form of ennui.

And yet there is a very straightforward explanation as to why, enduringly, things seem to turn out in this way. The case of gambling provides a clear example. As I have suggested, gambling would not meet the strict requirements of a categorical wrong, but the experience with gambling nevertheless illustrates the tendencies that come into play when the legal restraints are removed from activities that were previously constrained as "vices."

In the early 1970s, the State of New York legalized a system of offtrack betting (OTB) with the hope of gathering some revenue for itself while at the same time undercutting the illegal network in gambling. Soon after the system was underway, however, it was estimated that $6 continued to flow within the illegal network for every $1 that moved through the legal betting parlors. By January 1974, it was estimated that illegal gambling had increased by 62 percent in dollar volume since OTB went into effect, while the state's racetracks were down sharply.



Courtesy of the American Antiquarian Society.

The Drunkard's Progress, *1826. Should temperance mean abstinence?*

The reasons were not hard to fathom. When the state itself declared gambling to be legitimate—indeed, when it urged the public, through advertising, to go out and bet—the state swept aside the moral reservations that still made many people reluctant to gamble. If there was nothing wrong with gambling in principle, then it was only a matter of betting where the returns were highest. They were highest, of course, with the illegal bookmakers.

The logic that has been played out in the legalization of gambling has been present perennially in the efforts to legalize prostitution as well. In the gatherings of the urbane today, it is quite common to hear it said that the problem of prostitution ought to be solved by having brothels licensed by the state. As the price of legal acceptance, prostitution would be confined to its own zone within a city, and there would be a regular system of medical examination for the sake of protecting "consumers" from venereal disease. In some cases, the argument is made that prostitution ought to be "decriminalized" altogether.

One would hardly know from the current conversation that virtually all of these proposals had been tried at one time, by rather sophisticated people of an earlier generation, and that

they were all eventually abandoned.

A century ago, Sheldon Amos wrote his classic survey on the *Prohibition, Regulation, and Licensing of Vice in England and Europe* (1877), and what he recorded was a general repeal throughout Europe of the laws that licensed and legitimized prostitution. Characteristic of the movement was the action of the municipal government of Zurich, Switzerland, which abolished its system of regulation in 1874 as an arrangement that was finally "irreconcilable with the idea of the State as a moral power." The officers of the municipal government spoke out of an understanding, informed by tradition, of what was truly meant by a "city." As they put it:

> Toleration [of prostitution] gives rise to a fatal confusion of ideas; men become accustomed to regard all that passes in houses thus protected as a permitted thing. . . . A moral confusion no less fatal is produced among the employees and agents employed in the "morals-police"; the fact of being in constant relations with the tenants of bad houses necessarily leads to a species of intimacy. Moreover, it is not possible that they should display much energy against unlicensed prostitution while they are occupied in favouring licensed prostitution. . . . To admit any sort of compromise with a trade fundamentally evil, to tolerate one description of houses of debauchery and make war upon others, is to enter upon the path of half-measures, compromises, and the equivocal partiality, fruitless of every good result. . . .

As Sheldon Amos observed, the state becomes corrupted when it makes itself the sponsor of vice; it would stand before its subjects as "the supreme monopolist and prime minister of sin." Or, as the saying has it in New York, the state would become "the biggest pimp of them all."

Those in our own time who rail against the "intrusion" of the law into questions of morality are adamant in other cases that the law must also render "justice." They are no more willing than anyone else to repeal laws that embody what even they would concede to be moral perspectives. They are unwilling to remove the statutes on the battering of wives and the selling of children. Many of them, as I have noted, would argue that most of these cases involve material harms; and yet without quite admitting it to themselves, they are willing enough to impose restraints through the law even when material harms are not present. They may insist on stopping men from "exposing themselves" to children. They may act in the name of "the environ-

ment" to pull down billboards or garish neon lights.

What, then, is the source of the conviction, so prevalent and clichéd in our own day, that one may not "legislate morality?" There is, of course, a rich tradition of moral relativism that may be drawn upon in a variety of forms, along with the admonition, ancient and trite, that a law that runs counter to popular habits may be difficult to enforce. But when people insist today that it is both wrong and futile to legislate morality, the example they cite most often is that of Prohibition, the movement that succeeded (for a while) in banning the manufacture and sale of alcoholic beverages.

Prohibition, it might be said, gave morals a bad name. It encouraged the tendency, even among the educated, to confuse *morals*—and the discipline of principled discourse—with a strident *moralism.* As I have already suggested, Prohibition represented a counterfeit morality: It condemned the drinking of liquor in any quantity, under any circumstances—it condemned drinking, in short, with the force of categorical judgment, even though it was plain that drinking could not meet the strict requirements of a categorical wrong.

Corruption of the People

Abraham Lincoln, who clearly sought moral ends in politics, preserved his own detachment from the so-called "temperance" movement of his time. The problem for Lincoln was that these crusaders did not seek temperance at all, in the classic sense of "moderation"; what they sought, rather, was abstinence. As Lincoln characterized the movement, it looked forward to the day when all appetites would be controlled, all passions subdued, all matters subjected, and "*mind,* all conquering *mind,* shall live and move the monarch of the world."

One danger with visions of this kind is that the mandates of perfection require a concentration of power that might be incompatible with the conditions of free government. The law has a responsibility to teach, but statesmen have an obligation to be prudent and reasonable. As Thomas Aquinas argued, the aim of the law is to lead people to virtue, not suddenly, but gradually. "Otherwise," he wrote, "these imperfect ones, being unable to bear such precepts, would break out into yet greater evils: thus, it is written (Prov. 33): *He that violently bloweth his nose, bringeth out blood.*"

But if we lean, in our teaching, toward prudence, if we leaven our laws with a sense of what can reasonably be expected, we do not imply in any way that morals are impractica-

ble, or that the dominant concern of the law can be anything other than moral instruction. We are led to remind ourselves that the case for constitutional government has the same origins in principle as the case for republican government or government by consent: They both begin with the recognition that beings which are capable of reasoning over moral things do not deserve to be ruled in the way that one rules beings that are not capable of giving and understanding reasons. And if the case for lawful government begins with the capacity of human beings for moral judgement, the rulers must be invested with an obligation to do far more than seek their own interests and preserve the security of the citizens.

It has often been observed that, for Jefferson, the greatest threat to republican government came from the usurpations that the government itself might commit if the people lost their vigilance or their capacity for revolution. That understanding had, as far as it went, a certain truth, but it took Lincoln and the experience of another generation to make it more complete. As Professor Harry Jaffa has pointed out, Lincoln understood that "once the government was established upon a popular basis, the great danger was the corruption of the people" themselves. A corrupted people, who were willing to injure some of their members to serve the interests or the passions of the majority, would soon bring forward talented and ambitious men, who were more than content to ride to power by catering to those passions.

A government that drew its leaders from the people themselves could not afford to be indifferent to the moral condition of its citizens. It was the most serious corruption of understanding to say that this government—a republican government—should have less concern than any other with the moral improvement of its citizens. That is a persuasion that would be inconsistent at its root with the premises on which a free government rests, and it would render us incapable of addressing those questions of justice which must form, enduringly, our most urgent business.