

Conscience and the Law

*No society can exist if respect for the Law does not reign to some degree; but the surest way for laws to be respected is that they be respectable. When the Law and Morality are in contradiction, the citizen finds himself in the cruel alternative of abandoning his morality or losing respect for the Law, two misfortunes one as great as the other and between which it is difficult to choose.*¹

— Frédéric Bastiat (1854)

James E. Alcock

It is against the law to steal from your neighbour, yet were the law to be lifted, would you become a thief? Murder, too, is proscribed by law, but were it otherwise, would we be murderers all? Not likely, even if we could act with impunity. Why not? Because for most people, the primary constraints against profoundly antisocial behaviours are internal rather than external and we are governed by the dictates of conscience.

Internal constraints: Conscience

Pangs of conscience; clear conscience; “let your conscience be your guide;” “conscience does make cowards of us all.” What is this “conscience” and what endows it with the power to punish, calm, guide and restrain? The term has been loosely applied to a broad range of cognitions and emotions and activities relating to morality, some of which are associated with religious injunctions, others are culturally determined ethical prescriptions, and still others reflect idiosyncratic personal views of right and wrong.

The cognitive aspect of conscience involves both those principles acquired in childhood that deem actions such as lying or theft unacceptable as well as the ethical positions adopted in adulthood through reason, such as those that motivate a refusal to serve in the military or to eat meat.

The affective aspect component of conscience can be thought of as a kind of “moral intuition”² which punishes deviations from im-

portant moral principles through negative emotions including guilt and shame. Such emotional reactions can have a powerful effect on an individual, as the Greek tragedian Sophocles noted twenty-five hundred years ago: “*There is no witness so terrible and no accuser so powerful as conscience which dwells within us.*”³

While the cognitive and emotional aspects of conscience are usually closely aligned, this is not always so. Consider the prototypical psychopath, an individual motivated only by self-interest and ready to carry out antisocial behaviour in service of that self-interest, regardless of the harm it might bring to others. The psychopath typically understands the moral principles but does not experience guilt or remorse when they are transgressed.⁴ In other words, psychopathic behaviour is not the result of cognitive deficits in moral judgement, but instead are due to a deficit in affect, both in terms of empathy for the suffering of others and subsequent guilt or shame.

Of course, what is considered right or wrong varies from culture to culture, from era to era, and even between one set of circumstances and another. For example, when millions of Africans were enslaved in Europe and the Americas, most people of “good conscience” felt no pricks of conscience, for slavery did not violate their moral codes and the owning of slaves did not elicit feelings of guilt. On the other hand, while acts of murder go against good conscience everywhere, killing humans is only viewed as murder depending on who does it, who dies, and the situation in which it occurs. In some

circumstances, people who kill other people are viewed as heroes.

And even within a given society, people of “good conscience” sometimes disagree with regard to what is right and what is wrong. For example, while some modern-day physicians refuse to conduct *legal* abortions because of conscience, other physicians in times gone by risked their careers or even their liberty by carrying out *illegal* abortions because of their conscientious belief that women have the right to control their own bodies.⁵ Similarly, while some physicians helped severely ill people to end their lives in a dignified manner when it was illegal to do so – because of the dictates of conscience – other physicians now refuse – again out of conscience – to provide such help even though the law now allows it.

Conscience usually receives respect when used as a justification for a particular action or inaction. Reference to conscience often trumps any requirement for justification in terms of logic or reason. As Law Professor Laura Underkuffler observed:

Individually defined conscience may lead to claimed individual actions as above the law, which we as a society do not wish to recognize or which are repugnant to our own individual beliefs. But as frail and as flawed as it is, individually defined conscience is still a rare instance in the law where individual responsibility to determine moral norms is recognized.⁶

Sociologist Charles Moskos and historian John Chambers pointed out that one of the most important examples of defying laws in the name of conscience is the refusal to do mandated military service in defense of one’s country.

If the citizen soldier can be traced back to the origins of the modern Western state, an equally durable social type is the conscientious objector to mili-

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tary service. Conscientious objection is at the core of the individual’s relationship to the state because it challenges what is generally seen as the most basic of civil obligations – the duty to defend one’s country. At the same time, allowing the right to refuse to bear arms has become a hallmark of the liberal democratic society.⁷

Origins of conscience

Where do our moral principles come from? For the religiously devout, fundamental moral principles are attributed to a deity – think of the Ten Commandments – and it is seen as a parental duty to teach children to adhere to the transcendent moral code. Behaviour in violation of these divine principles is further discouraged by the belief that one’s behaviour is under constant surveillance by an all-seeing, all-knowing God, who will mete out appropriate rewards and punishments on Judgement Day.

However, religion has no monopoly on morality. Principles of right and wrong are prominent in every society and are inculcated in religious and secular upbringings alike. It is the internalization of these moral rules, combined with the conditioning of negative emotional reactions as a result of parental discipline following their transgression, that results in what we call conscience.

Psychologist Lawrence Kohlberg⁸ characterized this acquisition of moral reasoning in terms of a series of steps or stages beginning in early childhood when “good” behaviour initially results from a desire to avoid punishment. As children mature, the focus shifts from avoiding punishment to obtaining positive outcomes such as praise and gratitude. Gradually, a more sophisticated sense of morality takes root as children begin to recognize the importance of social conventions and rules for the orderly functioning of society. At this point, obligations

and responsibilities begin to exercise control. The developmental process eventually leads to the recognition that laws are not absolute statements of right and wrong but are essentially social contracts that provide the greatest good for most people. From this perspective, compromise is important, and laws change as society changes. Kohlberg posited a final stage of moral development, which he believed to be achieved by only a few, in which justice is considered more important than law, a realization that results in an obligation to disobey laws that are viewed as not just.

While there have been criticisms of Kohlberg's "stage" approach, his description of moral development generally applies. With maturity, abstract concepts of fairness and justice gain increasing importance, and as internal controls over behaviour gain strength, they supplant the need for external controls.

Yet, not everyone achieves the same level of moral development, nor do all people share the same moral principles, and not everyone has the same degree of self-discipline that enables them to resist temptations to transgress. Therefore, in order to have a smoothly functioning society where individuals' rights and properties are protected, societies cannot depend on internal controls alone.

External constraints: Law

Because we cannot rely on conscience alone to ensure the common good, every society needs laws and the means of enforcing those laws. While criminal laws typically focus on the same behaviours that are also subject to conscience, many civil laws that serve to coordinate activities and promote a harmonious society – think of the highway traffic code or laws pertaining to contracts or building codes – only involve morality to the extent that an individual believes that it is immoral to break any law.

The enactment of laws enforced by the power of the state has a long history. The Mesopotamian *Code of Ur-Nammu* written in the Sumerian language 2000 years BCE is the world's oldest known law code. Its prologue

adumbrates the worthy goals of eliminating malediction and violence while protecting the weakest individuals in the society. Different categories of crime are described along with their mandated punishments. For example, it mandated execution as the punishment for murder, robbery or rape, while kidnapping led to imprisonment and a fine. And when an accused person was found to be innocent, the accuser was then punished.⁹

Nonetheless, despite the impact of law codes, early Western civilization was riven by violence perpetrated by individuals retaliating against those who had wronged them. It was only in the 6th century BCE that leaders in Athens sought to put an end to this centuries-old uncontrolled and individualistic justice-seeking by establishing a system of justice that could be seen to be fair to all. They recognized that delivering justice is a great challenge, so they turned for help to the popular philosopher-poet Solon (638-558 BCE) whose writings had revolved around the concept of justice. He was charged with the responsibility of finding a way to slake the thirst for private vengeance through the provision of public justice. His reforms planted the seeds for an institutionalized and fair justice system and contributed significantly as well to the development of democracy itself. For the first time in history, the administration of justice was freed from the dictates of religion and was based on the notion of equality of those who came before the law. Transgressions were assessed through the adversarial process presided over by a judge and evaluated by a jury of peers.¹⁰

From those early beginnings has developed a highly complex system of laws, rules and regulations that reach into virtually every aspect of our lives. As French philosopher Émile Boutroux observed over a century ago:

Law, the expression of the collective will of societies, has become endlessly diversified, adapting itself to the beliefs, the geographical, economic, and historical conditions, and the ends pursued by different states or communities. It has none the less preserved its essential characteristics: universality, obligation and sanction...The individual con-

science did not set forth its claim to existence and inviolability as did the law. The ancients, for the most part, cared little about it.¹¹

Boutroux added that law and conscience are tied together:

Law presupposes conscience; for, whether its aim be justice or utility... it has in conscience its original source... legal articles of the most abstract and precise nature were at first individual and impermanent feelings and thoughts.¹²

The essential importance of law was emphasized by Judge Josiah Wood of the British Columbia Supreme Court who wrote in 1989 that:

It is the rule of law which distinguishes civilized society from anarchy. Everything which we have today, and which we cherish in this free and democratic state, we have because of the rule of law. Freedom of religion and freedom of expression exist today because of the rule of law... Without the rule of law there is only the rule of might.¹³

Judge Wood further pointed out that laws only work when most people agree to them:

The rule of law exists in this society only because the overwhelming majority of citizens, irrespective of their different views on religion, morality or science, agree to be bound by the law. That agreement, which cannot be found recorded in any conventional sense, has survived the deepest and most profound conflicts of religion, morality and science . . . But . . . the continued existence of that agreement is threatened by its own inherent fragility.

And he warned that:

Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored, is but an invitation to

ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.

Law and moral principle

St. Augustine proclaimed that *Lex iniusta non est lex* (“An unjust law is no law at all”), a statement that St. Thomas Aquinas later adopted as his motto, and one to which Martin Luther King made reference during the American Civil Rights Movement.¹⁴ This idea of an essential link between law and morality is a key element of the centuries-old theory of *natural law*: laws must have moral legitimacy in order to be valid. In modern times, however, natural law has largely been supplanted by *legal positivism*, in which the validity of a law is adjudicated on the basis of the legitimacy of the authorities who promulgated it and the process by which it was enacted.¹⁵ Henry David Thoreau accepted that laws are legally binding even when morally unacceptable, but he emphasized the danger of obeying “legally valid” laws that offend morality. He argued that the obligation to obey laws is outweighed by one’s moral obligations and he promoted civil disobedience as a means of defying laws that are morally reprehensible.¹⁶

The times they are a changin’

As worldviews evolve, so do moral principles. Abortion, long considered morally unacceptable, is now legal in many countries, even though it continues to offend the moral codes of a significant minority. Laws that criminalized homosexuality have been struck down in many modern nations and have been replaced by legal same-sex marriage.

Again, in the words of philosopher Émile Boutroux:

There is a remarkable affinity between the strictly human conscience and the law. By making the law its study, the conscience is awakened; its work is to create laws.... It is by relying on the law that we make ourselves capable of transcending it; it is by

laying down a law that is more universal, just and moral, more worthy of the name of law, that the conscience becomes more noble and free. Hence it follows that... the law cannot stifle the individual conscience without being changed into a blind, despotic force ...¹⁷

As civilization continues to evolve, moral principles will no doubt continue to evolve as well, and laws once considered reasonable and right will come to be seen as unreasonable and wrong. Changes in moral sensibilities lead to campaigns to change laws, and we see this in modern day struggles to outlaw workplace and pay discrimination on the basis of gender or race. Social and political tensions arise when societal values change more quickly than the relevant laws, as well as when changes in the law occur before everyone's values have undergone corresponding change. Only in an intellectually stagnant society, or one that has become stultified under the ironfisted rule of a dictator, does the pressure to revise or eliminate laws that have come to be seen as unjust ultimately disappear. •

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James Alcock is Professor of Psychology at Glendon College, York University. He is a member of the College of Psychologists of Ontario, a Fellow of the Canadian Psychological Association, and is a long-serving member of the Executive Committee of the international Committee for Skeptical Inquiry.

