



THE LIMITS OF LAW: A JURISPRUDENTIAL AND CONCEPTUAL EXPLORATION

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<https://doi.org/10.5281/zenodo.21773570>

Abstract: The law is standardly conceived as the ultimate instrument of social order, justice, and governance. However, the legal system is neither omnipotent nor boundless. The "Limits of Law" inquiry examines the structural, moral, practical, and conceptual boundaries beyond which legal regulation becomes inefficient, unjust, or counterproductive. This paper explores the jurisprudential constraints on legal intervention, analyzing where the law must yield to individual liberty, moral pluralism, structural feasibility, and institutional capacity.

Keywords: Limits of law, harm principle, overcriminalization, legal positivism, Hart-Devlin debate, law and morality, rule of law, practical constraints.

Annotatsiya: Ushbu maqolada huquqiy tartibotning mohiyati, uning davlat va jamiyatdagi vakolat va ta'sir doirasi hamda huquqiy tartibga solishning ob'ektiv chegaralari ilmiy-huquqiy nuqtai nazardan tadqiq etiladi. Ishda huquqiy pozitivizm va tabiiy huquq nazariyalari namoyandalari (H.L.A. Hart, L. Fuller, J. Raz) qarashlariga tayanib, huquqning axloq, shaxsiy erkinlik va ijtimoiy normalar bilan nisbati tahlil qilingan. Shuningdek, ortiqcha jinoiylashtirish (*overcriminalization*), huquqiy normalarni majburiy ijro etishdagi resurs hamda amaliy cheklovlar va davlatning shaxsiy hayotga aralashuvi muammolari yoritilgan.

Kalit so'zlar: Huquqning chegaralari, zarar tamoyili (*harm principle*), ortiqcha jinoiylashtirish, huquqiy pozitivizm, Hart-Devlin bahsi, axloq va huquq, huquq ustuvorligi, amaliy cheklovlar.

Аннотация: В данной статье с научно-правовой точки зрения исследуются сущность правопорядка, пределы его полномочий в государстве и обществе, а также объективные границы правового регулирования. На основе концепций юридического позитивизма и естественного права (Х.Л.А. Харт, Л. Фуллер, Дж. Раз) анализируется соотношение права с моралью, личной свободой и социальными нормами. Кроме того, освещаются проблемы избыточной криминализации (*overcriminalization*), ресурсные и практические ограничения при



принудительном исполнении норм, а также допустимые границы вмешательства государства в частную жизнь.

Ключевые слова: Пределы права, принцип вреда, избыточная криминализация, правовой позитивизм, дискуссия Харта-Девлина, право и мораль, верховенство права, практические ограничения.

A central—perhaps *the* central—question of the philosophy of law concerns the relationship between law and morality. The concern breaks down into many issues, both conceptual and evaluative. Among the evaluative issues is the question of obedience to law: does the fact that some norm is a legal norm provide any reason to obey it? (Green 2004 [2012]; Delmas & Brownlee 2021). By contrast, conceptual or analytical issues include the identification of conditions necessary for the existence of a legal system, irrespective of the system's goodness or otherwise. Must some reference to morality enter into an adequate definition of law or legal system? (Hart 1963 [1982]; Dickson 2012). And so on.

The present topic, the question of the *limits of law*, is widely understood to be one of the important *evaluative* questions, revolving around the legal *enforcement* of morality. In the nineteenth century John Stuart Mill proposed “the harm principle” as his answer; in the late twentieth century H.L.A Hart adopted a significantly modified version of Mill's principle and further important versions of the harm principle followed in the hands of Joel Feinberg and Joseph Raz (Sections 4–6 below). The harm principle in all its manifestations has encountered strong resistance, most notably from “legal moralists” (Sections 1–3) and remains in the eyes of many the focus of debate, the view to adopt, supplement or modify (as some would say), or to beat and replace (as others would say).

A more recent strand to the question of the legal enforcement of morality is Rawlsian in origin, most notably the claim that constitutional essentials and matters of basic justice should be subject to a constraint of *public reason* (Section 7). An alternative perspective challenges the assumption that the limits of law is simply an *evaluative* question focussed on law as a neutral instrument put to good ends and bad. It takes the limits of law as in part a *conceptual* question. Law of its nature has an internal morality of its own, so it is claimed, with its own built-in limits (Section 8). A further question relates to the deployment by the law of techniques beyond coercion

Legal moralism is an initially simple and natural position to take in delineating the legitimate boundaries of the legal use of coercion. At its heart is a strong link between moral wrongdoing and legal (especially criminal)



wrongdoing. In the 1960s Herbert Hart applied the label “legal moralist” to his intellectual sparring partner, Lord Patrick Devlin, and the label stuck (Hart 1963; Devlin 1965). Devlin’s account, which we come to below, has led to numerous responses; beyond Hart himself a sample might include: Rostow (1960), Ronald Dworkin (1965), Ten (1972), Feinberg (1987), Kane (1994), Jeffrie Murphy (1999), Gerald Dworkin (1999), Kekes (2000), Nussbaum (2004, 2010), Wall (2013). While many of the responses to Devlin have been heavily critical, the approach is alive and well and continues to develop in the hands, among others, of self-declared legal moralists, such as Michael Moore and Antony Duff (Duff 2016: 96, 2018; Moore 1997, 2014) and in writers who seem at least broadly favourably disposed (Tadros 2016a: 169–170). Something akin to it is also found implicit in a vast range of legal writing.

Legal Moralism is often formulated in terms of immorality as a *sufficient* condition for legal coercion. Hart asks whether the fact that conduct is immoral is “sufficient to justify making that conduct punishable by law?” (Hart 1963 [1982:4]). Larry Alexander similarly defines legal moralism as “the position that immorality is sufficient for criminalization” (Alexander 2003: 131). Joel Feinberg—mindful of the possibility that a legal moralist might want to excise from the picture certain kinds of immorality—defines legal moralism without mention of sufficient conditions:

it *can* be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others. (Feinberg 1984: 27, emphasis added)

However, Hart’s and Alexander’s formulations are at best misleading as characterizations of legal moralism;^[1] and Feinberg’s is incomplete by the measure of his own formulations of rival positions. What both leave out is the important point that immorality or wrongdoing is generally taken by legal moralists to be a *prima facie* or *pro tanto* ground for the imposition of legal coercion, subject to potential defeat by other factors.^[2] That certain conduct is by common standards immoral gives the society, in Devlin’s view, “prima facie right to legislate” (Devlin 1965: 11). The immorality is certainly a valid reason for criminalization, but such a reason will fail to be conclusive if unable to override a series of potential defeating factors that Devlin outlines. Accordingly, the

appointed law makers of society have the duty to balance conflicting values...and to form a judgement according to the merits of each case. (Devlin 1965: 117)



Devlin identifies a series of “factors which should restrict the use of the criminal law”, even where an immorality or moral wrong has been identified (Devlin 1965: viii). Balances must be struck as between “factors of principle” and “factors of expediency” (we examine some of these in the next section). Hence it will often be the case that the posited wrongness or immorality will *not* be a sufficient ground for legal coercion.

As far as Feinberg’s formulation is concerned, it is perhaps revealing to contrast his formulation of the harm principle (which we discuss below in [section 4](#)) with his formulation of legal moralism cited above.

Harm to others: It is always a good reason in support of penal legislation that it would be *effective* in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and that there is probably *no other means* that is equally effective at no *greater cost to other values*. (Feinberg 1984: 26, emphasis added)

In formulating his harm principle, Feinberg is careful to qualify his central claim with conditions relating to what would be “effective” and of what the “cost” may be to “other values”. Not so, however, when he formulates legal moralism. This may be no more than an oversight. However, considerations of the sort—potential “effectiveness”, “cost to other values”—are central to legal moralists as will be seen in the next section (Devlin 1965; Moore 1997: 663–665). Stressing these, as regards the harm principle, but omitting them, as regards legal moralism, leaves the unfair impression that the former has a subtlety and a realism that the latter lacks. Furthermore, Feinberg’s formulation makes wrongdoing or immorality sound like something of an afterthought or a factor of only marginal importance to the criminalization question. The legal moralist by contrast sees wrongdoing or immorality not as marginal or in play only after harm and offence have had their due, but as central or pivotal. Wrongs, as Devlin would have it, “shape” crimes. Of the best known—murder, rape, battery, theft, fraud, arson—so called *mala in se*—we should say “a moral idea shapes the content of the law” (Devlin 1965: 27). It is true, the moralist will say, that while these crimes are shaped by morality, the criminal offence of, say, murder is not identical to the moral wrong of murder as law will import various other requirements, of legality and so on; for example the law

must trim the edges so that they present a line sharp enough for the clear acquittal or condemnation which the administration of justice requires. (Devlin 1965: 27)



The wrongdoing is, however, essential. Hence the legal moralist takes murder, fraud etc as ripe for criminalization because they are wrongful. They may (or may not) be wrongful *because* harmful; but from the fact that harms form a significant subset of wrongs, we should not be tempted to put the cart before the horse. Harms matter a great deal, but this is because they are often a kind of wrong. As Devlin's fellow legal moralist Michael Moore puts it

we care about harm to non-consenting victims because to cause such harms (and sometimes, to fail to prevent them) breaches our moral obligations. (Moore 1997: 649)

If one were to revise Feinberg's definition of legal moralism so as to be symmetrical with his definition of the harm principle one would get something closer to the essence of the position: It is (always or sometimes) a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) wrongs and that there is probably no other means that is equally effective at no greater cost to other values.^[3]

Legal moralism, then, broadly comes in two parts, first, a wrong or immorality is identified and, second, a set of countervailing factors are considered; and considered with the aim of reaching an all-things-considered-judgement on whether legal coercion should be deployed. The wrong may be strong enough to see off the countervailing factors, as the case may be, or the factors may be powerful enough to defeat the wrong, all things considered. Thus, some wrongs will be tolerable, according to this position, and some will be intolerable. Beyond this core of the position, legal moralist accounts diverge significantly. Moore takes a specific philosophy of punishment, a form of retributivism, as an essential component of his account (Moore 1997). Duff argues that only a subset of moral wrongs should be criminalizable—public, not private wrongs (Duff 2016, 2018). Tadros, whose relationship to legal moralism is complex, also excludes a subset of moral wrongs as potentially criminalizable, for example “less serious wrongs committed in families” (Tadros 2016a: 131). Against this Moore accepts there is initially reason to criminalize *all* kinds of morally wrongful conduct—even breach of contract or treachery among friends—and leaves it to the second part of the structure mentioned above, the countervailing factors, to block the absurdity of criminalizing such conduct (Moore 1997, 2016). There is also considerable variation between legal moralists as to how “morality” is to be understood. Notably, Devlin's understanding of morality is widely rejected by his successors. Below the flexibility of the approach will be emphasized.



The inquiry into the limits of law reveals a foundational truth: the efficacy and legitimacy of a legal system depend as much on what it refrains from regulating as on what it commands. While law remains an indispensable instrument for securing social order, protecting rights, and maintaining justice, it is neither omnipotent nor boundless. As demonstrated through jurisprudential analysis, legal overreach—whether through excessive paternalism, the enforcement of private morality, or over-criminalization—inevitably erodes public trust, strains institutional resources, and weakens the Rule of Law.

A well-constituted legal order must operate within its moral, structural, and practical constraints. By respecting the boundaries of personal autonomy, acknowledging the primacy of informal social norms, and ensuring that criminalization remains a measure of last resort (*ultima ratio*), the legal system preserves both its moral authority and its practical functionality. Ultimately, recognizing the limits of law is not an admission of legal failure, but a necessary prerequisite for sustainable justice and human freedom.

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