

## MORALITY AND ETHICS

This page is concerned with three issues relating to morality and ethics at this stage:

1. how we separate a moral question away from other types of question;
2. the nature of morality and the different nature of ethics;
3. the necessary link between morality and law.

### What is a moral question?

It is a common part of our discourse to assert “moral claims” to particular goods or for people to suggest that other people owe a “moral duty” to them: but what does it mean to define something as being a “moral question”? Kant’s *Groundwork for the Metaphysics of Morals* does not deal with this question head on but Kant does suggest that a moral issue surrounds “any exercise of free will”. This, it seems to me, fails to define what is meant by a moral question. If morality equates with every exercise of free will then bending down to pick up a bottle of milk from the doorstep would be a moral action, scratching an itch behind one’s own ear would be a moral action, and so on. What Kant must mean is that every exercise of the free will must have bound up in it some trace of a moral imperative as to the decision to act in that way rather than in another way, and so on. This, still, is hopelessly broad. At the most reductive level, my decision to take a shower in the morning, as opposed to catching a plane immediately to distribute food to those who are starving, is at some level a moral question about my comfortable Western priorities about cleanliness and then breakfast which disclose a greater concern for my own welfare than for the hunger of others: but that does not help us to know what is the quality in my bundle of actions and omissions which adds the moral element, as opposed to being a queue of otherwise unrelated activities. It would be pointless to describe my conscious act of writing this paragraph, as opposed to scouring the neighbourhood for people less well-off than myself to whom I could extend my help, as being a moral decision.

Perhaps one element which distinguishes mundane, consciously value-free (that is actions which I intend consciously to have no moral content, or in relation to which I am unaware of any available moral content) activity from moral issues is whether or not that activity carries with it some question as to whether it is right or wrong. There is a clear problem here: who must decide that an issue of the rightness or wrongness of my activity is raised? Within my own moral system there may be no moral question raised at all by my choice to wear a particular brand of training shoe: however, once I am informed that children are employed in the factory which made that shoe, then I might realise for the first time that there is a moral question as to the rightness or wrongness of wearing a training shoe which was manufactured under conditions which I consider to be wrong and to which I would not submit myself. But before I am aware of these factors, does that question nevertheless have a moral base already? In other words, is there an objective context to that question which means that it is a moral question without my being

conscious of it? If so, this may go against Kant's dictum that morality has to do with exercises of the free will: that would depend on what was meant by "free will".

So, what do we mean by free will? Is that synonymous with making a conscious decision to act in a particular way? If so, that would satisfy the notion that it was an act of will, as opposed to an involuntary act. If my leg acquires a sudden cramp and I twitch involuntarily, so stamping on an insect by accident, then my part in the death of that insect would not have been an exercise of my will at all, nor would it have been free. Nevertheless, in law we make people liable for the consequences of their actions even if they did not intend those consequences, or even if they regret those consequences. Consider the following: suppose that I am driving late at night and inadvertently I fall asleep at the wheel for an instant, having been lulled into a sense of torpor by the dark conditions and the rhythmic noise of the engine. If I veer off the road briefly but am almost immediately awoken by the rumbling of the wheels on the broken earth by the side of the road, such that I turn the wheel and rejoin the road, then I will face no liability for anything as a matter of fact because no-one knows what has happened and as a matter of law because it is difficult to see what act would have brought me within any liability for careless driving and so forth (in that I hit nothing, albeit I might have stopped driving had I realised how tired I was).

However, suppose that my car slid down an embankment onto a railway line and caused a train to crash and kill hundreds of passengers (such a case occurred recently in England). In this instance the question would be as to my culpability for the homicide of train passengers, my recklessness in driving in a tired condition and so forth. In the recent English case, it was considered important that the driver was found to have been aware of his tired condition in such a manner that he ought not to have driven when he did. Here, the driver's liability is for the effects of his tiredness and not for the tiredness itself: therefore he is criminally liable for the results of his act of free will and not for his free will in itself.

Similarly, if I intend to kill you and form a plan in my mind as I sit and look at you by which I will murder you, but if I never take any step towards carrying out this plan nor do I communicate it to any other person, then I will face no criminal penalty. But if I do pick up the ice pick as I intended and carry out my plan to the tiniest detail, then I will be criminally liable for your murder. We are liable, therefore, for what we do and not simply for what we think. We are liable for the *exercise* of our will and not simply for the will in itself.

English criminal law requires a combination of the act (*actus reus*) and the requisite mental element (*mens rea*: the quality of the necessary *mens rea* differs from offence to offence) to impose criminal liability. It is only the resulting punishment which will take into account whether or not there has been regret or whether or not there were any aggravating factors, and so on. In the civil law, liability may be imposed for damages or for some other remedy if harm which is appropriate for compensation has been caused to another person, to their property and so on: again, in many cases there is no requirement that that person need have known of their liability for many heads of claim, such as negligence, will impose liability wherever the law is concerned there is sufficient proximity (in the form of a duty of care) between the parties no matter what the defendant intended or thought consciously. There are other forms of liability – such as knowing receipt of property passed to a person in breach of trust – which are dependent on the

defendant having the requisite knowledge. The latter category of case could then be said to relate to free will, whether the defendant had the requisite knowledge when he acted, whereas the former need not have any such knowledge.

So, to return to our question of what constitutes something a moral question, we can see that the law imposes liability in some cases on the basis of a conscious exercise of free will and in other cases it does not. So, how do we understand some claims as involving moral questions and others not? To frame the matter in terms of right and wrong does not help us because the law is imposed by an external body – either the legislature or the judiciary – and does not necessarily depend upon the individual having had any conscious decision to act in a particular way: rather the results of that individual's actions may be enough to impose liability. In consequence, we would have to accept that questions relating to the rightness or wrongness of given activities might have nothing whatever to do with the individual's free will: rather, the person who frames the rightness or wrongness of a given action may be a third party. And thus we come to understand morality as being an objectively imposed body of normative requirements of individuals.

Further elements of a moral question are that the question of rightness or wrongness relates to that act or omission on which the individual is being judged.

### **What is the distinction between morality and ethics?**

A useful distinction can be drawn between morality and ethics. This definition is my own and does not necessarily correspond with other people's delineation of the subject. Ethics are best understood as codes of behaviour which are most easily identified in the rules of professional bodies intended to direct the activities of their members in the exercise of their professional duties. We also talk of individuals having an ethical code: again, I would suggest that a person's ethics are in the form of a code which is absorbed as a code or a partial code from membership of some social group. Morals are defined by many people as being a social set of beliefs and attitudes relating to the rightness and wrongness of given activities. However, I prefer to think of morals as being internal to the individual in the manner discussed in my essay on conscience. That is, all individuals absorb the vast majority of their attitudes from their social circumstances: from their families, their schooling, their training in young adulthood, through the media, through their culture (whether religious, ethnic or recreational) and so on. While the individual may feel these beliefs as being entirely her own even when not obviously identifying them with an external source (an example of such identification being someone who can source their belief to a particular tenet of their religious creed) nevertheless those beliefs will have been assimilated through the acquisition of language, through the assimilation of taboo and acceptance of certain social customs, and so on and so forth.

Thus the social necessarily forms a part of the individual without the individual knowing that. So, morals are for the most part something inside the individual which comes from the social either in terms of being directly or indirectly assimilated messages from outside, or else being latent attitudes which are only brought to the individual's conscious attention by encountering some challenge to them in the outside world: e.g. realising one's disgust at a particular sexual practice for the first time only when seeing it

displayed on television, or realising one's dislike of racist propaganda only when encountering a member of a racist organisation in person in the workplace. Here, the outside brings to the conscious mind attitudes of which the individual could not consciously have known until the outside world called them to mind. While we may think that she may have had expectations of what her attitudes would have been, nevertheless it is suggested that even asking the question "what do you think your attitudes would be?" in itself is calling those attitudes to mind for the first time: so, debate may form attitudes as well as direct experience of the matter which is being discussed. So, while I may never have been shot in the head through conscious thought I can be sure I would not like it.

So, given the extent of the external input into personal morality, why do I suggest that I prefer to see it as a personal expression? The answer is that no two people's moral codes on a sufficiently large range of issues will be identical either in content or in quality: that is, while they may agree "yes/no" whether a given proposition is good or bad, the extent to which they feel that may differ. In consequence we have to recognise that individuals will internalise those external messages about morality in different ways and to different extents with the result that each individual's morality will be something unique to him or her: as is considered in the essay on conscience.

The solution to this internal/external conundrum, I would suggest can be borrowed from Marcuse whose essay on the end of the Freudian subject (Marcuse, 'The Obsolescence of the Freudian Concept of Man', collected in *Contemporary Social Theory* (ed Elliott), 1999, Oxford: Blackwell, 1) suggested that twentieth century capitalism had forged the populace into a mass so that it was possible for the first time to talk of "the masses" and to market and sell products which were designed for the masses to that mass from assembly lines designed to "mass manufacture" goods. In consequence, Marcuse considered that the notion of the Freudian subject, who had his own specific cocktail of ego, id and superego which made him unique, was rendered obsolete by this mass culture which rendered individuals simply part of a herd with broadly similar desires, opinions and aspirations. In this web-site we considered the process of individualisation which followed the mass culture era in which a much greater portion of society demands to have products and services manufactured and designed specifically for their individual needs and tastes. There is an awkward collision of ideas here: individualisation has suggested both there be a base level of customer service which the consumer wishes to be identical the world over (as discussed by Marc Auge in relation to airport and restaurant services in supermodernity) and yet a feeling that the individual is being treated as a special case with distinctive treatment and unique products which fit in with her chosen lifestyle (see individualisation). So, the marketing industry has swung from an age in which it could sell homogenous products to the masses to an era in which individuals wish to be treated as being distinctive and special, while at the same time receiving reliable service from computer systems, airline staff and soft drinks (to select some random examples) the world over.

What this means for our understanding of morality is that individuals are more likely than ever today to think of themselves as being separate and special. In consequence, the notion that moral notions are fed into the individual from outside may seem surprising because the individual comes to value ever more her distinctiveness. The individual's understanding of the world is being limited by her own sense of her uniqueness – by the language which talks of her human rights, her consumer rights and

her education to consider herself as being as valuable a person as any other person, all in a culture which increasingly seeks to serve its customers well – and by her blindness to the subtle ways in which her schooling, her desire to be accepted by others in society, and the professionally slick messages of marketing people shape her opinions. All the while, no-one will find it in their interests to challenge her belief in her own significance – the marketing people want her custom, the politicians want her vote, and the media want her attention – and therefore it is only if she is the victim of violence or convicted of a crime that she is likely to have her sense of herself challenged in a way which denies her ability to cling resolutely to her conception of herself as powerful and intrinsically valuable.

Nevertheless, whereas this sense of self generates a sense of freedom which only lack of money seems to challenge generally healthy individuals in the twentieth century, in truth the choices available to her are in truth limited. The adverts show people skiing in the sunshine, sailing on yachts in the sunshine and drinking champagne in the rain, but the lifestyles which they depict are legendarily phoney and beyond most people's realistic aspirations. The beautiful people in breakfast commercials who throw back the bedclothes in their cardboard bedrooms with a smile and dive into bowls of sugary breakfast sunshine are not real: they have no morning breath, no desire to hit the snooze button until the end of time, nor a dreadful commute to the office, to school or to the children's bedroom. And so, of course, there is an ironic advert which plays on all of these real life experiences of the morning. In truth there are limited choices for us all, unless we step sideways out of society.

By way of analogy, a restaurant will offer us the freedom to choose any food we want (provided that we can pay for it). Our freedom is limited, however, on even the largest menu by the fact that we cannot order anything that is not on the menu: and even if we insist on something not on the menu we are limited to what the cook has in the kitchen or what the shops have which the cook can buy.

But our morality allows us absolute freedom of thought, provided that we are subtle enough to see beyond the messages which we receive from mainstream culture. It is here that we develop our real selves: in the one place – our minds – on which there are no formal limits. The limits instead are imposed by conditioning – on which see Norbert Elias on the generation of the self through training – and by ideology.

It is suggested that morality is an internal phenomenon which is the result of a filtration of externally-based inputs, whereas ethics are formal codes of behaviour which may be created as a code by groups to which an individual belongs and which are acted upon as a formal system of belief or of qualification.

## **Morality and law**

This section is a very short introduction to the concept of morality and law which will be expanded upon in later developments of this site.

Before legal positivism took hold in England in the late nineteenth century it was common to think of law as being either a secular expression of god-given values or as being the expression of a system of non-religious moral values through law. In the USA it is still far more common to think of law as being based on natural law – that is, law

derived from moral principles – than it is in England because the cornerstone of US municipal law is its Constitution which supplies a code of moral principles on which the rest of the legitimacy of the substantive and procedural law of the USA can be based. The principle difficulty with arguments in favour of understanding law as being based on natural law principles is that it is said to be impossible to justify the source of those moral principles which in turn are intended to form the bedrock of municipal law. Legal positivists instead tend to argue that law should be considered to be legitimate if it conforms to the legally-accepted mechanism for creating those laws. This is to summarise the views of the positivists greatly – but even this ugly summary demonstrates that positivists may themselves have a problem in justifying the root which justifies them in creating the laws which they have created.

Leaving the essentialist question of the legitimacy of law to one side for a moment, we can nevertheless see that not all law is easily explicable in terms of morality in any event. Not in terms of any particular ethical code at any rate. Take, for example, regulation of financial services in the UK carried on under the Financial Services and Markets Act 2000. This regulation is carried on according to law and in accordance with a very large number of highly technical and obscurely drafted rules set out the various statutory instruments and the Financial Services Authority's rulebooks which were created under the auspices of that Act. For a positivist and for a practising lawyer, these rules have been created under the auspices of an Act of Parliament which was itself properly created. There is no explicit morality in the legislation itself. The rulebooks do require that those selling financial services must act with "integrity" but there is no detailed guidance on what integrity might mean in this context.

What we might take from an analysis of this legislation, however, is that there may be moral questions hidden behind the operation of the legislation. So, the role of the Financial Services Authority in carrying out its powers may be said to relate to the moral imperative to ensure that the pension investments of ordinary citizens are not invested unsuitably by regulated institutions so that those citizens suffer hardship through living in poverty in their old age as a result of their property – in the form of their investments – being mishandled. Similarly, those institutions which are regulated under the Act must ensure that the "integrity" which the Act and its attendant regulations require them to demonstrate also extends to a duty of care to their investors. And yet this moral principle does not govern the manner in which the Act will be applied to any given complaint by any given investor precisely because the Act will be given a technical interpretation by lawyers considering the extent of the financial institution's duties of integrity in any given context. There cannot be a moral *answer* to any given complaint because there is no ethical code nor any moral prescription as to the detail of each case: rather the morality is merely the context in which we might choose to discuss this problem.

Indeed, the investor is likely to wish to make the question a moral question whereas the financial institution will prefer to keep it as a purely technical question as to its investment policies and practices. Indeed, the extent to which either register comes to dominate the court's deliberations will probably be decisive of any litigation. For example, if the court chooses to believe that the financial institution has acted so badly that its actions were not merely unsuitable but actually morally opprobrious, then the court is more likely to find that the institution should be liable to its investor, whereas if

the court considers that the question is simply one of the technical decisions of the institution to invest in a particular instrument rather than another one then it is likely to find that the institution has no liability to compensate the investor. Therefore, questions of morality may simply be the register in which a court chooses to approach a given problem.

It is suggested that the question of the intimacy between morality and law is often a question of the register in which any given legal problem is approached. All laws may be said to relate in some way to a moral decision about the ordering of our social relations. Property law ensures that some are richer than others; contract law ensures that some bargains are enforced but that some promises made without consideration are not; labour law ensures that some may lose their jobs and others not; and so on. There are moral questions behind almost all laws if one is prepared to look hard enough. Some laws raise moral problems more obviously than do others: the law on abortion, the law on euthanasia, the law on cruelty to animals, and so on, lend themselves to moral debate more readily than laws on the registration of title to company shares.

Consequently, I prefer to consider law as being constantly located somewhere between moral critique and positivist technique. The significance of morality in law is when moral arguments can be successfully brought into play so as to influence legal decisions. Morality in law is frequently concerned with the prevention of a benefit being taken from an immoral act (perhaps, a murderer walking unpunished or someone taking payment for a contract when she does not intend to perform her part of the bargain) or with the prevention of a person taking unconscionable advantage of a legal rule (perhaps, someone claiming absolute title to property under an erroneously drafted will which conscience dictates they should hold for someone else, or someone claiming property which they have already promised to pass to another). In these situations, morality informs legal technique. It is a gateway through which legal argument permits discourse about right and wrong to penetrate into technical legal debates. To pretend that the law is entirely positivist and that its nature should be the result of careful taxonomies of category and subject is to overlook the fact that law infuses and supports a world teeming with moral questions.

In this sense it becomes important to ask: what is law? Law may be a vehicle for the punishment of crime or for the punishment of non-criminal wrongs by ensuring suitable compensation is paid or other retribution afforded in relation to that wrong. Law may also be a series of models for behaviour – for example, rules as to the creation of valid contracts or trusts – which does not punish those who fail to obey the rules but which does offer support to those who behave in a manner sanctioned by the law. Law operates both before and after the event in this second case. Law operates before the event in that it sets out the means by which its sanctioned models can be deployed – how to create a contract, how to register a company – and it operates after the event in that it will provide remedies supporting performance or providing compensation if people behave in a manner which does not accord with legal formality. So law is both something which is *of* the people in that it assists and formalises their inter-action and law is also something which is *done to* the people in that punishes infraction of certain rules or denies people access to things which they desired (such as failure to enforce a contract or denial of access to a child in divorce proceedings). Punishment and the denial of access to social goods are moral questions relating to the exercise of the will of the state and of the

free will of individuals. In this sense it will never be possible to divorce morality from law; nor will it ever be possible to deny law the possibility of creating models and techniques in which its goals are achieved or expressed.

To come: consideration of Fuller and Finnis.

### **Towards a theory of morality and ethics**

What is not yet on this part of the site is any detailed prescription for a scheme of morality: that is something which will come in time, however. What is on this site is a discussion of what I consider to be the two key concepts in forming a viable conception of morality and ethics, by which I mean a statement of my own views. In my view – stated as a conclusion at this stage and not yet worked out fully in writing – morality as a public system is a trade-off between the intrinsic importance of each individual human being (and animal and plant as we shall see in time) and the broader social good. A public morality must only interfere with the freedom or autonomy of an individual only in circumstances in which there can be demonstrated to be a compelling public or social good. Neither should be sacrificed completely to the other but it should be recognised that the broader social good will generally achieve most of the good which many individuals would want and therefore protection of the individual is frequently about the protection of activities of limited scale.

As to the consideration of these things on this site. First, consideration of the value of individuals is carried on in the essays on conscience, on autonomy, on human rights and particularly on individualisation. In particular this last essay considers the need for general security to protect individual interests before we can have recourse to complete anarchy. In relation to the general good the essay on social justice considers the framework for assessing the social good in detail.