

Legislating Morality: It's Not as Scary as You May Think

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Legislating morality is appropriate, required, and inevitable—and it's dangerous to think otherwise.

Appropriate

It's appropriate for people to choose the laws they live by.

Let's not confuse dissatisfaction in one area of legislating morality with a blanket rejection of moral legislation altogether.

Legislating morality recognizes:

- (1) Political Authority
Legislating morality recognizes the strength of individual human autonomy.
- (2) Moral Voice
Because it's appropriate to legislate morality, a morally bad law can be changed.
- (3) Moral Guidance
 - (i) Our imperfect rationality
 - (ii) Our lack of self-control

Required

The state can and should prohibit some immoral acts merely and only because they are immoral.

- (1) Legal History
 - (i) Religion
 - (ii) Morality
 - (iii) Rights
- (2) Legal Moralism
As a matter of the law itself, we still make things illegal only because they are immoral.
 - (i) Informational Blackmail
 - (ii) Dwarf-Tossing
- (3) Paternalism
Saying that something is illegal because it's bad for you. Well, even here, we are required to legislate morality. Example: Suicide.

Inevitable

The question isn't whether you are legislating morality, but what kind of morality you're legislating.

Problems with a Rights-Only Approach

- (1) Conflicts between Rights
- (2) Conflicts over the Same Rights
- (3) Conflicts about the Nature of Rights
 - (i) Can I relinquish my rights?
 - (ii) What's the basis for rights?

Dangerous to Think Otherwise

- (1) Judicial Activism
- (2) Big Government
- (3) The Totalitarian Impulse

Concluding Example

In response to the question, "What's the Most Important Supreme Court Case No One's Ever Heard Of?" Elizabeth Wurtzel told *The Atlantic* the following:

The 1989 case *Michael H. v. Gerald D.* tells us what would happen if Justice Antonin Scalia wrote a Harlequin romance. We have a California model, her New York City husband, her boyfriend next door, her boyfriend down the road—and the daughter they all love.

Scalia led the majority in siding with California law, which generally presumes a woman's husband to be the father of her children, regardless of anyone else's claims—because having a stable family matters more than biology.