[1]*The Journal of Medicine and Philosophy*, 1978, 3, 226-241.

Joseph Agassi

Liberal Forensic Medicine

THE VASTNESS OF THE PROBLEM

The liberal approach to ethics quite naturally tends toward the classic individualistic theory of society, to reductionism or psychologism so-called, that is, to a reduction of all social action to individual action.[2] For example, liberalism allows one to experiment with new medications on one's own body. By extension, liberalism allows one to experiment, it seems, on another person's body with new medication if one acts as the other person's agent, that is, if one has the other person's proper consent. We all know that new medicines are introduced into the market experimentally; indeed, government agencies, such as food and drug administrations, are supposed to supervise such experimentations and eliminate from the market as quickly as possible new (or old) medications that prove harmful. Hence, the very introduction of a new medicine into the market requires the consent of the public - in the form of proper permits to manufacture and market new (and old) drugs and other medications.

Yet, there is a flaw in this description. Individual citizens do not make the act of permission to doctors who act as their agents. As we saw, government agents grant permission to doctors; and even if we assume that both the government and the doctors act as the citizen's agents, the picture is too abstract and remote to be reduced to individualistic theory or to psychologism. In the first place, the individual is ignorant of much that goes in his name, and so his delegation of action is not the same as his own; and in such a situation the individual needs moral rules to guide his conduct as a citizen rather than as a mere individual. For the very anonymity of victims of medical action or inaction raises new moral problems not reducible to individual actions and its delegation (Agassi, 1971).

I have in mind such a simple act as inoculation. It is very commonly held, and in my view quite rightly, that any large-scale inoculation is likely to cause some damage, even death, especially in areas where epidemic is usually feared, namely, in dense backward populations. In such populations there is no telling whether there are any people allergic to the serum used, whether sanitary requirements will be fully observed, etc. Accidents will happen. Yet, usually, when an epidemic is predicted with a high enough probability, health departments seldom hesitate to administer inoculation to vast populations in the hope of preventing epidemics and thus saving lives. Even if the epidemic is not of a usually fatal illness, preventing it may save a sufficiently large number of lives to warrant action. Hence, we have here an argument from sheer numbers.

At least we are dealing here with a number of lives against a number of lives; at least we do not weigh the number of lives in gold. Yet in other cases we do, when we publicly spend money on inessentials, whatever these may be and however these may be produced

---

1

[2] The two traditionally competing social philosophies, reductionism and psychologism, encompass vast literatures, and not surprisingly so. From the individualistic viewpoint, the classic historical study is Halevy (1955), a comprehensive contemporary anthology is that of O'Niell (1973), and the contemporary survey of the same is that of Jarvie (1972). For more detailed examination, see Agassi *(1975a,* 1977). The collectivist literature is more diverse than the individualistic one, and I know of no good survey of it.

or consumed, instead of producing more ambulances and kidney and heart-lung machines, etc.[3]

Of course, there is always the argument that we do not really know how many lives will be saved by producing more ambulances and how many lives will be destroyed by the cessation of production of cosmetics – say, by the destruction of the means of livelihood of all those employed in the cosmetic industry. This argument sounds weak. There is the better argument that we all willingly raise to a slight extent the chance of death in exchange for the use of cosmetics. Here the anonymity of those who die from the shortage of ambulances, or from non-life-saving medication, is an essential element in the picture, since it makes the situation a gamble. Yet the first argument may now be restated: how do we assess the odds?

Here, in the second place, we have a factor not reducible to individual interactions. The assessment of the odds, even the very game of chance with lives, cannot possibly apply to small-scale individual interactions. And it also raises in us the problem of social responsibility - as opposed to individual responsibility: it is not a mere problem of numbers, but also of new kinds of problems, problems of the individual's responsibility toward his society at large, not only to all its members. For, he has the simple duty to consider, however cursorily, the question, what kind of society does he think it is proper to have, one with cosmetics or one whose total effort is devoted to the saving and preserving of lives? And how much effort should be put into this question? Should he put so much effort into it as to have a society devoted to learning and no entertainment?

But, in the third place, social responsibility is not only the individual's duty to his society. As we have noted, the individual in a modem society delegates an enormous portion of examination and decision in matters of his own life and death to social institutions, and these have to be responsible to the individual. The responsibility in question is partly that of the individuals who man these institutions. But this is only a part of the responsibility of institutions. In addition, institutions should be responsible in the sense that they should be so structured or constructed as to enable and even encourage public servants to act in the interests of the individual citizens which the government represents, not only in the interests of the government and its members.

This is no small matter. Any medical practitioner or public servant, in almost any capacity, who has experienced the effects of public institutions on public servants in Western countries and in backward countries, or even anyone who has compared such influences in different Western countries, must have observed this: at times a public institution is so poorly structured that it corrupts or eliminates any official who tries to behave decently or even any official who tries to keep himself within the bounds of the law. Thus, the encouragement to officials to act responsibly, when it takes place, is no mere accident but the outcome of much forethought and planning and organization.

How is this done? How do the citizen and the public servant discharge their duties at all reasonably well? How is the knowledge of the means of the smooth operation procured, and how is the knowledge necessary for the decision-making process procured? Who is to preside over such operations, and how does he discharge his duties?

---

[3] This point-that prolonging life must be weighed against social cost-was discussed by George Bernard Shaw in his prefaces to his diverse plays, especially *Doctor's Dilemma* and *Back to Methuselah.*

No doubt, the duties here referred to are both legal and moral. Even were we in possession of knowledge of our relative moral and legal duties, there is always the possibility of a clash between the two. What, then, is a citizen to do? What will he do when his professional ethic, his legal duty, and his sense of justice each pulls him in a different direction?

These are real problems with real examples in the history of medicine, even here and now. I do not pretend for a moment that even those simple and obvious decision procedures that are widely taken to be quite unproblematic are the best or as unproblematic as we would like them to be (Kaufmann, 1973).

Yet, some systems work fairly well, and, obviously, some of them are vastly superior to others. This is not to say that we can order them all on one scale: everyone knows that, in some respects, even the worst system is better, however slightly, than the very best we know. Nevertheless, we do prefer some systems to other systems with no hesitation, and the reason for such preference can be articulated and perhaps even utilized for the further improvement of some of our best systems of medical practice.

PRELIMINARY CONSIDERATIONS

I have before me a six-page essay by Irving Ladimer, of the American Arbitration Association, called "Social and Legal Responsibility in Medical Innovation" (Ladimer, 1973). I have chosen it because it is concise, because it speaks of innovation - and if we permit no innovation we do not have the problem at hand - and because it clearly distinguishes between the legal and the moral duties placed at the medical **man**. These qualities make the essay outstanding.

The first moral rule (189) of the medical profession that Ladimer quotes is, naturally enough, "do no harm." This is easier said than done; it is all right as a primary desideratum, but it can and does clash with others. Even the weaker rule - "do not knowingly harm a patient" - which is better, is of a very limited applicability, since we usually increase the chance of harm through neglect, through ignorance, or through ill luck. Even the still more qualified rule - "do not knowingly harm a patient without warning him' - which is still better, does not signify much; the warning is either too specific or too general. Now, specifically, the patient is no expert and, therefore, he lacks the specific knowledge to comprehend the specific warning and generally he knows that all medicine, as all action, involves some risk, and so the general warning is redundant.

The second moral rule (190) that Ladimer presents is, minimize the number of people you put into jeopardy. This does not clash with the first rule only when it is read to say, do not knowingly harm your patient. The second rule should likewise read, minimize risk as best you know how. But risk due to research is of necessity a gamble. Shall we take it? When?

These two moral rules are all too obvious and are seldom even stated, let alone discussed as fully as they deserve. They are trite and they are formulated as trite and unproblematic. Indeed, if anyone finds either of them problematic, we will reformulate them so as to avoid the problem and handle the problem separately.

This, incidentally, is good policy: whenever a rule is reasonably questioned, try to split it into the still unquestioned part and the questioned part. For, social life depends on consensus, and this is a cheap way to retain some.

Now, the two trite and unproblematic rules already suffice to help us decide against most systems of medicine practiced now in some place or another. This is shocking but obviously true. Most societies do not have the rudiments of public health as practiced in the West, and they are now just introducing them with results so stupendous as to cause the current population explosion that threatens the very continuation of human life on this Earth! Also, most existing public health systems are very poorly organized and manned. For example, most of the medical aid to poor countries, Red Cross, UNICEF, and the like, does not reach its destination due to simple difficulties caused by inefficiency and corruption.

I do not mean to put the two moral rules just mentioned in question. I mean to indicate that even putting to practice a most obvious principle may cause serious problems, perhaps even insurmountable ones.

The third moral rule (190) Ladimer mentions concerns medical research: it should be well done and honestly conducted. The fourth (190) is that of informed consent "of all those who participate in medical research." Again, "as much as possible" should hold for both principles. Anyone involved, even slightly, in any organized academic activity whatsoever, knows how hard it is to conduct it morally. For example, if research would improve by increased cooperation between medical and biological researchers, it is almost certain that enough objection from medical quarters will be whipped up to prevent it. Indeed, it is amazing how little cooperation there is between researchers on the same questions, belonging to different universities or to different schools in the same university, or between medical and non-medical researchers in general.

I know personally quite a few medical men who know all this to be the case, who are honest, yet who will do nothing whatsoever about it, not even admit it in public. How moral should we get? I do not know, and I do not know whether the advantage accrued by medical research is any compensation for all the unadmitted failings of the system and even of given individuals. I do not say this in order to demand that research stop or even that it improve, but as an argument to indicate the poverty of the blanket demand that research be conducted honestly and well (Agassi, 1969). For, if we insist on this demand, we thereby doom all medical research to immediate termination for an indefinite period. Hence, we must make the demand more specific and state it in a more qualified way.

Legal demands, however, are much easier to implement, simply because they are made not in the vacuum that moral demands are usually made but in sufficiently clearly specified institutional terms. We can easily compare a legal and a moral demand in this respect. For example, the demand for "informed consent" is both moral and legal. Indeed, it occurs in Ladimer's list of moral demands, as we have already noted. It also occurs as his first legal demand. The moral demand, we saw, is very hard to comprehend, since there are so many unresolved questions concerning it (Fletcher, 1960, 43 and chap. 2). By distinction, the legal demand is quite specific. Indeed, it is specified differently in different countries and places, and so anyone who is in doubt about it simply ought to consult a lawyer. This is not to say that the law is clear enough or good enough; after all, such matters are liable to further improvements, whether by courts or by legislatures.[4]

---

[4] See Hart (1963), Foucault (1965), and Szasz (1975), for the great progress already accomplished in this respect, unsatisfactory though the present situation still is.

But, to return to Ladimer, he adds the simple observation that many doctors violate the legal demand to inform their patients and procure their consent. Now, clearly, they often enough violate both the legal and the moral demand; but whereas they may, in ethics, try to defend their neglect, legally they simply cannot do so. Does this make their moral defense not good enough, or does it make the law not moral enough? There is no other alternative, I think.

Ladimer himself mentions at once here morally justified illegal conduct of doctors, whether performing an abortion (which is still illegal in many countries) or whether neglecting to inform the authorities regarding clients. Yet Ladimer demands that physicians always respect the law. Does he also forbid doctors from ever speeding on their way to an emergency? I don't really think so, and I think he is quite shoddy on a matter in which he poses as an expert and has influence that could be much better: all he says is that a doctor should be prepared to be punished for breaking the law. But the question is, what should a doctor do if he disapproves of the law, if he sees people dying and can easily save them by breaking the law? How much time and effort should such doctors put in legal reform, and how much in medical practice? Which saves more lives? Who knows? Should he try to find this out?

The second legal requirement Ladimer mentions has to do with legal qualifications. These, obviously, raise questions of medical guild rules. How serious are these? All Ladimer says, again, is, if you break them you may suffer; we all know that.

The third legal demand is to avoid improper and negligent conduct. Again, the law is specific enough. As everyone knows, the law is conducive to neglect through inaction by the avoidance of considerateness. If you are a doctor in a foreign country passing through the scene of an accident, you have a conflict on your hands between the legally commended conduct and the moral one. Ladimer, rather, turns to cases of research and of the need for formal consent. He then moves to cases of neglect, on which he says only that they are judged by the local standards of the community. That is true enough, except that the major factor lowering the community's standard is the conspiracy of silence. For, the standard is determined by the most outrageous conduct condoned in courts, and the unwillingness of doctors to testify against colleagues except in extreme cases lowers the standard to what doctors consider extreme cases.

This is an exaggeration: First, competent lawyers can break doctors' conspiracy of silence. Second, the profession often penalizes a member even after having testified in his favor under oath so as to get him off the hook. And, by inflicting such penalties, doctors do raise the standard a bit. Yet doctors could easily raise the standard much more were they honest witnesses. But there may be side effects to this! Will honest testimony only raise the standard or also scare some people out of the profession and make others hardened criminals? I honestly do not know.

Nevertheless, we can note, first, that Ladimer observes fairly correctly what are the most superficial, most preliminary moral and legal requirements from the profession. I think he underplays problems and overplays research (most practitioners have no part in it whatsoever), but he is scarcely in the wrong. It is amazing that with so little, and so ridden with problems, Western medicine went so far ahead of what it was a century or two ago. Of course, research was not only, not even mainly, medical: biologists, chemists, physicists, statisticians, and social thinkers have contributed much to the progress of medical knowledge; and much progress, let us not forget, was introduced in

the face of protest from the medical establishment (Slaughter, 1961, final 2 chaps.). Nevertheless, the fact remains. Vague and even confused as the rules may be, their commonsensical application to medicine does perform miracles. Is this all there is to it? Can we honestly conclude that in any place where the stated precepts are adopted by the medical profession the results will be as stupendous? Certainly not.

THE THEORETICAL BACKGROUND: THEORIES OF RATIONALITY

I must leave Ladimer with only half his essay examined. From there on, the quality of his essay is such that I prefer to ignore it. Nor is this peculiar to this one essay. I find the literature particularly wanting because here the mechanics of democratic legislation and democratic implementation of innovations enter, and no student of medical ethics and of research ethics I know has properly noticed, let alone adequately approached, the problem at hand. Nor is this a cause for surprise or censure: things are not simple in the least, as I wish to briefly indicate now.

The major trend in all Western philosophy that is peculiarly Western is what we broadly call rationalism. And the strange fact characteristic of practically all traditional rationalism is that it is practiced in one way and presented by philosophers in quite a different way. And this accounts for the fact that such study areas as forensic medicine, where practiced rationality seeks theoretical foundations, are in a peculiar jeopardy (Gurwitsch, 1957; Husserl, 1965; Agassi, 1974; Fried and Agassi, 1976).

I will go further. Philosophers who theorize about rationality have quite often presented two theories of rationality, known in the current literature by the names of justificationism and critical rationalism (Bartley, 1962, chap. 5; Popper, 1963; Bartley, 1964, 21; Agassi, 1975). Justificationism often gets into trouble, and irrationalists often attack rationalism by pointing at the well-known difficulties of justificationism. Quite understandably, rationalists feel that this is cheap and demand that the irrationalist abide, if not by the severe standards of justificationism, at least by the laxer but still decent enough standards of criticism. Hence, even avid justificationists are bound to switch to criticalism rather than stick with justificationism when engaged in combat with irrationalists. In practical matters they tend to do the same, especially since it is in matters of social action that the rationalist is most likely to sit at the same table as an irrationalist (Agassi, 1973).

When critical rationalism was at last developed, or redeveloped, by contrasting criticalism with justificationism, some irrationalists and some justificationists, even some former criticalists (Feyerabend, 1975, 48), have repeatedly pointed out that critical rationalism was never forgotten. The fact that I deem important is that it was often enough too weak to oust justificationism but that now the contrast is clear due, chiefly, to the philosophical effort of Karl Popper.

I shall state the contrast in one short paragraph and then move quickly to fields of application.

It seems so very obviously rational to give up one's view when that view has been effectively criticized that one hardly bothers to state this. Also, it usually seems to be not enough of a rationality: we usually want not only the justification of our rejections of views, but also and more so the justification of our acceptance of them. Critical rationalism denies that. For the critical rationalist, the act of acceptance, rather than, say, the fact of finding oneself believing in this or that theory, is a rational act insofar as it

seems to suit given ends (Jarvie, 1964; Agassi, 1975, 405); the ends themselves either happen to be accepted or are modifications of previous ends, or ends taken for granted or justified by other ends which are taken for granted (Jarvie, 1964, 220). The uncritical rationalist – namely, the justificationist – demands that each acceptance of each view *and* each end should be justified properly by the proper canons of justification. Hence, in particular, though he will endorse the view that criticized views should be rejected, he strengthens it to say even uncriticized views should be rejected unless and until they are justified. Hence, unlike the critical rationalist, the justificationist or uncritical rationalist will hardly bother to criticize unfounded views: often he will deem his critical job performed when he shows a view unjustified. This, of course, raises the question, what are the canons of justification? We do not know. The justificationists are still debating this question. There is also the question, by which canons can we justify the canons themselves? This question is what makes justificationism hopeless to begin with. When a justificationist realizes that his justificationism is in trouble he is willing to shift, pro tem, to critical rationalism, in order to save at least rationalism in any shape or form. But he soon reverts to justificationism and forgets or fails to notice that justificationism and critical rationalism are in conflict.

Now, the main field of application of rationalism is the theory of science or of knowledge. Is science justified, and how? The critical rationalists before Popper – from Socrates onward! – either evaded the question or answered it inadequately. Popper has suggested that all theories are unjustified; nevertheless, we prefer better explanations to worse explanations since we wish to comprehend, and we wish them to be testable in order to have a reason to accept them.[5] The result, says Popper, is that we have some interesting ideas that at times we prove to be false and thus find challenges to seek better ones. This answer is excellent as long as we keep technology quite apart from science (Popper, 1970, 53). When we come to technology, I think Popper's theory is not acceptable, and I have a better suggestion to offer, I think (Agassi, 1975b, chap. 12).

For the justificationists, science and technology are one: we apply in practice those theories we know to be true. We know this theory to be false: technology employs theories which are known to be false, whether Galileo's and Newton's mechanics, or classical elasticity which is anti-atomistic. Of course, we have good reasons for doing so, but doing so renders classical justificationism false.

Traditionally, however, philosophers scarcely bothered with rational technology. They did bother about rational ethics, which they viewed as the theory of knowledge of right and wrong, and so their ideal was that of scientific ethics. Strangely enough, they centered on daily interpersonal relations where neither technological complications nor political ones played any role – perhaps because these easy cases were hard enough, perhaps because they felt that, if citizens were morally good, politics would be unproblematic or even perhaps nonexistent.

Not that there is no traditional political theory. Rather, I suppose I can see why it centered on the question: how can we justify political authority? No doubt, answers to this question would, and at times did, suggest which kind of regime the person answering it would favor. But, remarkably, the regime came second to sovereignty: what legitimates the power of the sovereign? Traditionally, two and only two alternative answers were

[5] This is the point of Popper's classic "The Aim of Science" reprinted as chap. 5 of Popper (1972).

given, nature or convention. Only irrationalists like Edmund Burke claimed the authority of both (O'Gorman, 1973; Agassi, 1976, 219-20). The naturalist justification was too extreme in that it justified too much: with finality it supported one and only one regime as suitable to human nature (Akzin, 1968, 231). The conventionalist went too far the other way: he defended any workable regime, or, say, any stable regime. This leads to the cynicism often met in the Department of State and defended by Professor Samuel Huntington of Harvard University: any stable regime, communist, fascist, or whatever, is to be supported (Cairns, 1949, 537-38; Huntington, 1968, 72-92).

Legal philosophy follows the wake of political philosophy and of the theory of knowledge. It is thus doubly justificationist and narrow. Forensic medicine, then, has hardly a chance when couched against such a poor background. The only consolation it has is that, since justification ethics also rests on a justificationist theory of knowledge, there may be some congruence between forensic medicine and medical ethics. The connection is, naturally enough, human nature. And since conventionalists have little appeal to human nature, it is no surprise that the bias of forensic medicine is naturalist, not conventionalist.

But the regimes we live in, even the best, are not, definitely not, ideally suited to human nature. And so the medical man faces a crisis of conscience with other people's lives in the balance of his decision. Doctors are not to be envied for the unjust moral burden placed on their shoulders. If some of them seem to laymen too callous, this is either (usually) a mask or (in some rare cases, it is to be hoped) the result of a collapse under the heavy burden. And the burden can, indeed, be very heavy. Of course, not every move made by a doctor is either illegal or immoral, and not every such move involves life and death. But even one such case in a year or two may be too much. Even one such case may be too much: a doctor may refuse the unjust burden, use his common sense, and make do as best he can (Szasz, 1963).

This, by the way, is exactly what legislatures do from the beginning of parliamentary democracy. They do preach, if and when they philosophize, either a naturalist or a conventionalist theory, but they practice legal reform. They practice reformism while muddling through, to use George Bernard Shaw's apt expression.

Muddling through, though the best we had, had two major defects. One, it looked definitely anti-intellectual, and even the thinnest anti-intellectualist of guises is soon interpreted by some to be license for violence – moral and political. Two, the idea of muddling through politics, or even in politics as well as in ethics, leaves entirely neglected and unattended the vast and profoundly important field of political ethics.

It is thus no surprise that recently the view that all politics is utterly subject to ethics has been preached all over the West, and with violent means. The paradigm was the Nuremberg trials where Western Allies accepted the claim that, though Nazi atrocities were committed legally, since they were immoral, courts of justice could find their performers guilty. This amounted to saying that any court must accept any conscientious objection to any law and command. Obviously, this is not the intended reading, since the intended reading was regarding obvious immoralities of an obvious monster of a regime (Dinstein, 1965, 88-90, 242-52, 253; Falk, 1972).

Yet at about the same time when ethics was declared to be capable of overruling all law, a debate in England that H. L. A. Hart of Oxford University launched against Lord

Devlin apropos of the celebrated and epoch-making Wolfenden Report forged a new philosophy of law (Wolfenden, 1957; Hart, 1963; Devlin, 1965; Agassi, 1974).

Before going to details of the Wolfenden Report, however, let me conclude this section. When all is said and done, the classical liberal philosophy lays responsibility for decisions solely at the door of the individual (Hart, 1951; Halery, 1955; Hayek, 1955). It is thus nearest in spirit to the latest rebellious ideas of utter conscientious objection to anything deemed immoral. This extreme rebellious idea makes excellent sense on the suppositions of justificationist rationalism, especially the one concerning the possibility of infallible moral knowledge. Clearly, once this premise is questioned, and a diversity of moral theories is permitted as rational, though most of them should be false, we see that there must be more to society than that.

ETHICS AND THE LAW

The question the parliamentary commission headed by Sir John Wolfenden was appointed to examine was that of certain victimless crimes, so-called, more specifically, homosexuality and prostitution. It is sheer luck that the victimless crime the commission was particularly studying, namely, homosexuality, turned out - to many people's great surprise - to be an extremely widely practiced one: in Britain, one person in twenty-five, male or female, the commission estimated, is a homosexual, and a much higher percentage (one psychologist had estimated up to one in three among college students) is at least strongly attracted to homosexuality (Hyde 1970, 11-12). This troubled the British more than the question of victimless crimes. For, it is a sane rule of legislation that a law violated regularly by a considerable portion of the population should be better enforced or repealed.

I mention this because it is of great significance both in medical ethics and in forensic medicine, where debates about legal abortion, persist and will persist for quite a while. Many debate the question, is abortion a victimless crime or is the fetus a legally rightful or a morally rightful victim? But here the more urgent issue is the widespread incidence of illegal abortion in many countries, which corrupts young women, doctors, unlicensed abortionists, and many others (Packer 1968, 151-52; Zinberg and Robertson, 1972).

To return to victimless crimes, there is no doubt that they constitute a specific category even in the popular mind. In the United States, organized crime, the greatest menace to civil society there, feeds on drugs – at times alcohol, at times cannabis – gambling, and prostitution, where and when they are criminal by law. This is so because the public cooperates with them. The public thus exhibits a conflicting attitude toward these acts; they are both desired and undesired; the public both wants them illegal and wants to practice them. It wants them illegal in order to curb them, even though it knows laws can be broken, and oft are broken. The population at large accepts this situation even though it knows that organized crime is thus thrown into the bargain, including gangland warfare and all that goes with that. Is that wise?[6]

Lord Devlin rendered a service when he bluntly took a philosophic uncompromising view. In a democratic conventionalist stance he said, never mind whether homosexuality is evil, or whether I think it is evil (it is not, and he did not think it is); what matters is

[6] The fact that at times the majority votes to prohibit practices in which the majority engage is hardly noticed in the literature. See Waninger (1958); Room (1976), who refers to Waninger as a classic and who notices the difficulties involved; Silberman (1976).

that the public detests it and wants it banned and has the right to legislate against it. And, in reply to this, H. L. A. Hart took a new stance, though one adumbrated by Karl Popper: laws are there to be improved and made to better accord with our moral code.[7]

The question remains, in the meantime, what is a practitioner to do when the law and his conscience conflict?

The traditional liberal attitude is not good enough. As we have seen in the beginning of this essay and again a few paragraphs ago, the traditional liberal view centers on morality and wishes the law to reflect nothing but morality, to be so limited as to have hardly a chance to conflict with ethics, etc. This is sheer utopia. Indeed, both the liberal utopia, which leaves all decisions to the individual, and the collectivist (Platonist) utopia, which leaves all decisions to the State, are so unrealistic as to be utterly useless. As we have seen, at least one writer on forensic medicine - and one of the best, I think - can tell doctors nothing more than that if they break the law they may suffer the consequences. Doctors' conspiracy of silence apart, this is an obvious truth that is hardly a guide to a doctor, especially a researcher, who has a moral-legal conflict on his

The moral-legal conflict can be presented dramatically for rather rare cases. It can be put less dramatically for cases of victimless crimes such as drug taking and euthanasia. One can put it even less dramatically to render it applicable to common everyday matters such as prescription of medicine by unauthorized persons. Everyone with hospital experience knows that it is both forbidden and demanded of nurses to prescribe and administer such drugs as painkillers, sleep inducers, sedatives, tranquilizers, emergency injections of all sorts, etc. Everyone even slightly sensitive to nurses' plights must notice the hardship this double bind creates for them and the opportunities it opens for cruelty to them by all and any of their supervisors. But enough of that.

There is no doubt that every citizen may have at times the opportunity to be torn between law and morality. And, no doubt, in such cases the democratic straight rule is, be honest and if need be, be damned, or even be honest and be damned anyway. But this straight rule conflicts with other, equally straight rules, such as that one has duties to kith and kin and colleagues and underlings, and that one should not escape these by cavalierly going to jail.

Here the double-bind is no small matter. The law is no help, since it is one form of a dilemma. So is custom or received moral opinion. And so the individual citizen has to decide, on the grounds of both principle and expediency, when it is not just cavalier to go to jail. Yet, on the whole, no one can ask of another to go to jail except in such extreme cases, perhaps, as when forced to commit Nazi atrocities.

Nevertheless, members of the medical profession can and perhaps should try to liberalize the law, so as to abolish all victimless crimes, and permit euthanasia. In principle, the law should not be made a means of exercising control but of enabling people to exercise their responsibilities.

This, however, covers only a small part of medical praxis. Quality control of medications, for example, old or new, is no small matter, and we have not touched upon it yet. More generally, I think we can first develop a view of social responsibilities of

---

[7] Devlin's uncompromising position is, "immorality, then, for the purpose of the law, is what every right minded person is presumed to consider immoral." Yet, careful reading shows all sorts of qualifications.

individuals and then of institutions.

The first principle of the social responsibility of the individual seems to me to be that of the delegation of authority: when you perform a service for me, I have to commission it. And if it is my responsibility, then I am not absolved of it unless I have successfully delegated it to a responsible person. And, finally, I can delegate the task of examining people for their competence and responsibility to professional examiners (Agassi 1971).

So far so good. Except that the professional examiner must be put under democratic examination and control (Feyerabend 1976, 189). And in medicine this seldom is the case. This explains why only public scandals lead to significant changes. But, clearly, at least some public scandals are easily predictable, and at least in these cases it is wise, and desirable for all parties involved, to begin proceedings toward significant reform long before the scandal explodes. Why, then, is this not done? The answer is complex. First and foremost, there are no institutions to this end. Second, often a scandal is caused simply by efforts to bring an issue to the public eye - at times even in cases where medical ethics and forensic medicine violently clash, for example, the situation which Good Samaritan legislation came (in vain) to remedy. Third, most people do not pay heed to prediction, out of ignorance and out of complex social conditions.

Yet, clearly, here lies the future of all wise technological legislation, including, in particular, legislation regarding what is acceptable medical practice.

To conclude, ethics and the law clash regularly, and legislation is the attempt to close the gap - at times unsuccessfully, at best partly successfully. This is the starting point, I propose, of all serious study aiming toward the development of better and more liberal forensic medicine.

REFERENCES

Agassi, J. "The Concept of Scientific Theory as Illustrated by the Practice of Bloodletting." *Medical Opinion and Review* 5, 1969, 156-69. Reprinted in J. Agassi, *Science and Culture, Boston Studies in the Philosophy of Science*, vol. 231, 2003.

Agassi, J. "Qualifying Exams, Do They Qualify?" *Educational Forum*, 1971, 156-66.

Agassi, J. "Rationality and the *Tu Quoque* Argument." *Inquiry* 16, 1973, 395-406. Reprinted in J. Agassi, *Science and Society, Boston Studies in the Philosophy of Science*, vol. 65, 1981.

Agassi, J. "Conventions of Knowledge in Talmudic Law." In *Studies in Jewish Legal History in Honor of David Daube*, edited by Bernard S. Jackson. London: Jewish Chronicle Publications, 1974; also published as a special issue of *Journal of Jewish Studies* 25, 1974, 16-34.

Agassi, J. "Institutional Individualism." *British Journal of Sociology* 26, 1975, 144-55. Reprinted in J. Agassi and I. C. Jarvie, *Rationality: The Critical View*, Dordrecht: Kluwer, 1987.

Agassi, J. *Science in Flux. Boston Studies in the Philosophy of Science*, vol. 28. Dordrecht, 1975.

Agassi, J. "Critical Study: Against Method" and "Replies." *Philosophia*, 6, 1976, 165-76 and 190-91. Reprinted in J. Agassi, *The Gentle Art of Philosophical Polemics:*

Selected Reviews and Comments, LaSalle IL: Open Court, 1988.

Agassi, J. *Towards a Rational Philosophical Anthropology.* The Hague, 1977.

Akzin, Benjamin. "Legislation, Nature and Function." In *International Encyclopedia of Social Sciences*, edited by David L. Sills, Vol. 9, 1968.

Bartley, W, W., III. *The Retreat to Commitment.* London and NY, 1962.

Bartley, W. W., III. "Rationality versus Theories of Rationality." In *The Critical Approach, Essays in Honor of Karl Popper*, edited by Mario Bunge. NY and London, 1964.

Bartley, W. W., III. "Theories of Demarcation between Science and Metaphysics." In *Problems in the Philosophy of Science, Proceedings of the International Colloquium in the Philosophy of Science, London, 1965*, edited by I. Lakatos and A. Musgrave, 1968.

Cairns, H. *Legal Philosophy from Plato to Hegel.* Baltimore, 1949.

Devlin, Patrick. *The Enforcement of Morals.* London, 1965.

Dinstein, Yoram. *The Defence of "Obedience to Superior Orders" in International Law.* Leyden, 1965.

Falk, Richard A. *The Vietnam War and International Law.* Vol. 3: *The Widening Context.* Princeton, N.J., 1972.

Feyerabend, P. K. *Against Method.* London, 1975.

Feyerabend, P. K. "Replies to Agassi." *Philosophia* 6, 1976, 177-89. Reprinted in J. Agassi, *The Gentle Art of Philosophical Polemics: Selected Reviews and Comments*, LaSalle IL: Open Court, 1988.

Fletcher, J. *Morals and Medicine: Moral Problems of the Patient's Right to Know the Truth, etc.* Princeton, N.J., 1954; Boston, 1960.

Foucault, M. *Madness and Civilization: A History of Insanity in the Age of Reason.* NY, 1965.

Fried Y., and Agassi, J. *Paranoia: A Study in Diagnosis.* Boston Studies in the Philosophy of Science vol. 50, 1976.

Gurwitsch, Aron. "The Last Works of Edmund Husserl." *Philosophy and Phenomenological Research* 17, 1957, 370-98.

Halevy, Elie. *The Growth of Philosophic Radicalism.* Translated by Mary Morris. Boston, 1955.

Hart, H. L. A. "The Ascription of Rights and Responsibilities." In *Logic and Language*, edited by Anthony Flew. 1st ser. Oxford, 1951.

Hart, H. L. A. *Law, Liberty and Morality.* NY, 1963.

Hart, H. L. A. *Punishment and Responsibility.* NY and Oxford, 1968.

Hayek, F. A. *The Counter Revolution of Science, Studies on the Abuse of Reason.* Glencoe, IL, 1955.

Huntington, S. P. *Political Order in Changing Societies.* New Haven, CN, 1968.

Husserl, Edmund. *Phenomenology and the Crisis of Philosophy.* NY, 1965.

Hyde, H. M. *The Other Love.* London, 1970.

Jarvie, I. C. *The Revolution in Anthropology.* London, 1964.

Jarvie, I. C. *Concepts and Society.* London and, Boston, 1972.

Kaufmann, W. *Without Guilt and Justice: From Decideophobia to Autonomy.* NY, 1973.

Ladimer, Irving. "Social and Legal Responsibility in Medical Innovation." In *International Symposium on Society, Medicine and Law, Jerusalem, March,* 1972, edited by H. Karplus. Amsterdam, London and NY, 1973.

O' Gorman, Frank. *Edmund Burke: His Political Philosophy.* London, 1973; Bloomington IN, 1974.

O'Niell, John, ed. *Modes of Individualism and Collectivism.* London, 1973.

Packer, Herbert. *The Limits of the Criminal Sanction.* Stanford, CA, 1968.

Popper, Karl. *The Open Society and Its Enemies.* London, 1945 and later editions.

Popper, Karl. *Conjectures and Refutations: The Growth of Scientific Knowledge.* London and NY, 1963 and later editions.

Popper, Karl. "Normal Science and Its Dangers." In *Criticism and the Growth of Knowledge,* edited by I. Lakatos and A. Musgrave. Cambridge, 1970.

Popper, Karl. *Objective Knowledge: An Evolutionary Approach.* Oxford, 1972.

Room, Robin. "Ambivalence as Sociological Explanation: The Case of Cultural Explanation of Alcohol Problems. *Am. Soc. Rev.,* 41, 1976, 1047-65.

Silberman, Matthew. "Toward a Theory of Criminal: Deterrence." *Am. Soc. Rev.,* 41, 1976, 442-61.

Slaughter, F. G. *Semmelweis: The Conqueror of Childbirth Fever.* NY, 1950, 1961.

Szasz, T. S. *Law, Liberty and Psychiatry: An Inquiry into the Social Use of Mental Health Practices.* NY, 1963.

Szasz, T. S. "The Moral Physician" *Center Magazine,* 8, 1975, 2-9.

Waninger, Charles. "The Nature and Function of Official Moralities." *Am. J. Soc.,* 44, 1958, 165-68.

Wolfenden, Sir John. *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution.* CMD 247. London: HMSO, 1957.

Zinberg, Norman E., and Robertson, John A. *Drugs and the Public.* NY, 1972.