

The Limits of Law

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1 Introduction

There are two types of limitations on the reach of law:¹

1. 'Means-end' limitations or practical limitations: i.e. what can the law actually achieve?
2. Normative or principled limitations: i.e. what kinds of behaviour should the law legitimately regulate (regardless of whether it is practically possible or not)?

Philosophers tend to regard the second question as the more interesting one and brush over the first question, moving instead to focus on normative limitations such as John Stuart Mill's 'harm principle', or moral aspects of the law. But I am a pragmatist. While I think that the second question is very important, I also believe that we also have to consider the first question. There is no point making a law if it is not going to work.

I should perhaps disclose my own limitations first. I am not a jurisprudence scholar or philosopher. I am a private law lecturer who teaches contract law, property law, tort, trusts and remedies. Nonetheless, I am constantly thinking of how I can make the law workable and effective.

When there is a social problem or something of the sort, it is quite common to hear people exclaim, "There should be a law against it!" Even lawyers are apt to exclaim it. However, I suggest that we should think very carefully before we act on such pronouncements. If laws are not well thought out, they may not work. In some cases, a badly thought out law will actually produce the *opposite* effect of what was intended.

Tonight I will look at four different issues which may affect the limits of law in a practical sense:

- (1) Self-interest and the law of unintended consequences;
- (2) Belief in the law;
- (3) Pale Criminality; and
- (4) The law as a blunt instrument.

2 Self-interest and the law of unintended consequences

Adam Smith noted in the *Wealth of Nations*:

* BA/LLB (Hons) (Melb), PhD (Melb). The thoughts in this talk have arisen out of discussions on <http://skepticalawyer.com.au>. I am indebted to my co-blogger, Helen Dale, for introducing me to some of these concepts and thoughts. Thank you also to Michael 'Lorenzo' Warby for recommending me as a speaker.

¹ John Stanton-Ife, 'The Limits of Law', *The Stanford Encyclopedia of Philosophy (Winter 2008 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2008/entries/law-limits/>

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations...²

Smith recognises that people are less likely to follow the law if it is *against their interests* to do so. In addition, as some law and economics scholars have noted, if the chance of being punished is far less than the gain to be made from breaking the law, then people will be willing to ‘chance it’. For example, one of my forebears was transported to Australia for stealing a side of beef. Presumably, the perpetrators of crimes such as these knew they risked getting hung or transported, but they were going to starve anyway, and everyone else they knew was doing the same thing, so it was worth taking that risk. Perhaps they also calculated the risks of being caught as well. It is all about balancing the different incentives. For me, there would be no incentive to steal in normal circumstances. This is because I am a risk-averse person. Furthermore, I have a moral objection to taking other people’s property, as after all, I am a property lawyer. In terms of disincentives, if I were caught, I would be fined, or possibly go to gaol. I would not be able to practice law again. There is nothing in my current situation which I want badly enough which would lead me to take the risk that I would be caught. On the other hand, if my children were starving and I had few other options, the tables would turn, and there *might* be sufficient incentive for me to steal. My moral, economic and social objections could be overridden.

Self-interest is important to all rules. When we think about why a rule such as “Thou shalt not kill” generally works, the reason for this is in part that it is in our self-interest for our society to have such a rule. We ‘do unto others as we would have them do unto us’. Of course, we do not wish to be killed wantonly ourselves. So, when we design laws, we have to think carefully about the incentives and disincentives we are setting up. If we want to coerce people to do something, they are more likely to do it if there is something in it for them to do as we ask. This may seem simple and obvious but I am afraid that I often see people suggesting regulation of particular activities with no thought to the incentives or disincentives that they may be setting up.

Laws that do not appeal to people’s self-interest can end up in terrible trouble, no matter what good intentions the legislator has. An example of such a law is the *Americans With Disabilities Act* (‘ADA’) enacted in 1990 by Bush Snr. The aims were creditable: it was designed to protect the civil rights of people with physical and mental disabilities. It required changes in the way that both businesses and the government operated so as to allow disabled people have full access to and full participation in every aspect of society. It sought to remove barriers that denied individuals with disabilities equal opportunity and access to jobs, public accommodation, government services, public transportation and telecommunications. Sounds great, doesn’t it?

² Adam Smith, *The Wealth of Nations*, 316.

But in practice, it has not necessarily worked so well. In a 2008 column in the *New York Times*, Stephen Dubner and Steven Levitt of *Freakonomics* fame recount an anecdote that may explain why:³

A few months ago, a prospective patient called the office of Andrew Brooks, a top-ranked orthopedic surgeon in Los Angeles. She was having serious knee trouble, and she was also deaf. She wanted to know if her deafness posed a problem for Brooks. He had his assistant relay a message: no, of course not; he could easily discuss her situation using knee models, anatomical charts and written notes.

The woman later called again to say she would rather have a sign-language interpreter. Fine, Brooks said, and asked his assistant to make the arrangements. As it turned out, an interpreter would cost \$120 an hour, with a two-hour minimum, and the expense wasn't covered by insurance. Brooks didn't think it made sense for him to pay. That would mean laying out \$240 to conduct an exam for which the woman's insurance company would pay him \$58 — a loss of more than \$180 even before accounting for taxes and overhead.

So Brooks suggested to the patient that they make do without the interpreter. That's when she told him that the *Americans With Disabilities Act* (A.D.A.) allowed a patient to choose the mode of interpretation, at the physician's expense. Brooks, flabbergasted, researched the law and found that he was indeed obliged to do as the patient asked — unless, that is, he wanted to invite a lawsuit that he would probably lose.

If he ultimately operated on the woman's knee, Brooks would be paid roughly \$1,200. But he would also then need to see her for eight follow-up visits, presumably with the \$240 interpreter each time. By the end of the patient's treatment, Brooks would be solidly in the red.

He went ahead and examined the woman, paying the interpreter out of his pocket. As it turned out, she didn't need surgery; her knee could be treated through physical therapy. This was a fortunate outcome for everyone involved — except, perhaps, for the physical therapist who would have to pay the interpreter's bills.

Brooks told several colleagues and doctor friends about his deaf patient. "They all said, 'If I ever get a call from someone like that, I'll never see her,'" he says. This led him to wonder if the A.D.A. had a dark side. "It's got to be widely pervasive and probably not talked about, because doctors are just getting squeezed further and further. This kind of patient will end up getting passed on and passed on, getting the runaround, not understanding why she's not getting good care."

The problem is that the legislation has made the situation such that is not in the doctor's self-interest to treat the disabled patient, and has led to a perverse disincentive for disabled people to be treated like everyone else.

Anecdote is one thing, but there was also research to back up Brooks' hunch that the A.D.A. was harming disabled people as much as it was helping them. The evidence concerned the experience of disabled people in the employment market.⁴ The research suggested that for disabled people under 40, there was a sharp *drop* in employment of disabled workers after the A.D.A. came into operation in 1992. The researchers concluded that this was likely because of the cost of accommodating

³ Stephen Dubner and Steven Levitt, 'Unintended Consequences', 20 January 2008, *New York Times*, URL = http://www.nytimes.com/2008/01/20/magazine/20wwln-freak-t.html?_r=4&ref=magazine&oref=slogin&oref=slogin

⁴ Daron Acemoglu and Joshua D Angrist, 'Consequences of Employment Protection? The Case of the Americans with Disabilities Act' (2001) 109 *Journal of Political Economy* 915.

disabled workers (which fell squarely on employers) and fear of lawsuits from disgruntled disabled employees.⁵

This does *not* mean that we should refrain from legislating to help disabled people or to make life easier for them. But we do need to think very carefully about whether we are achieving what we set out to achieve. As Dubner and Levitt say, ‘...[I]f there is any law more powerful than the ones constructed in a place like Washington, it is the law of unintended consequences.’

3 Belief in the law

Another important limitation on the effectiveness of laws has been noted by Joseph Raz, namely, that laws which accord with the general mores of society are more likely to be followed and are more easily enforced.⁶ What do I mean by this?

Generally, another reason why we do not kill is because most of us believe that it is fundamentally wrong. Even if there were not a law against it, many of us would continue to believe that we should not engage in conduct of this kind. Therefore, people are self-regulating in respect of such rules. It is not so hard to enforce rules that people believe in because they regulate themselves.

Sometimes a law may be enforced and regulated, but ultimately that law is a failure, and people just ignore it. That is usually a sign that the law is out of keeping with the general social consensus. If the government passed a law tomorrow that we all had to wear particular coloured clothes depending on our profession and social status, I am willing to bet that little enforcement would take place on the part of regulators (even if there was a regulator for every person) and that very few people would obey that law.⁷ This is because in today’s liberal Australian society, it is generally accepted that people can wear almost anything in public, and thus everyone would think such a law was ridiculous and not worth keeping. And people are (by and large) sensible beings.

A good law has to set up a good system of incentives to keep the law and disincentives to break it. It works best if there are already moral, social and economic incentives for the law to be followed. Of course, sometimes the law itself moulds the moral, social and economic incentives, and people’s attitudes change as a result of the law. When I was 11 or 12, my primary school teacher acted towards my Muslim friend in a discriminatory way that would simply be unacceptable these days. My friend was fasting for Ramadan, and this teacher said that her traditions were stupid, and tried to force her to eat a ham sandwich (particularly inappropriate for a Muslim child). One cannot imagine this happening 25 years later. People’s attitudes change as a result of law. Sometimes it’s a chicken and egg thing – did the law change the attitude, or did the attitude change the law?

I suspect that with respect to anti-discrimination legislation there was a bit of both. There was a general societal realisation that racial and religious discrimination was generally not acceptable in our society, but the fear of being sued for discriminatory conduct also changed people’s attitudes, such that you simply cannot imagine someone behaving like that school teacher above in this day

⁵ Ibid, 950.

⁶ Joseph Raz, ‘Incorporation by law’ (2004) 10 *Legal Theory* 1.

⁷ Various societies have tried to enact ‘sumptuary laws’ of this type, requiring people to wear particular clothing, including the Ancient Romans and Medieval Europeans: such laws have usually been spectacularly ineffective, honoured more in the breach.

and age without a tremendous uproar. It is interesting to note that the International Convention on the Elimination of All Forms of Racial Discrimination was signed in 1966 and entered into force in 1969. The Australian *Racial Discrimination Act* (Cth) was enacted in 1975. A friend and I were discussing racially discriminatory dispositions under trusts. There are a number of cases where a will or a trust has purported to confer property on a relative as long as the relative worships in a particular religion, marries someone of a particular religion, or does *not* marry someone of a particular religion, as the case may be. There are rather a number of these cases, and the outcomes vary, but very few arise after 1970.⁸ I suspect that by and large, people simply do not believe that they are entitled to make discriminatory dispositions of this sort any more, and thus these cases do not arise so frequently.

Nonetheless, sometimes one cannot change attitudes no matter what the law says. If people are not responding well to a particular law, there is a fair chance that no matter what the motive behind it, how well known it is or how well regulated it is – it is not a “good” law. By “good” law, I do not mean that it is immoral, but simply that it does not achieve what it is supposed to do.

Sometimes I think people stop believing in the legitimacy of entire systems of governance, and that this is when a revolution or a rebellion occurs. One could see the present movements in the Middle East as representing a rejection of the belief that dictatorships are a legitimate form of government.⁹

4 Pale criminality

Earlier I talked about ‘self-interest’ as a reason for keeping the law, but human beings are many-faceted and complex beings who do not always act in their own self-interest. Sometimes making things forbidden makes them *more* attractive. Marketing Professor Robert Cialdini refers to this in his book *Influence* (about the factors people use to influence our behaviour):

...from a purely psychological point of view, those favoring strict censorship may wish to examine closely the results of a study done on Purdue University undergraduates. The students were shown some advertisements for a novel. For half the students, the advertising copy included the statement, “a book for adults only, restricted to those 21 years and over”; the other half of the students read about no such age restriction on the book. When researchers later asked the students to indicate their feelings toward the book, they discovered the same pair of reactions we have noted with the other bans: Those who learned of the age restriction (1) wanted to read the book more and (2)

⁸ Eg, *Clayton v Ramsden* [1943] AC 320 (bequest to daughter forfeited if she did not marry someone “of Jewish parentage and of the Jewish faith” – held to be void); *Re Harris* [1950] VLR 192 (trust for certain persons of the Jewish faith who had Jewish spouses – held to be valid); *Re Allen* [1953] 1 Ch 810 (disposition to person who must be a member of the Church of England to be effective – held to be valid); *Re Hurshman* (1956) 6 DLR (2d) 615 (bequest to daughter forfeited if she married a Jewish man – held to be void); *Re Kearney* [1957] VLR 56 (trust for persons who were Roman Catholics and not married to Protestants); *Church Property Trustees Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 (bequest to sons only given on the condition that their wives converted to Protestantism); *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1976] 1 All ER 545 (bequest to son predicated upon marrying a Jewish wife – held to be valid).

⁹ See eg, <http://strangetimes.lastsuperpower.net/?p=1364> which draws a parallel between the abolition of chattel slavery and the abolition of dictatorships.

believed that they would like the book more than did those who thought their access to the book was unlimited.¹⁰

Freud also found a similar phenomenon among some of his patients. Some did things which were forbidden simply because they were forbidden and in doing these actions or in being detected doing them the patients found relief.¹¹ He named this phenomenon 'pale criminality'.

Simply making something forbidden or against the law may have the opposite effect of what was intended. It may make the forbidden behaviour *more* attractive to some people and pique their interest.¹² It is related to scarcity economics – people naturally want something that they cannot have. Again, in *Influence*, Cialdini describes the following experiment:

One Virginia-based study nicely captured the terrible twos style among boys who averaged twenty-four months in age. The boys accompanied their mothers into a room containing two equally attractive toys. The toys were always arranged so that one stood next to a transparent Plexiglas barrier and the other stood behind the barrier. For some of the boys, the Plexiglas sheet was only a foot tall—forming no real barrier to the toy behind, since the boys could easily reach over the top. For the other boys, however, the Plexiglas was two feet tall, effectively blocking the boys' access to one toy unless they went around the barrier. The researchers wanted to see how quickly the toddlers would make contact with the toys under these conditions. Their findings were clear. When the barrier was too small to restrict access to the toy behind it, the boys showed no special preference for either of the toys; on the average, the toy next to the barrier was touched just as quickly as the one behind. But when the barrier was big enough to be a true obstacle, the boys went directly to the obstructed toy, making contact with it three times faster than with the unobstructed toy. In all, the boys in this study demonstrated the classic terrible twos' response to a limitation of their freedom: outright defiance.¹³

This is something that affects legal areas such as regulation of illicit drugs, attempts at censorship, and even the desire to control the use of confidential information.

In relation to illicit drugs, Portugal decriminalised the use and possession of heroin, cocaine, marijuana, LSD and other illicit street drugs in 2001. Spain and Italy have also followed suit. *Scientific American* reported in 2009:

Five years later, the number of deaths [in Portugal] from street drug overdoses dropped from around 400 to 290 annually, and the number of new HIV cases caused by using dirty needles to inject heroin, cocaine and other illegal substances plummeted from nearly 1,400 in 2000 to about 400 in 2006, according to a report released recently by the Cato Institute, a Washington, D.C. libertarian think tank.

"Now instead of being put into prison, addicts are going to treatment centers and they're learning how to control their drug usage or getting off drugs entirely," report author Glenn Greenwald, a former New York State constitutional litigator, said during a press briefing at Cato last week.

¹⁰ Robert B Cialdini, *Influence* (Collins Business, revised ed, 2007), 252-3.

¹¹ Sigmund Freud, *Complete Psychological Works*, James Strachey (ed) (London, 1953 – 1974), vol XVI, 332–3.

¹² See Samuel Scheffler, *Human Morality* (Oxford 1992), 70 – 1.

¹³ Cialdini, above n 10, 246-7.

Under the Portuguese plan, penalties for people caught dealing and trafficking drugs are unchanged; dealers are still jailed and subjected to fines depending on the crime. But people caught using or possessing small amounts—defined as the amount needed for 10 days of personal use—are brought before what's known as a "Dissuasion Commission," an administrative body created by the 2001 law.

Each three-person commission includes at least one lawyer or judge and one health care or social services worker. The panel has the option of recommending treatment, a small fine, or no sanction.

Peter Reuter, a criminologist at the University of Maryland, College Park, says he's sceptical decriminalization was the sole reason drug use slid in Portugal, noting that another factor, especially among teens, was a global decline in marijuana use. By the same token, he notes that critics were wrong in their warnings that decriminalizing drugs would make Lisbon a drug mecca.

"Drug decriminalization did reach its primary goal in Portugal," of reducing the health consequences of drug use, he says, "and did not lead to Lisbon becoming a drug tourist destination."

...

Drug legalization removes all criminal penalties for producing, selling and using drugs; no country has tried it. In contrast, decriminalization, as practiced in Portugal, eliminates jail time for drug users but maintains criminal penalties for dealers.¹⁴

One can speculate that perhaps one of the reasons why decriminalisation appears to have worked to reduce drug use in Portugal is because drug use has lost its appeal to pale criminals. It is no longer edgy and rebellious, nor does it carry that exciting frisson of danger any more.

In any case, pale criminality is something that bears thinking about when we attempt to prevent particular behaviour by passing a law against it.

5 The law as a blunt instrument

Sometimes, the law cannot prohibit a greatly undesired activity without affecting a greatly desired activity at the same time. This is the problem of 'mixtures': you may deter some bad behaviour and some good at the same time. An example of this might be Senator Conroy's proposed Australian Internet Filter. While the filter may prevent paedophiles from accessing child pornography, it may also prevent people from seeing socially useful websites. I note that my own blog has been "banned" on the computers at my grandparents' Uniting Church retirement home by the stringent Net Nanny. I suspect this is because when I was 20 weeks pregnant with my son I posted an ultrasound photo, in which the obstetrician had circled and labelled the genitalia to prove that he was a boy. We also had a discussion of the photography of Bill Henson and the legal issues arising from that. As a result, our humble blog has been branded "pornographic" although it is hardly that.¹⁵

¹⁴ Brian Vastag, '5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results' 7 April 2009, *Scientific American*. URL = <http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization>
The original report by the Cato Institute is available here: http://www.cato.org/pub_display.php?pub_id=10080

¹⁵ Unless perhaps some people find discussions of the latest High Court cases to be very exciting?

As a remedies lawyer, I am also fascinated by the mixed nature of legal remedies. Sometimes a plaintiff will get both positive and negative effects from enforcing legal rights. I am particularly fascinated by defamation actions where the plaintiff succeeds against the defendant, but also succeeds in publicising the particular defamatory statement as a result of the legal action. It is certain that I would never have known that a New York model named Liskula Cohen was described on a blog as a “skank” if she had not taken legal action against the blogger and forced disclosure of the blogger’s identity.¹⁶

Indeed, the rise of online media has led to a simultaneous rise in this phenomenon, so much so that it has its own name, the “Streisand effect”.¹⁷ The term was coined after singer Barbra Streisand unsuccessfully attempted to sue photographers for US\$50M in an attempt to have an aerial photograph of her mansion removed from the publicly available collection of 12,000 California coastline photographs, citing privacy concerns. As a result of the case, public knowledge of the picture increased substantially and it became popular on the Internet, with more than 420,000 people visiting the site over the next month.

So, ultimately, the law is a blunt instrument. It may prevent both positive and negative behaviour. Or it may produce both positive and negative outcomes. One has to take care with it.

6 Conclusion

In the *Wealth of Nations*, Adam Smith criticised excise taxes and attempts to prevent smuggling:

...[B]y the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capitals.

An injudicious tax offers a great temptation to smuggling. But the penalties of smuggling must rise in proportion to the temptation.

The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it; and it commonly enhances the punishment, too, in proportion to the very circumstances which ought certainly to alleviate it, the temptation to commit the crime.¹⁸

Smith was clearly aware that sometimes, the law has limitations in achieving particular aims, and that, at times, it may end up encouraging the very thing it seeks to discourage. No doubt his observations were enhanced by his position as Commissioner of Customs in 1778!

If we take Smith’s example, we can see that all the points I have raised may operate to explain why excise taxes and anti-smuggling laws did not prevent smuggling or even benefit the community more broadly. First, it was not in the self-interest of smugglers to pay excise taxes, and it was in their self-interest to make a profit by selling smuggled goods more cheaply. The taxes actually created an *incentive* to smuggle. It was also in the interests of the local community that smuggling occurred.

¹⁶ See, James Bone, ‘Vogue model Liskula Cohen wins right to unmask offensive blogger’ 19 August 2009, *The Sunday Times Online*. URL =

http://www.timesonline.co.uk/tol/news/world/us_and_america/article6801213.ece

¹⁷ URL = http://en.wikipedia.org/wiki/Streisand_effect

¹⁸ Adam Smith, *The Wealth of Nations*, Book V, Chapter II, Part II

Secondly, it could be speculated that society in general did not have a strong belief in the importance of paying excise taxes and believed that the anti-smuggling laws were the kind of irritating laws which existed to be broken. Thirdly, presumably smuggling appealed to those 'pale criminals' in society, who enjoyed outwitting the customs authorities and breaking the law in this way. Finally, by outlawing smuggling, presumably the law made illegal some entrepreneurial activity which was beneficial to society.

Apparently Adam Smith always intended to write a work on law, and indeed he lectured in jurisprudence for over 10 years at the University of Glasgow. Professor Metzger says:

Smith...treated law as part of a larger enterprise: the study of mankind and the communities that mankind creates. Other subjects treated by Smith as part of this larger enterprise—political economy and moral decision-making—famously received his most careful attention and elucidation. Law, sadly, did not. Thus we miss his projected work on law very keenly.¹⁹

Like Smith, I am fascinated by the study of human beings and the communities we create. I hope that tonight, I have managed to make you think about the limits of law and complications involved in enforcing laws.

Personally I think that we still need the law to regulate society in certain ways, and I think Smith would have agreed with me. But I suggest that we do have to be *careful* with the laws we promulgate.

¹⁹ Ernest Metzger, 'Adam Smith's Historical Jurisprudence and the "Method of the Civilians"' (Conference paper presented on 2 April 2009 at *Smith in Glasgow '09*, University of Glasgow. URL – <http://ssrn.com/abstract=1567907>)