

To achieve cooperation—the essence of society—there must be widespread compliance with society's established moral order. Professor Jenkins identifies forces that motivate the members of an individual society to such compliance: a sense of moral responsibility, an apparatus of legal liability, and the pressure of group accountability.

By moral responsibility, Jenkins means answerability to one's self; by legal liability, answerability to law; and by accountability, answerability to colleagues. Several generations of social scientists from the "Weber school" have argued that Americans do not share any beliefs, meanings, and values. By surveying American culture, Professor Jenkins finds a decline in public morality and an increasing reliance upon law enforcement. He attributes this decline and shift to the failure of "collegial groups" to hold members accountable, i.e. to exercise peer pressure. Jenkins includes among "collegial groups" professional associations, labor unions, scientific laboratories, and philanthropic foundations.

Professor Jenkins, a former President of AMINTAPHIL, suggests that improvement in the operation of the law will not prove insufficient to stem the tendency toward anomie in American society. To increase accountability, Professor Jenkins calls for "collegial groups" to resume a major amount of responsibility for their members.

ACCOUNTABILITY, LEGALITY AND THE SOCIAL ORDER

IREDELL JENKINS*

Accepting the rough but recognizable distinction between ethics and morality, this essay deals exclusively with issues of the latter type. It has nothing to say about the semantics of such ethical terms as "good," "right," "ought" and the like. More than enough ink has been spilled on these verbal quarrels, and I do not intend to add to this mass of philosophical detritus. My interest is directed instead toward the practical problem of how—by what means—people are led or driven, motivated or compelled, to adhere to established moral rules and standards.

More specifically, my theme is the public morality and the sad decline

* Professor of Philosophy, *emeritus*, University of Alabama; Author, *Social Order and the Limits of Law*, Princeton University Press (1980).

in the quality of this that is now so widely proclaimed and lamented. Since my concern is practical, this essay will focus on two issues: the forces that are required to sustain this indispensable civic virtue and the causes that are responsible for its present decline and virtual demise. But I shall also, in concluding, have something to say about the measures that we must take if we are to correct the present deplorable state of affairs.

I. THE MEANS BY WHICH PUBLIC MORALITY IS ACHIEVED

But first, what *is* the public morality? The phrase has a remote and abstract sound, but I think that what we mean by it is simple and concrete. We want all persons, whatever their station in life and whatever their social role, to do their jobs honestly and diligently. We want them to abide by the rules of the game, to uphold the ideals they proclaim, and to conform to the standards they profess — that is, to practice what they preach. And finally, we want them to be brought to book and punished for their transgressions.

Now, how are these goals achieved? By what means is the public morality kept sound and secure? The answer I shall suggest consists of two theses. The first of these holds that there are three principal instruments — three forces and agencies — that serve this end: these are *the sense of moral responsibility*, *the apparatus of legal liability*, and *the pressure of group accountability*. My second thesis holds that these three are all species of a single genus, that of *answerability*. It is upon these that we must rely to uphold the public morality. I must now put flesh on the bare bones of these two theses, and I shall take them in reverse order.

A. *Answerability*

Answerability means that one must bear the consequences of one's actions. People are answerable for what they say and do, and for what ensues upon their words and deeds. Individuals must acknowledge that they are the authors of their acts and of the outcomes to which their acts lead; they must be prepared to explain and justify themselves; and they must be obliged to pay for their sins and errors. Such answerability is the bedrock upon which society is built. Men live in space and time, and what they do impinges upon others and makes an impact on the world. A casual or malicious word can ruin a person's reputation; reckless driving can maim a child; negligence in maintenance work can wreck a train

or plane; an incompetent diagnosis or bungled operation can kill a patient. In sum, since we are active agents, we must answer for the difference that we make in the course of events — for the effects that we cause: responsibility, liability, and accountability are the means that we employ to this end — they are all that we have. This is their generic nature.

B. *Responsibility, Liability, Accountability*

And now what of their specific characters? How do they differ? We have seen *for what* one must answer: it is for ones actions and their consequences. I now suggest that the differences among responsibility, liability, and accountability are to be found by asking *to whom* one must answer. They are distinguished by the principals — the individuals, institutions, or groups — to whom an answer is owed. So we ask this: for each of these species, to whom is one answerable?

For the first two species, I think the solutions are obvious. The responsible person answers to *himself*. He who is liable answers to the *law*. But to whom is one accountable? My suggestion is that he who is accountable answers to *his colleagues*: that is, he answers to an identifiable group of persons with whom he is associated by a common interest or function. I shall refer to such groups as *collegial groups*. In filling out these identifications, I shall pay particular attention to accountability, which is, I think, the most important of the three and the failure of which is at the root of our troubles with the public morality.

Responsibility is a moral virtue, or trait of character, in the Aristotelian sense. It is a habit of attitude and action, leading one to be concerned for the consequences that he causes and thus responsibility leads individuals to take pains that these consequences should be at best beneficial and at least not harmful. The responsible person has the welfare of others at heart. He anticipates the possible outcomes of his actions, and he discharges his obligations in a voluntary and conscientious manner. In short, to be responsible is to care and to take care.

Responsibility is intensely personal and informal: one answers to himself and to his own values and standards; that for which he must answer is determined by his own character and commitments; and irresponsibility — the failure to answer properly — is punished by conscience, remorse, and the sense of guilt.

Liability is a legal state. Realizing that the moral virtue of responsibility is insufficient to ensure that men will act with care, society introduces an additional factor into the equation. This is law. Eschewing the effort

to lead men to act responsibly *before the event*, law holds them liable for the consequences of their actions *after the event*. The legal apparatus can do little to instill in men a spirit of benevolence and concern. But it can, by holding men liable, do a great deal to induce them to act with forethought and caution. And it can punish them for their violations and force them to make reparation to those they have injured by any manner.

In sharp contrast with responsibility, liability is impersonal and formal: one answers to that abstract entity, the law; that for which one must answer is determined by the body of the laws; and violation of the law's edicts - the failure to answer properly - is punished by such official sanctions as fines, damages, and imprisonment.

And now what of accountability? I define this as *an answer owed to a collegial group of which one is a member*. I am using the term "collegial" very broadly and in accord with its derivation: collegial means having to do with one's colleagues or partners: in sum, with a definite group of persons with whom one is associated through some special bond or relationship. And the term "collegial group" in turn refers to any one of that vast and miscellaneous array of groups that have some specific rule and function in society such as: Industry, finance, agriculture, or commerce; the professions, crafts, or trades; educators, journalists, artists, or scientists.

Those persons with shared interests and responsibilities soon organize in order to speak with one voice and to better serve both society and themselves. Such groups vary greatly in character. They may be large or small; they may be tightly or loosely organized; they may serve only one purpose or several; their members, as individuals, may be closely similar or widely divergent. Familiar examples of collegial groups are professional associations, labor unions, trade and industrial organizations; cultural, artistic, and scientific federations; legislatures, philanthropic foundations, political parties, and police forces; and glee clubs or theatre groups.

It is of the essence of collegial groups that they are Janus-faced: they look in two directions, both outward toward their society and inward toward their members. In the former aspect, they are public and functional bodies: each has a specific role and responsibility, tasks to discharge, values to further, and standards to uphold. Society looks to these groups to serve its needs and oversee their members. In the latter aspect, collegial groups are private and protective bodies: they counsel and serve their members, further their personal interests, protect them against un-

due interference and harassment, and seek to strengthen their own positions in the social order.

These two sets of purposes and standards are always present and well-known, even if they have never been explicitly formulated and promulgated: they constitute both the *raison d'être* and the bonding force of the group. In short, every collegial group has its *code*. We have encountered the character and importance of such codes in such forms as "the honor of the regiment," "the word of a gentlemen," *noblesse oblige*, the Hippocratic Oath, "the frontier code," initiation rites, the Code of Legal Ethics, and the charters and by-laws of associations. Further, the Constitution of the United States is best seen not as a written document, but as just such a code, to be adhered to and maintained by all of those holding public office, and indeed, by all the citizens. To be accountable is to be answerable to the tenets of the code to which the group is committed. In joining a collegial group, one seals a pact with it and its members to abide by its rules, respect its standards, and promote its purposes. And he must answer for any failure to do so.

Accountability is thus collegial and inter-personal. One answers to his colleagues; that for which he must answer is defined by the group code; and any failure to answer properly — any deviation from this code — the failure to answer properly — is punished by sanctions ranging from a token fine through censure, deprivation of certain privileges, and demotion, to expulsion.

C. Accountability: The Most Effective Means to Achieve Public Morality

I come now to the heart of my argument, and I want to advance two further theses. The first of these holds that accountability always has been and always must be the strongest factor in assuring that men will answer for their actions — that they will do their jobs honestly and diligently, abide by established rules and standards, and be punished for their delinquencies. The reason for this primacy is simple. As we have seen, the only other available forces are personal morality and public law. The former of these is too variable among individuals, too easily swayed by passion or self-interest, and too short in its reach. We act responsibly only toward those who are quite close to us, and it is difficult to care and take care for distant strangers and remote consequences.

Similarly, law is too weak and uncertain in its grasp, too easily evaded, and too erratic in its application to be effective. And even at its best,

legal liability does not motivate men positively to act in approved ways, but only negatively to avoid getting caught acting in forbidden ways.

The significance of accountability lies in the fact that it can reach further than responsibility and can grasp more firmly than liability. This is possible because collegial groups occupy a position intermediate between the solitariness of conscience and the formalism of law. The members of such groups are our fellows, with whom we are closely associated in common pursuits: we want their esteem, and they can serve as both a public conscience and as private officers to detect and report violations of the group code. It is to their collegial groups that most people feel the closest ties and from which they receive the greatest influence. It is the family, the neighborhood and native region, the social or ethnic class, the peer group, and especially the vocational world — whether professional, commercial, industrial, political, military, educational, artistic, or agricultural — in which people move and work and have their being that puts its stamp most clearly upon them and holds them most closely in its grip. To the extent that a person honors a set of values and a code of behavior, these are largely the bequest — quite literally the *imprinting* — of those collegial groups to which he is the most attached, upon which he most depends, and which can, if they will, most easily detect his shortcomings and bring him to book.

II. THE CAUSE BEHIND THE DECLINE OF PUBLIC MORALITY

If this assessment is correct, then we of the present have cause for concern.

A. *The Failure of Collegial Groups*

My second thesis holds that collegial groups are failing lamentably to live up to their public responsibilities. They are supposed to serve the society conscientiously in their allotted roles: to this end, they see that their members are properly qualified, discharge their duties diligently, and do not abuse their positions. But collegial groups are doing none of these things adequately. They show little or no regard for the behavior of their members, and even less for the calibre of the work that they do or the services that they offer. Men are treating these groups simply as instruments to further their private interests: as a cover for their actions, and as a shield for their sins.

And how do the groups respond to this abuse? Unfortunately, they

abet it. They make no more than an empty pretense of enforcing their rules and standards, watching over the qualifications and conduct of their members, or punishing even the grossest violations of their codes. Instead, they rush to the defense of these members when their transgressions are exposed and retribution threatens. The evidence for this is everywhere, and its recital makes a doleful tale. Acting on the maxim that example is more efficacious than precept, I will cite a few familiar cases.

It may be common knowledge that certain lawyers engage in grossly unethical and illegal acts, but it is extremely rare for a bar association to move to disbar or even censure a guilty member. Similarly, a doctor may be known by his colleagues to be incompetent, to perform unnecessary operations, to overcharge his patients, or to cheat on Medicaid. Yet it is unusual for such doctors to be impugned and exposed by their colleagues, much less lose their licenses to practice. In a different context, captains of industry are found guilty by the law of the most venal acts — fraud, bribery, price-setting, unfair competition, corruption, and monopolistic practices — without in the least losing caste with their associates or suffering any group sanction. Again, a union member may be well known to do shoddy work, to malinger, to violate company work rules, to create disturbances that interrupt production, or even to engage in sabotage. But his union will probably come to his defense and threaten a strike if any effort is made to discipline him.

In order not to appear holier than thou, it must be acknowledged that this virus has even infected the academic profession. One hears of cases where it is common gossip that a teacher is incompetent, uncooperative with his department and colleagues, abusive of his students, and neglectful of his most basic duties: but all of this will be overlooked or denied, and he will be protected by his faculty group and professional association. And to balance this budget of blame, university administrations often behave in this same manner. A particular administrator may be known to fail in all of the above mentioned ways, but all that he suffers is a lateral arabesque to a functionless position that still leaves him with an impressive title, a large office, a handsome salary, and two secretaries who have little to do. And now even research scientists, those supposed apostles of pure truth, are faking their experiments and falsifying their data in order to get a desired result.

The most familiar chapter in this tale of woe is that which recounts the many and varied delinquencies of public officials, from the President

down. But this is such a painful saga that it is simple kindness to pass over it quickly. So I will limit myself to one instance. Both houses of the Congress recently established stringent codes of conduct and announced that any suspected violations of these codes would be vigorously investigated and punished. Shortly thereafter, a senator was found guilty and sentenced to prison for accepting bribes, selling his influence, and generally corrupting his office. But he resigned with the praises of his colleagues ringing in his ears and a pension of \$45,000 in his pocket. These and numerous other cases of official immunity from the wages of sin can be summarized in a word. The old maxim that "the king can do no wrong" has not lost its force. It is only the seat of sovereignty that has changed.

When those who are guilty of gross violations of duty and decency go unpunished, enjoying instead their ill-gotten gains, men of good will but weak resolve are easily led to follow their example by flouting their codes and feathering their nests as best they can. Indeed, they are virtually persuaded that they must act so in simple self-protection. Once established, this infection spreads rapidly through the body politic. For as another old saw tells us, it doesn't take many rotten apples to spoil the barrel.

The social illness of which these cases are symptoms is obvious: collegial groups of all kinds have turned inward upon themselves, neglecting their functions in the social order and concerned only to strengthen their own and their members' positions therein. This tendency toward introversion is endemic in collegial groups: it is the inevitable consequence of their dual status as at once public and private. Tension between these roles is inescapable, and a stable equilibrium is as elusive as a balance among nuclear powers. But if my reading of the evidence is sound, what is now demoralizing our public life is a radical imbalance in this relationship. In turning altogether inward, collegial groups renounce their social character and purpose; and in failing to hold their members accountable, they repudiate their own obligation to be answerable to the society. In short, collegial groups are ceasing to be functional bodies and are becoming mere benevolent and protective orders.

B. The Replacement of Group Accountability with Legal Liability

Faced with this renunciation by collegial groups and their members of the standards and responsibilities imposed by the codes they still piously proclaim, our society appears to have lost all hope of breathing new life

into the moribund body of collegial accountability. As a result, we have resorted to the desperate measure of assimilating collegial accountability into legal liability. Since collegial groups fail to hold either their members accountable to themselves or themselves answerable to the society, we have decided to hold both of them liable to the law and its penalties. To this end, we spell out in strictly legal terms and in full detail exactly what is permitted and what is forbidden, the rules that must be followed, the duties that must be performed, and the sanctions that will be imposed - if guilt can ever be proved.

To realize the extent of this legalization of accountability, we need only examine any of the innumerable documents that govern the relations between collegial groups and their members and between these groups and the society at large. Typical examples are the Code of Legal Ethics formulated by the ABA; the similar charters and by-laws of other professional, civic, and commercial organizations; the contracts between labor and management; the elaborate shop rules that prevail in any large industrial plants; and the detailed criteria and procedures that now govern the granting of tenure and promotion, or the imposition of disciplinary measures, to university faculty members. And one must especially remember how very often disputes regarding any of these relationships eventually wind up in courts of law.

This process of legalization is most dramatically brought home by the following simple experiment: first, read the ancient Hippocratic Oath, a perfect example of a Collegial Code. Compare this with the Code of Medical Ethics as promulgated — and continually revised — by the AMA, a perfect example of a legal document. Then consider these interesting facts: immediately before receiving their diplomas, all medical students repeat in unison and pledge themselves to abide by the Hippocratic Oath. Just a few minutes later, immediately after receiving their diplomas and becoming full-fledged Doctors of Medicine, they become subject to the Code of Medical Ethics!

III. SOLUTION: A BETTER BALANCE BETWEEN LAW AND COLLEGIAL GROUPS

Given the present state of affairs, this steady replacement of collegial accountability with legal liability is understandable. But it is also potentially fatal, since, as I have sufficiently argued it is just such accountability that is necessarily the strongest support of the public morality and hence of social order and harmony. So if we are to repair the disarray of

the present, we must desist from such reductionism and concentrate our efforts on reviving collegial accountability and making it again an effective force. To this end, I think that there are two lines of action that must be taken and two general conditions that must be met if success is to be achieved. These are so closely interdependent that they must proceed simultaneously and step by step.

A. The Need for the Law to Restrict Itself

On the one hand, the law must pull in its horns and stop goring the other elements of the social order with its continual intrusion into their affairs. As matters now stand, the federal courts and regulatory agencies exercise a virtually constant supervision and interference into the decisions and actions of all other social agencies and institutions — the manifold of collegial groups that do the actual work of the society. As a result of these practices, the legal apparatus is taking upon itself far more responsibilities than it can effectively discharge. Legal officials of various sorts, and especially federal judges, routinely issue rulings and orders on matters in which they have little or no experience or expertise. In acting so, law is not only over-taxing itself; what is even worse, it is undermining both the incentive and the opportunity of collegial groups to fill their proper roles in the social order. If the law insists upon supervising the detailed operations of collegial groups and having the last word in every context, then these groups will respond in one of two ways: they will resist and evade court orders to the last ditch, seeking to have their own way and to do their jobs as they think best; or they will give over all effort to be active, effective, and innovative in the conduct of their affairs and will become purely supine bodies, servants — slaves? — of the law. So courts must relax their grip and restrict their reach, leaving more freedom and discretion to collegial groups.

B. The Need For Collegial Groups to Accept Social Responsibility

Concurrently with this easing of the grip of the law, collegial groups must reform themselves and redraft their codes in such a way as to properly discharge the responsibilities and authority that are now to be restored to them. We have seen earlier the function of these groups as a whole and the absolute dependence of a sound society on the inculcation by them of a strong sense of accountability in their members. It was precisely the failure of collegial groups to discharge their social functions and to police their members that led to judicial activism in the first place.

Judges did not make a grab for power for power's sake; rather, they intervened and took charge of matters — usually reluctantly — only when they found themselves forced to do so because of the deplorable conditions that prevailed in many contexts of the society and the refusal of collegial groups to achieve reforms by taking the actions that were their responsibility: obvious examples are the conditions in mental hospitals and prisons and the treatment of their inmates, the desegregation of public facilities, equal opportunities for women and minorities in education and employment.

Anyone who has given the slightest study to this problem will know that success of the law in achieving its goals depends entirely on the active cooperation of the collegial groups that are chiefly responsible for the management of affairs, and hence for the conditions that prevail, in these and other social contexts. When such cooperation is forthcoming, much good can be done and the situation can be greatly improved. When it is lacking, there is delay and evasion, and little results save sound and fury.

C. The Necessity of a Proper Balance

The simple truth is that law — positive or civil law — is only a secondary and supplemental principle of order: that is, an agency or instrument that serves to assure the public morality in the sense already given to that term. It supports and supplements other more primary and intimate principles of order — collegial groups of all sorts and sizes. But law cannot supplant or supersede these, for it is they that do the actual day to day work of the society and play the leading role in forming the character of men and impressing upon them sound habits of mind and action. And it is this inculcation of moral responsibility and collegial accountability that transforms the material of raw human nature into social beings fit to be subjects of the law. In sum, law is sovereign, but it is neither autonomous nor omnicompetent. It can issue orders at will, but others must implement them. And it is the implementation that gives rise to problems and upon which success or failure depends.

The well-being of a society depends upon a sound balance between law on the one hand and the manifold of collegial groups on the other. Law must assert its sovereignty to assure that collegial groups come up to the mark and discharge their social responsibilities in an honest and effective manner. But it must not abuse this sovereignty by dictating to the groups the precise standards to which they must adhere or the exact procedures that they must follow. Collegial groups must insist upon the

freedom to organize their efforts and to do their jobs as their professional judgment deems best. But they must not abuse this freedom in a manner to frustrate the purposes of the law or to neglect their social functions in order to pursue only their private interests.

It should now be clear that what we confront here is a particularly complex case of the Aristotelian maxim that all virtue — personal, civic, and political — consists in a mean between two extremes. It is simple and convincing to advance this as a theory. It is equally so to cite abstract examples, such as the famous dictum that courage is the mean between cowardice and foolhardiness. Yet in even so seemingly simple a case as this, it can be very difficult to determine what constitutes courage in a concrete situation. There are too many factors to be weighed: the strength of the two parties, the values at stake, the possible consequences of victory or defeat, what duty demands and intelligence recommends, and so and on.

In the problem that concerns us — the balance between law and collegial groups — all of these difficulties are magnified many times over. In this context, it is difficult to define the mean even in very general terms as a balance that allows for a great deal of variation. It is far more difficult to achieve this mean in practice. And it is quite impossible to establish this balance in a permanent and stable state: one must allow for a constant shifting in response to changes in both internal and external conditions.

The most that we can hope for in any large-scale relationship between law and some collegial group is that in the course of time the two parties will come to understand each other's purposes and problems and so will be moved to cooperate in a friendly manner in the pursuit of what usually - but not always - turns out to be a common goal.

Seeking to illuminate and test these general ideas in an actual occurrence, I have in recent years made a detailed study of the landmark case of *Wyatt v. Stickney*, in which federal judge Frank Johnson assumed virtually complete control of the Alabama Mental Health System, which was in a deplorable condition — as were most such institutions throughout the country. This suit was first filed in 1971. It went on for some sixteen years, and was terminated only in the fall of 1986, when the court relinquished its jurisdiction and returned the mental hospitals to state control. The point that stands out the most clearly and constitutes the most valuable lesson in any such study is this: the vast, slow and complex process of implementing the court orders proved to be an unparal-

leled learning experience for all of the parties involved in the case: plaintiffs, defendants, judge, attorneys, amici. Each of the parties separately realized that he could not have his way completely; they had to compromise. And all of them collectively realized that they could expect neither perfection nor permanence in any context that was as complex and variable as the operation of a mental hospital, where emergencies and the unexpected are the norm. The same general conclusions hold true for any social problem where courts and collegial groups find themselves in conflicts that must be transformed into mutual sympathy and cooperation. The more quickly this lesson is taken to heart, the easier will life be for all of them.

In the abstract terms that I used earlier, courts must realize that although they can use their sovereignty to issue peremptory orders, their real effectiveness is limited by the fact that they are neither autonomous nor omnicompetent: they must depend upon collegial groups to carry out their orders. Collegial groups must realize that though courts cannot implement their own orders, they can always exert their sovereignty by issuing yet stricter orders and standards, by exerting yet closer supervision, and by imposing yet sterner sanctions. In sum, both over-zealousness by courts and stubbornness by collegial groups are equally fruitless.

IV. CONCLUSION

My point of departure in this essay was the serious decline in the public morality and the general social disarray that are such conspicuous features of the present scene. I argued that the proximate cause of these problems was the collapse of collegial accountability as an effective social force. This in turn resulted from the failure of collegial groups to perform their public functions conscientiously or to police their members.

These failures left gaping social vacuums: important tasks went unperformed, pressing problems were passed over, and deplorable conditions were ignored. When this neglect persisted, the law finally moved in, asserted its sovereignty, assumed control of the collegial groups in question — school boards, mental hospitals, public and private employers, and so on — and issued stringent orders to them, commanding them to take the actions that they should have long since taken on their own initiative.

Thus began the process of the legalization of collegial accountability. This was undoubtedly necessary, and it can show some notable successes. But it has demanded a high price in human energy and skill and in physical and economic resources. Further, it has too often led to disruption,

ineffectiveness, and even violence. The reason for this is simple. Once a judge has taken jurisdiction of a case and assumed control of the operation of the collegial group in question, he too often goes too far and issues detailed orders that, being beyond his experience and competence, are unrealistic and inappropriate. And this leads to the conflicts and deadlocks discussed above.

The solution to all of these problems is to establish a mean, or balance, between the powers of the law and those of collegial groups. The law has the power of its sovereignty and so can issue orders more or less at will. Collegial groups have the power of those who alone can implement these orders, transforming word into deed. So it is incumbent upon courts to issue orders that are reasonable and realizable. It is equally incumbent upon collegial groups to implement these orders as effectively and honestly as their limited resources allow.

I do not pretend that these will be easy tasks. In addition to all of the difficulties already noted in establishing a mean and balance between law and collegial groups, there remains one over-riding threat.

If power does not necessarily corrupt those who wield it, it certainly does tend to seduce them.
