HUL 360: Selected Topics in Philosophy
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Course packet I

Philosophical background: utilitarianism

1. James Rachels, "The Utilitarian Approach" and "The Debate over Utilitarianism" from *The Elements of Moral Philosophy*

What makes something a crime?

1. John Kleinig, "Crime and the limits of criminalization," from *Ethics and Criminal Justice: An Introduction*
2. Nigel Warburton, "The Harm Principle," from *Freedom – An Introduction with Readings*
3. Excerpt from the *Report of the Committee on Homosexual Offences and Prostitution* (Wolfenden report)

Legal moralism

1. Keith Culver, introduction from *Readings in the Philosophy of Law*
2. Patrick Devlin, "Morals and the Criminal Law," from *The Enforcement of Morals*
3. H.L.A. Hart, excerpt from *Law, Liberty and Morality*

CHAPTER 7

The Utilitarian Approach

Given our present perspective, it is amazing that Christian ethics down through the centuries could have accepted almost unanimously the sententious doctrine that "the end does not justify the means." We have to ask now, "If the end does not justify the means, what does?" The answer is, obviously, "Nothing!"

JOSEPH FLETCHER, *MORAL RESPONSIBILITY* (1967)

7.1. The Revolution in Ethics

Philosophers like to think their ideas can change the world. Usually, it is a vain hope: They write books that are read by a few other like-minded thinkers, while the rest of humanity goes on unaffected. On occasion, however, a philosophical theory can alter the way people think. Utilitarianism, a theory proposed by David Hume (1711–1776) but given definitive formulation by Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873), is a case in point.

The late 18th and 19th centuries produced an astonishing series of upheavals. The modern nation-state was emerging in the aftermath of the French Revolution and the wreckage of the Napoleonic empire; the revolutions of 1848 showed the continuing power of the new ideas of "liberty, equality, fraternity"; in America, a new country with a new kind of constitution was created, and its bloody civil war was to put an end, finally, to slavery in Western civilization; and all the while the industrial revolution was bringing about a complete restructuring of society.

It is not surprising that in the midst of all this change people might begin to think differently about ethics. The old ways of thinking were very much up in the air, open to challenge. Against this background, Bentham's argument for a new conception of morality had a powerful influence. Morality, he

urged, is not a matter of pleasing God, nor is it a matter of faithfulness to abstract rules. Morality is just the attempt to bring about as much happiness as possible in this world.

Bentham argued that there is one ultimate moral principle, namely "the Principle of Utility." This principle requires that whenever we have a choice between alternative actions or social policies, we must choose the one that has the best overall consequences for everyone concerned. Or, as he put it in his book *The Principles of Morals and Legislation,* published in the year of the French Revolution:

> By the Principle of Utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or what is the same thing in other words, to promote or to oppose that happiness.

Bentham was the leader of a group of philosophical radicals whose aim was to reform the laws and institutions of England along utilitarian lines. One of his followers was James Mill, the distinguished Scottish philosopher, historian, and economist. James Mill's son, John Stuart Mill, would become the leading advocate of utilitarian moral theory for the next generation, so the Benthamite movement would continue unabated even after its founder's death.

Bentham was fortunate to have such disciples. John Stuart Mill's advocacy was, if anything, even more elegant and persuasive than the master's. In his little book *Utilitarianism* (1861), Mill presents the main idea of the theory in the following way. First, we envision a certain state of affairs that we would like to see come about—a state of affairs in which all people are as happy and well-off as they can be:

> According to the Greatest Happiness Principle . . . the ultimate end, with reference to and for the sake of which all other things are desirable (whether we are considering our own good or that of other people), is an existence exempt as free as possible from pain, and as rich as possible in enjoyments.

The primary rule of morality can, then, be stated simply. It is to act so as to bring about this state of affairs, insofar as that is possible:

> This, being, according to the utilitarian opinion, the end of human action, is necessarily also the standard of morality, which may accordingly be defined, as the rules and precepts for human conduct, by the observance of which an existence such as has been described might be, to the greatest extent possible, secured to all mankind, and not to them only, but, so far as the nature of things admits, to the whole of sentient creation.

In deciding what to do, we should, therefore, ask what course of conduct would promote the greatest amount of happiness for all those who will be affected. Morality requires that we do what is best from that point of view.

At first glance, this may not seem like such a radical idea; in fact it may seem a mild truism. Who could argue with the proposition that we should oppose suffering and promote happiness? Yet in their own way Bentham and Mill were leading a revolution as radical as either of the other two great intellectual revolutions in the 19th century, those of Marx and Darwin. To understand the radicalness of the Principle of Utility, we have to appreciate what it *leaves out* of its picture of morality: Gone are all references to God or to abstract moral rules "written in the heavens." Morality is no longer to be understood as faithfulness to some divinely given code or to some set of inflexible rules. The point of morality is seen as the happiness of beings in this world, and nothing more; and we are permitted—even required— to do whatever is necessary to promote that happiness. That, in its time, was a revolutionary idea.

The utilitarians were, as I said, social reformers as well as philosophers. They intended their doctrine to make a difference, not only in thought but in practice. To illustrate this, we will briefly examine the implications of their philosophy for two rather different practical issues: euthanasia and the treatment of nonhuman animals. These matters do not by any means exhaust the practical applications of Utilitarianism; nor are they necessarily the issues that utilitarians would find most pressing. But they do give a good indication of the kind of distinctive approach that Utilitarianism provides.

7.2. First Example: Euthanasia

Matthew Donnelly was a physicist who had worked with X-rays for 30 years. Perhaps as a result of too much exposure, he contracted

cancer and lost part of his jaw, his upper lip, his nose, and his left hand, as well as two fingers from his right hand. He was also left blind. Mr. Donnelly's physicians told him that he had about a year to live, but he decided that he did not want to go on living in such a state. He was in constant pain. One writer said that "at its worst, he could be seen lying in bed with teeth clinched and beads of perspiration standing out on his forehead." Knowing that he was going to die eventually anyway, and wanting to escape this misery, Mr. Donnelly begged his three brothers to kill him. Two refused, but one did not. The youngest brother, 36-year-old Harold Donnelly, carried a .30-caliber pistol into the hospital and shot Matthew to death.

This, unfortunately, is a true story, and the question naturally arises whether Harold Donnelly did wrong. On the one hand, we may assume that he was motivated by noble sentiments; he loved his brother and wanted only to relieve his misery. Moreover, Matthew had asked to die. All this argues for a lenient judgment. Nevertheless, according to the dominant moral tradition in our society, what Harold Donnelly did was unacceptable.

The dominant moral tradition in our society is, of course, the Christian tradition. Christianity holds that human life is a gift from God, so that only he may decide when it will end. The early church prohibited all killing, believing that Jesus' teachings on this subject permitted no exceptions to the rule. Later, some exceptions were made, chiefly to allow capital punishment and killing in war. But other kinds of killing, including suicide and euthanasia, remained forbidden. To summarize the church's doctrine, theologians formulated a rule saying that *the intentional killing of innocent people is always wrong.* This conception has, more than any other single idea, shaped Western attitudes about the morality of killing. That is why we are so reluctant to excuse Harold Donnelly, even though he may have acted from noble motives. He intentionally killed an innocent person; therefore, according to our moral tradition, what he did was wrong.

Utilitarianism takes a very different approach. It would have us ask: Considering the choices available to Harold Donnelly, which one would have the best overall consequences? What action would produce the greatest balance of happiness over unhappiness for all concerned? The person who would be

most affected would, of course, be Matthew Donnelly himself. If Harold does not kill him, he will live on, for perhaps a year, blind, mutilated, and in continuing pain. How much unhappiness would this involve? It is hard to say precisely; but Matthew Donnelly's own testimony was that he was so unhappy in this condition that he preferred death. Killing him would provide an escape from this misery. Therefore, utilitarians have concluded that euthanasia may, in such a case, be morally right.

Although this kind of argument is very different from what one finds in the Christian tradition—as I said before, it depends on no theological conceptions, and it has no use for inflexible "rules"—the classical utilitarians did not think they were advocating an atheistic or antireligious philosophy. Bentham suggests that religion would endorse, not condemn, the utilitarian viewpoint if only its adherents would take seriously their view of God as a *benevolent* creator. He writes:

> The dictates of religion would coincide, in all cases, with those of utility, were the Being, who is the object of religion, universally supposed to be as benevolent as he is supposed to be wise and powerful . . . But among the votaries of religion (of which number the multifarious fraternity of Christians is but a small part) there seem to be but few (I will not say how few) who are real believers in his benevolence. They call him benevolent in words, but they do not mean that he is so in reality.

The morality of mercy killing might be a case in point. How, Bentham might ask, could a benevolent God forbid the killing of Matthew Donnelly? If someone were to say that God is kind but that he requires Mr. Donnelly to suffer for the additional year before finally dying, this would be exactly what Bentham means by "calling him benevolent in words, but not meaning that he is so in reality."

But the majority of religious people do not agree with Bentham, and not only our moral tradition but our legal tradition has evolved under the influence of Christianity. Euthanasia is illegal in every Western nation except Holland. In the United States, it is simply murder, and Harold Donnelly was duly arrested and charged. (I do not know what happened in court, although it is common in such cases for the defendant to be found guilty of a lesser charge and given a light sentence.) What

would Utilitarianism say about this? If, on the utilitarian view, euthanasia is moral, should it also be made legal?

This question is connected with the more general question of what the purpose of the law ought to be. Bentham was trained in the law, and he thought of the Principle of Utility as a guide for legislators as well as for ordinary people making individual moral decisions. The purpose of the law is the same as that of morals: It should promote the general welfare of all citizens. Bentham thought it obvious that if the law is to serve this purpose, it should not restrict the freedom of citizens any more than necessary. In particular, no type of activity should be prohibited unless, in engaging in that activity, one is doing harm to others. Bentham objected to laws regulating the sexual conduct of "consenting adults," for example, on the grounds that such conduct is not harmful to others, and because such laws diminish rather than increase happiness. But it was Mill who gave this principle its most eloquent expression, when he wrote in his essay *On Liberty* (1859):

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, physical or moral, is not a sufficient warrant . . . Over himself, over his own body and mind, the individual is sovereign.

Thus, for the classical utilitarians, laws prohibiting euthanasia are not only contrary to the general welfare, they are also unjustifiable restrictions on people's right to control their own lives. When Harold Donnelly killed his brother, he was assisting him in concluding his own life in a manner that he had chosen. No harm was caused to anyone else, and so it was none of their business. Most Americans seem to agree with this point of view, at least when it is a practical issue for them. In a 2000 study conducted by the National Institutes of Health, 60% of terminally ill patients said that euthanasia or physician-assisted suicide should be available upon request. Consistent with his philosophy, Bentham himself is said to have requested euthanasia in his final days, although we do not know whether this request was granted.

7.3. Second Example: Nonhuman Animals

The treatment of nonhumans has not traditionally been regarded as presenting much of a moral issue. The Christian tradition says that man alone is made in God's image and that mere animals do not even have souls. Thus the natural order of things permits humans to use animals for any purpose they see fit. St. Thomas Aquinas summed up the traditional view when he wrote:

> Hereby is refuted the error of those who said it is sinful for a man to kill dumb animals: for by divine providence they are intended for man's use in the natural order. Hence it is no wrong for man to make use of them, either by killing them or in any other way whatever.

But isn't it wrong to be *cruel* to animals? Aquinas concedes that it is, but he says the reason has to do with human welfare, not the welfare of the animals themselves:

> If any passages of Holy Writ seem to forbid us to be cruel to dumb animals, for instance to kill a bird with its young: this is either to remove man's thoughts from being cruel to other men, and lest through being cruel to animals one becomes cruel to human beings: or because injury to an animal leads to the temporal hurt of man, either the doer of the deed, or of another.

Thus people and animals are in separate moral categories. Strictly speaking, animals have no moral standing of their own. We are free to treat them in any way that might seem to our advantage.

When it is spelled out as baldly as this, the traditional doctrine might make one a little nervous: It seems rather extreme in its lack of concern for the animals, many of whom are, after all, intelligent and sensitive creatures. Yet only a little reflection is needed to see how much our conduct is actually guided by this doctrine. We eat animals; we use them as experimental subjects in our laboratories; we use their skins for clothing and their heads as wall ornaments; we make them the objects of our amusement in zoos and rodeos; and, indeed, there is a popular sport that consists in tracking them down and killing them just for the fun of it.

If one is uncomfortable with the theological "justification" for these practices, Western philosophers have offered an

abundance of secular ones. It is said, variously, that animals are not *rational,* that they lack the ability to *speak,* or that they simply are not *human*—and all these are given as reasons why their interests are outside the sphere of moral concern.

The utilitarians, however, would have none of this. On their view, what matters is not whether an individual has a soul, is rational, or any of the rest. All that matters is whether he is capable of experiencing happiness and unhappiness, pleasure and pain. If an individual is capable of suffering, then we have a duty to take that into account when we are deciding what to do, even if the individual in question is not human. In fact, Bentham argues, whether the individual is human or nonhuman is just as irrelevant as whether he is black or white. Bentham writes:

> The day *may* come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum* are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they *reason?* nor Can they *talk?* but, *Can they suffer?*

Because both humans and nonhumans can suffer, we have the same reason for not mistreating both. If a human is tormented, why is it wrong? Because she suffers. Similarly, if a nonhuman is tormented, she also suffers, and so it is equally wrong for the same reason. To Bentham and Mill, this line of reasoning was conclusive. Humans and nonhumans are equally entitled to moral concern.

However, this view may seem as extreme, in the opposite direction, as the traditional view that gives animals no independent moral standing at all. Are animals really to be regarded as

the equals of humans? In some ways Bentham and Mill thought so, but they were careful to point out that this does not mean that animals and humans must always be treated in the same way. There are factual differences between them that often will justify differences in treatment. For example, because humans have intellectual capacities that animals lack, they are able to take pleasure in things that nonhumans cannot enjoy—humans can do mathematics, appreciate literature, and so on. And similarly, their superior capacities might make them capable of frustrations and disappointments that other animals are not able to experience. Thus our duty to promote happiness entails a duty to promote those special enjoyments for them, as well as to prevent any special unhappinesses to which they are vulnerable. At the same time, however, insofar as the welfare of other animals is affected by our conduct, we have a strict moral duty to take that into account, and their suffering counts equally with any similar suffering experienced by a human.

Contemporary utilitarians have sometimes resisted this aspect of the classical doctrine, and that is not surprising. Our "right" to kill, experiment on, and otherwise use animals as we please seems to most of us so obvious that it is hard to believe we really are behaving as badly as Bentham and Mill suggest. Some contemporary utilitarians, however, have produced powerful arguments that Bentham and Mill were right. The philosopher Peter Singer, in a book with the odd-sounding title *Animal Liberation* (1975), has urged, following the principles laid down by Bentham and Mill, that our treatment of nonhuman animals is deeply objectionable.

Singer asks how we can possibly justify experiments such as this one:

> At Harvard University R. Solomon, L. Kamin, and L. Wynne tested the effects of electric shock on the behavior of dogs. They placed forty dogs in a device called a "shuttlebox" which consists of a box divided into two compartments, separated by a barrier. Initially the barrier was set at the height of the dog's back. Hundreds of intense electric shocks were delivered to the dogs' feet through a grid floor. At first the dogs could escape the shock if they learned to jump the barrier into the other compartment. In an attempt to "discourage" one dog from jumping, the experimenters forced the dog to jump *into* shock 100 times. They said that as the

> dog jumped he gave a "sharp anticipatory yip which turned into a yelp when he landed on the electrified grid." They then blocked the passage between the compartments with a piece of plate glass and tested the same dog again. The dog "jumped forward and smashed his head against the glass." Initially dogs showed symptoms such as "defecation, urination, yelping and shrieking, trembling, attacking the apparatus" and so on, but after ten or twelve days of trials dogs that were prevented from escaping shock ceased to resist. The experimenters reported themselves "impressed" by this, and concluded that a combination of the plate glass barrier and foot shock were "very effective" in eliminating jumping by dogs.

The utilitarian argument is simple enough. We should judge actions right or wrong depending on whether they cause more happiness or unhappiness. The dogs in this experiment are obviously being caused terrible suffering. Is there any compensating gain in happiness elsewhere that justifies it? Is greater unhappiness being prevented, for other animals or for humans? If not, the experiment is not morally acceptable.

We may note that this style of argument does not imply that all such experiments are immoral—it suggests judging each one individually, on its own merits. The experiment with the dogs, for example, was part of a study of "learned helplessness," a topic that psychologists regard as very important. Psychologists say that finding out about learned helplessness will lead to long-term benefits for the mentally ill. The utilitarian principle does not, by itself, tell us what the truth is about particular experiments; but it does insist that the harm done to the animals *requires justification.* We cannot simply assume, because they are not human, that anything goes.

But criticizing such experiments is too easy for most of us. Because we do not do such research, we may feel superior or self-righteous. Singer points out, however, that none of us is free of blame in this area. We are all involved in cruelty just as serious as that perpetrated in any laboratory, because we all (or, at least most of us) eat meat. The facts about meat production are at least as harrowing as the facts about animal experimentation.

Most people believe, in a vague way, that while the slaughterhouse may be an unpleasant place, animals raised for food are otherwise treated well enough. But, Singer points out, noth-

ing could be further from the truth. Veal calves, for example, spend their lives in pens too small to allow them to turn around or even to lie down comfortably—but from the producers' point of view, that is good, because exercise toughens the muscles, which reduces the "quality" of the meat; and besides, allowing the animals adequate living space would be prohibitively expensive. In these pens the calves cannot perform such basic actions as grooming themselves, which they naturally desire to do, because there is not room for them to twist their heads around. It is clear that the calves miss their mothers, and like human infants they want something to suck: They can be seen trying vainly to suck the sides of their stalls. In order to keep their meat pale and tasty, they are fed a liquid diet deficient in both iron and roughage. Naturally they develop cravings for these things. The calf's craving for iron becomes so strong that if allowed to turn around, it will lick at its own urine, although calves normally find this repugnant. The tiny stall, which prevents the animal from turning, solves this "problem." The craving for roughage is especially strong, since without it the animal cannot form a cud to chew. It cannot be given any straw for bedding, since the animal would be driven to eat it, and that would affect the meat. So for these animals, the slaughterhouse is not an unpleasant end to an otherwise contented existence. As terrifying as the process of slaughter is, for them it may actually be a merciful release.

Once again, given these facts, the utilitarian argument is simple enough. The system of meat production causes great suffering for the animals. Because we do not need to eat them—vegetarian meals are also tasty and nourishing—the good that is done does not, on balance, outweigh the evil. Therefore, it is wrong. Singer concludes that we should become vegetarians.

What is most revolutionary in all this is simply the idea that the interests of nonhuman animals *count.* We normally assume, as the dominant tradition of our society teaches, that human beings alone are worthy of moral consideration. Utilitarianism challenges that basic assumption and insists that the moral community must be expanded to include all creatures whose interests are affected by what we do. Human beings are in many ways special; and an adequate morality must acknowledge that. But it is also true that we are only one species among many inhabiting this planet; and morality must acknowledge that as well.

CHAPTER 8

The Debate over Utilitarianism

The utilitarian doctrine is that happiness is desirable, and the only thing desirable, as an end; all other things being desirable as means to that end.

JOHN STUART MILL, *UTILITARIANISM* (1861)

Man does not strive after happiness; only the Englishman does that.

FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS* (1889)

8.1. The Classical Version of the Theory

Classical Utilitarianism, the theory of Bentham and Mill, can be summarized in three propositions: First, actions are to be judged right or wrong solely by virtue of their consequences. Nothing else matters. Second, in assessing consequences, the only thing that matters is the amount of happiness or unhappiness that is created. Everything else is irrelevant. Third, each person's happiness counts the same. As Mill put it,

> the happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.

Thus, right actions are those that produce the greatest possible balance of happiness over unhappiness, with each person's happiness counted as equally important.

The appeal of this theory to philosophers, economists, and others who theorize about human decision making has been enormous. The theory continues to be widely accepted, even though it has been challenged by a number of apparently devastating arguments. These antiutilitarian arguments are so nu-

merous, and so persuasive, that many have concluded the theory must be abandoned. But the remarkable thing is that so many have not abandoned it. Despite the arguments, a great many thinkers refuse to let the theory go. According to these contemporary utilitarians, the antiutilitarian arguments only show that the classical theory needs to be improved; they say the basic idea is sound and should be preserved, but recast into a more satisfactory form.

In what follows, we will examine some of these arguments against Utilitarianism and consider whether the classical version of the theory may be revised satisfactorily to meet them. These arguments are of interest not only for the assessment of Utilitarianism but for their own sakes, as they raise some fundamental issues of moral philosophy.

8.2. Is Happiness the Only Thing That Matters?

The question *What things are good?* is different from the question *What actions are right?* and Utilitarianism answers the second question by referring back to the first one. Right actions, it says, are the ones that produce the most good. But what is good? The classical utilitarian reply is: one thing, and one thing only, namely happiness. As Mill put it, "The utilitarian doctrine is that happiness is desirable, and the only thing desirable, as an end; all other things being desirable as means to that end."

The idea that happiness is the one ultimate good (and unhappiness the one ultimate evil) is known as Hedonism. Hedonism is a perennially popular theory that goes back at least as far as the ancient Greeks. It has always been attractive because of its beautiful simplicity and because it expresses the intuitively plausible notion that things are good or bad on account of the way they make us *feel*. Yet a little reflection reveals serious flaws in this theory. The flaws stand out when we consider examples like these:

A promising young pianist's hands are injured in an automobile accident so that she can no longer play. Why is this bad for her? Hedonism would say it is bad because it causes her unhappiness. She will feel frustrated and upset whenever she thinks of what might have been, and *that* is her misfortune. But this way of explaining the misfortune seems to get things the wrong way around. It is not as though, by feeling unhappy, she has made

an otherwise neutral situation into a bad one. On the contrary, her unhappiness is a rational response to a situation that *is* unfortunate. She could have had a career as a concert pianist, and now she cannot. That is the tragedy. We could not eliminate the tragedy just by getting her to cheer up.

You think someone is your friend, but he ridicules you behind your back. No one tells you, so you never know. Is this unfortunate for you? Hedonism would have to say no, because you are never caused any unhappiness. Yet we feel there is something bad going on. You think he is your friend, and you are "being made a fool," even though you are unaware of it and you suffer no unhappiness.

Both these examples make the same basic point. We value all sorts of things, such as artistic creativity and friendship, for their own sakes. It makes us happy to have them, but only because we already think them good. (We do not think them good because they make us happy—this is how Hedonism "gets things the wrong way around.") Therefore, it is a misfortune to lose them, independently of whether or not the loss is accompanied by unhappiness,

In this way, Hedonism misunderstands the nature of happiness. Happiness is not something that is recognized as good and sought for its own sake, with other things desired only as a means of bringing it about. Instead, happiness is a response we have to the attainment of things that we recognize *as* good, independently and in their own right. We think that friendship is a good thing, and so having friends makes us happy. That is very different from first setting out after happiness, then deciding that having friends might make us happy, and then seeking friends as a means to this end.

For this reason, there are not many hedonists among contemporary philosophers. Those sympathetic to Utilitarianism have therefore sought a way to formulate their view without assuming a hedonistic account of good and evil. Some, such as the English philosopher G. E. Moore (1873–1958), have tried to compile short lists of things to be regarded as good in themselves. Moore suggested that there are three obvious intrinsic goods—pleasure, friendship, and aesthetic enjoyment—and that right actions are those that increase the world's supply of these things. Other utilitarians have bypassed the question of how many things are good in themselves, leaving it an open

question and saying only that right actions are the ones that have the best results, however that is measured. Still others bypass the question in another way, holding only that we should act so as to maximize the satisfaction of people's *preferences*. It is beyond the scope of this book to discuss the merits or demerits of these varieties of Utilitarianism. I mention them only in order to note that, although the hedonistic assumption of the classical utilitarians has largely been rejected, contemporary utilitarians have not found it difficult to carry on. They do so by urging that Hedonism was never a necessary part of the theory in the first place.

8.3. Are Consequences All That Matter?

The idea that only consequences matter is, however, a necessary part of Utilitarianism. The theory's most fundamental idea is that in order to determine whether an action would be right, we should look at *what will happen as a result of doing it.* If it were to turn out that some other matter is also important in determining rightness, then Utilitarianism would be undermined at its very foundation.

Some of the most serious antiutilitarian arguments attack the theory at just this point: They urge that various other considerations, in addition to utility, are important in determining right and wrong. Here are three such arguments.

Justice. Writing in the academic journal *Inquiry* in 1965, H. J. McCloskey asks us to consider the following case:

> Suppose a utilitarian were visiting an area in which there was racial strife, and that, during his visit, a Negro rapes a white woman, and that race riots occur as a result of the crime, white mobs, with the connivance of the police, bashing and killing Negroes, etc. Suppose too that our utilitarian is in the area of the crime when it is committed such that his testimony would bring about the conviction of a particular Negro. If he knows that a quick arrest will stop the riots and lynchings, surely, as a Utilitarian, he must conclude that he has a duty to bear false witness in order to bring about the punishment of an innocent person.

This is a fictitious example, of course, although it was obviously inspired by the lynch-law that prevailed at one time in some

parts of the United States. In any case, the argument is that if someone were in this position, then on utilitarian grounds he should bear false witness against the innocent person. This might have some bad consequences—the innocent man might be executed—but there would be enough good consequences to outweigh them: The riots and lynchings would be stopped. The best outcome would be achieved by lying; therefore, according to Utilitarianism, lying is the thing to do. But, the argument continues, it would be wrong to bring about the execution of an innocent person. Therefore, Utilitarianism, which implies it would be right, must be incorrect.

According to the critics of Utilitarianism, this argument illustrates one of the theory's most serious shortcomings: namely, that it is incompatible with the ideal of justice. Justice requires that we treat people fairly, according to their individual needs and merits. McCloskey's example illustrates how the demands of justice and the demands of utility can come into conflict. Thus, an ethical theory that says utility is the whole story cannot be right.

Rights. Here is a case that is not fictitious; it is from the records of the U.S. Court of Appeals, Ninth Circuit (Southern District of California), 1963, in the case of *York* v. *Story:*

> In October, 1958, appellant [Ms. Angelynn York] went to the police department of Chino for the purpose of filing charges in connection with an assault upon her. Appellee Ron Story, an officer of that police department, then acting under color of his authority as such, advised appellant that it was necessary to take photographs of her. Story then took appellant to a room in the police station, locked the door, and directed her to undress, which she did. Story then directed appellant to assume various indecent positions, and photographed her in those positions. These photographs were not made for any lawful purpose.
>
> Appellant objected to undressing. She stated to Story that there was no need to take photographs of her in the nude, or in the positions she was directed to take, because the bruises would not show in any photograph.
>
> Later that month, Story advised appellant that the pictures did not come out and that he had destroyed them. Instead, Story circulated these photographs among the personnel of the Chino police department. In April, 1960,

> two other officers of that police department, appellee Louis Moreno and defendant Henry Grote, acting under color of their authority as such, and using police photographic equipment located at the police station made additional prints of the photographs taken by Story. Moreno and Grote then circulated these prints among the personnel of the Chino police department.

Ms. York brought suit against these officers and won. Her legal rights had clearly been violated. But what of the *morality* of the officers' behavior? Utilitarianism says that actions are defensible if they produce a favorable balance of happiness over unhappiness. This suggests that we consider the amount of unhappiness caused to Ms. York and compare it with the amount of pleasure taken in the photographs by Officer Story and his cohorts. It is at least possible that more happiness than unhappiness was caused. In that case, the utilitarian conclusion apparently would be that their actions were morally all right. But this seems to be a perverse way of thinking. Why should the pleasure afforded Story and his cohorts matter at all? Why should it even count? They had no right to treat Ms. York in this way, and the fact that they enjoyed doing so hardly seems a relevant defense.

Here is an (imaginary) related case. Suppose a Peeping Tom spied on Ms. York by peering through her bedroom window, and secretly took pictures of her undressed. Further suppose that he did this without ever being detected and that he used the photographs entirely for his own amusement, without showing them to anyone. Now under these circumstances, it seems clear that the only consequence of his action is an increase in his own happiness. No one else, including Ms. York, is caused any unhappiness at all. How, then, could Utilitarianism deny that the Peeping Tom's actions are right? But it is evident to moral common sense that they are not right. Thus, Utilitarianism appears to be unacceptable.

The moral to be drawn from this argument is that Utilitarianism is at odds with the idea that people have *rights* that may not be trampled on merely because one anticipates good results. In these cases, it is Ms. York's right to privacy that is violated; but it would not be difficult to think of similar cases in which other rights are at issue—the right to freedom of religion, to free speech, or even the right to life itself. It may

happen that good purposes are served, from time to time, by violating these rights. But we do not think that our rights should be set aside so easily. The notion of a personal right is not a utilitarian notion. Quite the opposite: It is a notion that places limits on how an individual may be treated, regardless of the good purposes that might be accomplished.

Backward-Looking Reasons. Suppose you have promised someone you will do something—say, you promised to meet her downtown this afternoon. But when the time comes to go, you don't want to do it; you need to do some work and you would rather stay home. What should you do? Suppose you judge that the utility of getting your work accomplished slightly outweighs the inconvenience your friend would be caused. Appealing to the utilitarian standard, you might then conclude that it is right to stay home. However, this does not seem correct. The fact that you promised imposes an obligation on you that you cannot escape so easily. Of course, if a great deal was at stake—if, for example, your mother had just been stricken with a heart attack and you had to rush her to the hospital—you would be justified in breaking the promise. But a *small* gain in utility cannot overcome the obligation imposed by the fact that you promised. Thus Utilitarianism, which says that consequences are the only things that matter, once again seems to be mistaken.

There is an important general lesson to be learned from this argument. Why is Utilitarianism vulnerable to this sort of criticism? It is because the only kinds of considerations that the theory holds relevant to determining the rightness of actions are considerations having to do with the future. Because of its exclusive concern with consequences, Utilitarianism has us confine our attention to what *will happen* as a result of our actions. However, we normally think that considerations about the past are also important. (The fact that you promised your friend to meet her is a fact about the past.) Therefore, Utilitarianism seems to be faulty because it excludes backward-looking considerations.

Once we understand this point, other examples of backward-looking considerations come easily to mind. The fact that someone did not commit a crime is a good reason why he should not be punished. The fact that someone once did you a favor may

be a good reason why you should now do him a favor. The fact that you did something to hurt someone may be a reason why you should now make it up to her. These are all facts about the past that are relevant to determining our obligations. But Utilitarianism makes the past irrelevant, and so it seems deficient for just that reason.

8.4. Should We Be Equally Concerned for Everyone?

The final component of utilitarian morality is the idea that we must treat each person's welfare as equally important—as Mill put it, that we must be "as strictly impartial as a disinterested and benevolent spectator." This sounds plausible when it is stated abstractly, but it has troublesome implications. One problem is that the requirement of "equal concern" places too great a demand on us; another problem is that it disrupts our personal relationships.

The Charge That Utilitarianism Is Too Demanding. Suppose you are on your way to the theater when someone points out that the money you are about to spend could be used to provide food for starving people or inoculations for third-world children. Surely, those people need food and medicine more than you need to see a play. So you forgo your entertainment and give the money to a charitable agency. But that is not the end of it. By the same reasoning, you cannot buy new clothes, a car, a computer, or a camera. Probably you should move into a cheaper apartment. After all, what is more important—your having these luxuries or children having food?

In fact, faithful adherence to the utilitarian standard would require you to give away your resources until you have lowered your own standard of living to the level of the neediest people you could help. We might admire people who do this, but we do not regard them as simply doing their duty. Instead, we regard them as saintly people whose generosity goes *beyond* what duty requires. We distinguish actions that are morally required from actions that are praiseworthy but not strictly required. (Philosophers call the latter *supererogatory* actions.) Utilitarianism seems to eliminate this distinction.

2 Crime and the limits of criminalization

> Actions receive their tincture from the times,
> And as they change are virtues made or crimes.[1]

The last chapter offered one possible ethical framework for a criminal justice system, namely, a set of three institutions consisting of a legislature, a judiciary, and various law enforcement operations that reasonable people might be expected to agree to if they were concerned to protect and advance their basic interests or rights. Of course, as with most frameworks, the theory is neater than the practice and the various institutions that actually comprise our criminal justice system do not perfectly exemplify what they profess to be and do.

What makes conduct criminal?

In this chapter we shall briefly turn our attention to the issues of crime and criminalization. Although it is clear that the criminal justice system exists to identify, process, and respond to criminal activity within the community, the initial question we must answer is: What makes activity *criminal* in the first place? A quick response, based on the social contract theory that we spelled out in the last chapter, might be that activities are criminal if they transgress the laws that govern our social interactions. Because the laws we have are those that we have "agreed" to have imposed on us, those who violate them are properly subject to criminal penalties. But though this answer captures some of what we think justifies punishing those who violate certain laws, we will see that it fails to answer the more fundamental

[1] Daniel Defoe, "A Hymn to the Pillory" (1703), in Daniel Defoe, *Satire, Fantasy and Writings on the Supernatural*, ed. W. R. Owens (London: Pickering and Chatto, 2003), vol. I, 239.

question of why breaking some laws is viewed as criminal whereas breaking others is not.

Social rules that we designate as laws are highly diverse, and what we designate as criminal law represents only one small segment of the laws that we might be said to have agreed to have imposed on us. Some laws, for example, are laws about other laws – they are laws about how laws are to be made, interpreted, changed, and revoked. (These laws are sometimes spoken of as "second order" laws, for they pertain not directly to conduct that falls under the law but to the laws themselves.) But even laws that bear directly on our day-to-day activities (thus, "first order" laws) are of many different kinds. For example, we have various *administrative* rules that set out procedures for achieving certain ends (such as voting or getting married or starting a business). We also have rules of *contract* that specify what people who want to engage in certain exchanges (such as buying a house or selling a car) must do in order for those transactions to have legal effect and thus protection. And additionally, we have what are known as *tort* laws that regulate privately pursued redress for wrongs or injuries that result from carelessness (such as incautious driving) or negligent workmanship (such as an unsafe appliance that caused injury). And then of course there is *criminal* law, which focuses on what are usually called public wrongs or crimes (such as fraud, theft, and assault), and against which "the state" initiates proceedings.

What makes fraud, theft, and assault public wrongs or crimes? Were we to review the whole range of activities that our law characterizes as criminal we might be tempted to throw up our hands and say (as indeed some theorists have done[2]), that what makes an activity criminal is that it has been deemed to be criminal by the law. Of course, it is true that an activity becomes criminal in the eyes of the law only when the law has classified it as such. But there must be something more to what makes an activity criminal other than that the law classifies it as criminal. There must (or should) be some rationale for criminalization. At least there should be if we are concerned about the *ethics* of the criminal justice system. Why? Because those who are convicted of *crimes* are normally *punished* or at least penalized or imposed on in some significant way, and if this is to be justified we need to be able to point to some substantive problem with the conduct

[2] See, for example, P. J. Fitzgerald, *Criminal Law and Punishment* (Oxford: Clarendon, 1962), 7.

for which someone is punished and not simply point to the fact that the conduct has been outlawed. We need to be able to point to good reasons for outlawing certain conduct and imposing censuring penalties for engaging in the outlawed conduct.[3]

Traditional approaches

Unfortunately, there is little agreement about why we should view some conduct as sufficiently undesirable to justify us in imposing legal punishment on those who engage in it. To help us sort out the issues relevant to this topic and see how answers to the questions we have asked will shed light on the processes of criminal justice, it is useful to start with some traditional legal distinctions.

Mala in se and *mala prohibita*

The first distinction on which we shall focus is one that is drawn between acts that are said to be evil in themselves (often referred to by the Latin phrase *mala in se*), and those that are said to be evil solely in virtue of their being prohibited (referred to as *mala prohibita*). Acts that we consider intrinsically or inherently evil are evil not because they lead to bad results (though they usually do) but because they are in and of themselves wrong. Some acts that we consider evil in this way are murder, assault, fraud, and theft. We do not usually have qualms about their criminalization – that is, about establishing laws that make the commission of these acts criminal activities that are legally punishable. But what about the second category of laws – those that are criminal because they are prohibited by law? Why should fishing without a license or carrying a concealed firearm be seen

[3] In focusing on conduct we are, of course, narrowing the scope of what has traditionally been regarded as criminal. Mere possession (of a firearm) for example, is sometimes punished as is having a certain status, such as "being without lawful means of support." Historically, even intentions could be criminalized ("encompassing the death of the king"). That something has been traditionally viewed as criminal does not make it appropriately so. But even if we limit ourselves to what we think should be considered criminal, we will not find a single set of necessary and sufficient conditions; more likely a cluster of conditions some number of which will be sufficient to justify the crime label.

as criminal offenses? Does this not leave us with the empty account we rejected earlier, namely, that they are criminal only because the law deems them so?[4] That judgment, however, would be premature. Instead of looking at the intrinsic features of acts that are *mala prohibita*, we are directed to look elsewhere to understand their criminalization. Consider the laws that make it a crime for a person to drive on the left-hand side of the road in the United States and on the right-hand side of the road in the United Kingdom. Clearly, there is nothing intrinsically evil about driving on one or another particular side of the road. It probably makes as much sense to drive on one side as on the other. What is important is that travel on the roads not be (too) hazardous, so that although it does not matter which side of the road one drives on, it very much matters that all those who are travelling in a particular direction drive on the same side of the road. The United States and the United Kingdom have designated the side of the road on which you must travel (though each has chosen different sides of the road as its "legal" side). Because those who disobey this law (in either country) *endanger* others, it is considered appropriate to penalize them.[5]

Therefore, in addition to an act's being either inherently evil or making such evil outcomes likely, we now have a second reason why we should penalize certain conduct, namely, that it is conduct that, although not intrinsically evil, is such as would – given the demands of social organization – jeopardize others or endanger things we socially value. But we have not yet satisfactorily resolved the issue of why some acts should be designated crimes and others not. To see why something more has been thought necessary for an act to be outlawed as "criminal," consider the following two cases. Case 1: I carelessly leave an upturned rake on my front lawn only to have a neighbor's child step on it and suffer serious injury, my negligence thereby producing an intrinsically bad outcome. Although my negligence

[4] Much more extensive and subtle discussions can be found in Stuart P. Green, "Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses," *Emory Law Journal* 46 (1997): 1533–1615; and Douglas N. Husak, "Malum Prohibitum and Retributivism," in *Defining Crimes: Essays on the Special Part of the Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford University Press, 2005), 65–90.

[5] Here as elsewhere there are exceptions. Some *mala prohibita* – such as driving without an up-to-date car registration – will not endanger others. It is useful here to distinguish "crimes" from mere "violations," as does the American Law Institute's *Model Penal Code*, §1.04.

might provide grounds for a legal suit against me, it is not viewed as "criminal."[6] Case 2: I promise a woman that I will marry her but change my mind on the day of the wedding and, without notice, leave her stranded at the church. My breach of promise might be viewed as intrinsically evil (quite apart from the suffering it presumably would cause) but, here again, what I have done would not usually be viewed as a crime. So the question we face is this: What, beyond the actual doing of something intrinsically evil or something that, given other circumstances, makes an evil outcome considerably more likely, is necessary for an act to be deemed criminal?

Actus reus and *mens rea*

Generally, jurists have considered that criminal acts have two components: they must be evil (referred to by the Latin phrase, *actus reus*), and they must reflect an evil or guilty mind (in Latin, *mens rea*). It is not a very adequate breakdown (at least for some of what we criminalize), but for present purposes it offers a helpful ladder that we can later throw away. The *mens rea* requirement is meant to ensure that conduct that is punishable as a crime is appropriately "connected" to the agent of the act, and is not, say, something that was accidentally done by the agent, or forced on the agent, or done without the agent's understanding of what he or she was doing. We want to be sure, that is, that if agents are to be punished by law for their conduct, then they engaged in the conduct "guiltily" – in central cases, knowingly and with malice. And so the *mens rea* requirement is usually introduced to ensure that the evil that was done was done as a result of the agent's intention to bring it about. This is one reason why the negligently upturned rake does not suffice for criminal charges.

We are not, however, out of the woods yet. The distinction between conduct that can be characterized as an *actus reus* done with *mens rea* and conduct that cannot be so characterized will not capture only and all cases of criminal conduct because some kinds of act that have been deemed criminal do not in fact fulfill the combined requirements of possessing an *actus reus* and *mens rea*. There are, for example, cases of criminal negligence (such as negligent homicide) and the large array of strict liability laws (such as

[6] We do, however, recognize an exception in the case of negligent homicide – if, for example, I drive my car carelessly and run over a pedestrian on a crosswalk.

statutory rape or using incorrectly calibrated weights and measures), in which a *mens rea* seems to be lacking, though in some cases an assumed failure of diligence may be thought to reflect a moral defect.[7] Furthermore, some intentional injuries – such as false imprisonment or invasion of privacy – are often not seen as criminal but are simply viewed as torts. Still, generally speaking, crimes tend to be distinguished from mere torts by the dual fact that (1) they are intended, and (2) they bring about evil outcomes that can be said not merely to disappoint private expectations but also to transgress *public* standards. Or, perhaps better, though not unexceptionably, crimes weaken the system of public trust on which we rely. Thus, criminal conduct may be viewed as wrongdoing that has a public dimension – we resist it not merely on our own behalf but also as a matter of public policy. This helps to explain why the jilted bride would have no criminal case and why, generally speaking, we no longer view adultery as a criminal offense.

Voluntariness and responsibility

The *actus reus* | *mens rea* distinction conceals a further important presumption of criminality. The criminal act must have been performed voluntarily; the performer must be able to be held responsible for what was done.[8] A young child may intend to take the chocolate from the candy store, but we may not consider it capable of appreciating the moral significance of what it is doing. The insane person may intend to shoot his victim, but the voices that are urging him on may relieve him from responsibility for it. In yet other cases, a person may be suffering from some defect of reason that merely diminishes rather than negates his capacity for making responsible decisions. When we denominate certain kinds of acts as crimes we presume not only an *actus reus* that transgresses public standards but also a responsible *mens rea*.

[7] Often, however, strict liability laws are used to enhance public safety in cases in which establishing *mens rea* would be difficult.

[8] There are, however, complexities here that we shall leave to one side – though some of them emerge in the debate about strict liability offenses, in which responsibility may be questionable by virtue of a person's ignorance or other inability.

Moral turpitude and moral failure

We are, however, still left with the question of what makes certain evils publicly condemnable via criminalization. Some have answered that we criminalize those evil acts that reflect moral turpitude on the part of those who commit them. This of course can provide only a presumptive reason for criminalization, because actual moral turpitude will require that we look at the circumstances under which the law was violated.[9]

Nevertheless, the presumption of moral failure offers both a plausible reason for the *stigma* that we tend to attach to criminal behavior and a prima facie justification for our *punishing* those who violate criminal laws (namely, they morally deserve it). But we have to remember that we do not believe that every act of moral turpitude is appropriately criminalized. Moral turpitude is at best a necessary condition for criminalization. We resist criminalizing conduct such as jilting one's bride or committing adultery even though we may consider them acts of moral dereliction. Furthermore, viewing moral turpitude as central to the criminalization of behavior is problematic given how much we differ among ourselves about what constitutes moral depravity, differences that are clearly on view in debates about sodomy or drug use. Therefore, rather than claim that we criminalize behavior that reflects moral turpitude, it may be more accurate to say that if moral failure is a consideration at all in our decision to criminalize behavior, it is only moral failure of a certain kind that we are concerned to criminalize, and not necessarily moral failure that rises to the level of moral turpitude. But though we may see some of the trees more clearly, we are still not out of the woods. Let us try a different path.

The harm principle

Classical liberals appreciated the problems of taking the presence of moral failure or turpitude as the central consideration in decisions concerning whether or not to criminalize certain acts. And this appreciation led them to posit a seemingly more straightforward and less ambiguous criterion for justifiable criminalization, namely, that behavior is appropriately criminalized

[9] This was to the forefront of the debate about whether compassionate euthanasia should be regarded as a form of murder.

only if it causes (or threatens) harm to others. This, coupled with the expanded *mens rea* requirement, also accommodates much of what is attractive in the idea that criminality reflects moral failure.

The most famous expression of the harm account is found in the writings of the nineteenth-century essayist and activist, John Stuart Mill (1806–73). In a well-known passage (that, unfortunately, demands closer scrutiny than we are able to give it here), Mill wrote:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[10]

The criterion that Mill suggests in the above-quoted passage (a criterion that has come to be known as Mill's "harm principle") was intended by him to be a negative criterion; it does not set out the conditions under which it is recommended that we interfere with another (adult) person's behavior, but rather the conditions under which we may *not* interfere with that behavior. We may not interfere with others' conduct unless it is harmful to others. In addition, it is meant to be a completely general criterion: it is meant to apply not merely to law-makers in their attempt to set limits on lawful behavior, but to everyone in his or her dealings with other adult persons. "Harm to others" is thus, for Mill, necessary if we are to interfere with others' conduct, both within and outside the context of law.

[10] John Stuart Mill, *On Liberty* (1869), ch. 1. Immediately after the passage quoted, Mill offers a few qualifications. His essay is available on line.

Certainly, with respect to criminal law, it seems to make good sense that "harm to others" should be the focus, for it seems to capture what we want to proclaim in the criminalizing of a particular kind of act – namely, that the act in question (intentionally, or, perhaps, recklessly) harms or threatens harm to others and so constitutes a public wrong. (Mill himself controversially goes even further by suggesting that *only* such conduct qualifies as morally wrong.)

But, as with other suggestions we have reviewed regarding what lies "at the heart" of criminalization, here too the solution is problematic. First, we need to determine just what constitutes "harm to others." One well-known account speaks of harm to others as conduct that wrongfully "sets back" others' interests,[11] but this does not take us very far unless we can determine what qualify as relevant interests. Even the view that our interests include desires for our welfare or well-being will not be particularly helpful given Mill's insight that "there is no parity between . . . the desire of a thief to take a purse, and the desire of the right owner to keep it."[12] The interest that a thief has in stolen goods (even if he is starving) does not (normally) have the same standing as that of the person from whom these goods are taken. Harming another, then, cannot be understood (by the law) merely as the frustration of that other's desires for well-being, for the frustration of some desires may in fact be in the law's interests and so not merit the law's protection. In addition, we should keep in mind that Mill puts forward his principle only as a necessary condition for criminalization and not as sufficient. Some harms are too small to be dealt with by means of the heavy engine of criminal law (in the Latin phrase: *de minimis non curat lex*) and others are not suited to its formal processes (as we often reflect in our response to harms done by juveniles).

There are several other problems with the harm principle that we shall note but not pursue here. (1) The principle seems to rely on a causal relationship between what a person does and some harm that befalls another. We've already seen in passing that harm is not always brought about. Not every attempt succeeds, and yet we generally punish attempts as well as

[11] See Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), ch. 1. Feinberg of course does devote attention to the scope of "interests." I have attempted a slightly different account in "Crime and the Concept of Harm," *American Philosophical Quarterly* 15, no. 1 (1978): 27–36.

[12] *On Liberty*, ch. 2.

completed crimes. Mill is not altogether indifferent to the somewhat problematic connection between what a person does and the harm that befalls another person, for he allows that we may sometimes be punished for omissions (failing to save a drowning child or contribute to the common weal, for example), and though an argument can be provided to suggest that omissions are causally potent, they are not causally potent in quite the same way as commissions.[13] Moreover, sometimes our acts are remote from the harms that befall others but we are held criminally responsible (we supply the gun that another fires). (2) In addition, we need to consider who the others are who are harmed. Not all crimes directly impact on other individuals – we may harm public institutions when we seek to bribe public officials or commit perjury, or our conduct may (somewhat more problematically) upset a general interest in public order. (3) There is considerable contention about what constitutes the "wrongful" invasion of interests – in particular, whether consent to harm done might negate or deflect the charge of criminality. We allow something like that in business ventures, where a heavy loser in the competitive marketplace is not (usually) considered to have been criminally harmed. Here we adopt the principle involved in an ancient saying: to the one who consents no wrong is done (*volenti non fit injuria*). But we are often much less willing to accept this principle with respect to conduct that might otherwise be viewed as *mala in se*: sadomasochism, voluntary euthanasia, suicide, mutilation, and, more recently, voluntary cannibalism.[14]

In addition, as Mill himself makes clear, there are rival positions to the view that the harm principle is the only criterion to which we can appeal in deciding which acts to criminalize and which not, rival positions that may even be consistent (albeit controversially so) with the aspirations of a liberal democratic society. Mill's rejection of interventions for the individual's "own good" may, for example, rule out seatbelt laws as well as some other paternalistic interventions that our society endorses as consistent with its liberal democratic principles (claiming as grounds for intervention that certain

[13] It may be worth noting that whereas most European countries have so-called Good Samaritan criminal laws, countries in the Anglo-American tradition have tended to oppose them. See my "Good Samaritanism," *Philosophy & Public Affairs* 5, no. 4 (1976): 382–407.

[14] See, for example, Vera Bergelson, "The Right to be Hurt: Testing the Boundaries of Consent," *George Washington Law Review* 75, no. 2 (February, 2007): 165–236.

small sacrifices of individual liberty are a reasonable trade for considerably enhanced safety).[15] Indeed, even Mill draws the line at self-enslavement. And what about behavior that is not harmful but is grossly offensive, such as racist rantings or public defecation or what Mill also recoils at, public indecency? Some would argue that intervention in regard to non-harmful but nonetheless offensive behavior would be appropriate while others might disagree, or disagree with respect to the kind of intervention that is appropriate. No doubt there will be similar disagreements about how to respond to conduct that harms no one, but which, like flag-burning or polygamy, challenges deeply and widely felt sentiments. These examples bring home to us that human conduct in its great variety does not come neatly packaged into exclusive categories of "criminal" and "noncriminal," and that the question whether we should or should not punish behavior that is harmful to self (or others), or is grossly offensive or in violation of widely held standards of right conduct, must take into account a variety of factors. Though we will surely find that cases of "harm to others" are those that are easiest to deal with, not even they are always easy to deal with, and other cases may have a legitimate claim on our attention as objects of criminalization. Of course, as we move away from cases in which harm is done to others we will find that decisions to criminalize are increasingly difficult to make as well as increasingly controversial.

Who should decide?

Of course, the fact that criminalization is the outcome of a *decision* about what should and should not be subject to punishment raises an additional important question – much debated by sociologists of crime – of *who* decides or, more importantly, *should* decide which acts in which circumstances should be subject to criminal sanctions. In liberal societies, it is a legislature that decides, with the legislature taken to speak for "the people," as it has been voted in by the people, and – at least in theory – if the people do not like what the legislature decides, other decisions can be made by other legislators whom the people can choose to replace the previous decision-makers. (A change of legislators can come about during the next voting

[15] Of course, one might argue in favor of some paternalistic laws without at the same time arguing for criminalizing noncompliance with these laws.

season and in some places even sooner if public protests are loud enough.) Sometimes, however, it appears that law-makers do not truly speak for the people at large. To be sure, laws are cast in terms that are general and seemingly applicable to all citizens and in like manner: all must adhere to them, law-makers and other citizens alike. But although all are subject to the requirements of the law, some laws are more onerous on some people and on some groups than on others. Anatole France famously and sarcastically remarked that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the street, and to steal bread."[16] Such laws as France referred to clearly affected the poor much more than they did the rich. But critics of the criminal law have frequently complained that laws *generally* tend to serve the values and interests of only particular segments of society – the well-to-do, the social aristocracy, men, Caucasians, or some other group or groups possessing some special social and legislative leverage – rather than society as a whole. At best (according to the complaint) some laws serve one group of citizens whereas other laws serve other groups. If this complaint is valid, then we have reason to believe that there really exists no single "people" for whom "the law" speaks, but only diverse groups, each with a particular set of interests, and no single way in which the interests of all can be recognized. (Of course, it is an open question whether the interests of all *should* be recognized. If the answer is negative, then we must somehow determine which interests should be recognized by law and which need not.)

The challenge of diversity

The multicultural challenge

The "harm principle" that Mill advanced addresses, at least to some extent, the problems raised above. But it does not solve them altogether. There will inevitably be disagreements about what constitutes the harm that is said to trigger legitimate interference with a person's conduct. For example, some think that abortion involves a significant harm to others ("the unborn") whereas others think that it does not (since they disagree that fetuses constitute "others" in the requisite sense). As liberal democratic societies come

[16] Anatole France, *The Red Lily*, trans. Winifred Stevens (New York: Dodd, Mead, 1922), 95.

chapter

3 The Harm Principle

OBJECTIVES

By the end of this chapter and associated reading you should:

- understand the main features of Mill's argument for negative liberty
- appreciate the sorts of criticism that can be levelled at the theory, and some counter-arguments to these criticisms
- have a clear idea of what utilitarianism is
- have improved your skills in reading longer passages of philosophy
- be confident that you can distinguish vagueness from ambiguity

INTRODUCTION

John Stuart Mill's *On Liberty* is the classic defence of a concept of negative liberty. In places it seems also to rely on an implicit concept of positive liberty, but the main thrust of the argument is that, other things being equal, individuals should be left free from interference, either by the state or by other citizens. *On Liberty* was published in 1859 and was in part a reaction to what Mill perceived as an oppressive drive towards collective mediocrity in mid-Victorian Britain. Mill felt that not only laws, but also social pressures, resulted in many potentially great individuals leading cramped and stultifying lives. The sum of misery was being increased by laws and attitudes which were detrimental to the society which imposed them. One of Mill's main targets was what he called 'the tyranny of the majority': the oppressive effects of social pressure to conform. *On Liberty* provided a range of arguments as to why we should preserve a large area of individual freedom, including freedom to be eccentric and outspoken, even if our eccentricities might not be fruitful ones and our outspoken opinions false. As we

shall see, not all the arguments in *On Liberty* are sound ones. It has nevertheless exerted and continues to exert a profound influence on decisions about the acceptable limits of negative freedom.

WHO WROTE IT?

Although *On Liberty* was published under Mill's name, this may be slightly misleading. In the dedication to the book he acknowledged the contribution made by his wife, Harriet Taylor, who died before it was completed: 'Like all that I have written for many years, it belongs as much to her as to me' (Mill 1985 edn, p. 58).

In his *Autobiography* (1873), he explained what this meant:

> When two persons have their thoughts and speculations completely in common; when all subjects of intellectual or moral interest are discussed between them in daily life, and probed to much greater depths than are usually or conveniently sounded in writings intended for general readers; when they set out from the same principles, and arrive at their conclusions by processes pursued jointly, it is of little consequence in respect to the question of originality, which of them holds the pen; the one who contributes least to the composition may contribute most to the thought; the writings which result are the joint product of both, and it must often be impossible to disentangle their respective parts, and affirm that this belongs to one and that to the other. In this wide sense, not only during the years of our married life, but during many of the years of confidential friendship which preceded, all my published writings were as much her work as mine; her share in them constantly increasing as years advanced.
>
> (Mill 1989 edn, pp. 183–4)

Mill is explicit that *On Liberty* was the result of such a collaborative approach to writing :

> The *Liberty* was more directly and literally our joint production than anything else which bears my name, for there was not a sentence of it that was not several times gone through by us together, turned over in many ways, and carefully weeded of any faults, either in thought or expression, that we detected in it. It is in consequence of this that, although it never underwent her final revision, it far surpasses, as a mere specimen of composition, anything which has proceeded from me either before or since. With regard to the thoughts, it is difficult to identify any particular part or element as being more hers than all the rest. The whole mode of thinking of which the book was the expression, was emphatically hers. But I also was so thoroughly imbued with it that the same thoughts naturally occurred to us both.
>
> (Mill 1989 edn, pp. 188–9)

Mill's commentators have debated the extent to which Harriet Taylor can really be considered the joint author of *On Liberty*, but the sincerity of Mill's estimate of her input is not in question. He certainly believed that the work was as much hers as his. Perhaps, though, a more appropriate gesture would have been to make the joint authorship apparent by including both authors' names on the title page.

ONE VERY SIMPLE PRINCIPLE

In his *Autobiography*, Mill described *On Liberty* as 'a kind of philosophic text-book of a single truth' (Mill 1989 edn, p. 189), and in the book itself he describes his aim as 'to assert one very simple principle'. This 'very simple principle' is now usually known as the Harm Principle, or sometimes as the Liberty Principle. Mill gives several formulations of it. For instance, he writes early on in the book:

> the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.
>
> (Mill 1985 edn, p. 68)

The Harm Principle, at least at this stage in Mill's argument, relies on a concept of negative liberty. In the first instance, Mill wants to establish an area of freedom from constraint or interference for each member of a civilized society. The limit on that freedom is where the actions of one individual harm someone else. Only when there is a risk of harm to others is there any justification for intervention. Mill explicitly rules out paternalistic intervention, intervention for the good of the individual concerned. I should, according to the Harm Principle, be free to flail my arms about wildly up to the point where I risk hitting someone and thereby harming them; you shouldn't intervene to stop me flailing my arms, even if you think I risk harming myself by hitting various inanimate objects. You can reason with me, but you shouldn't act paternalistically and physically restrain me.

EXERCISE 3.1

COMPREHENSION

Read the questions below. Then read the passage which follows them and answer the questions. The reason for looking at the questions before reading the passage is to help you focus your reading of the passage. Finally, compare your answers with the ones given in the Discussion below. Resist the temptation to skip ahead to the Discussion. Part of the point of this exercise is to give you practice extracting the main points from a passage of philosophical writing. This aim will be thwarted if you don't try to answer the questions before looking at the answers I have given.

1 What two methods of coercion does Mill identify? Give an example of each.
2 Does Mill allow any grounds for coercing responsible adults in a civilized country, other than to prevent harm to others?
3 Although Mill rules out using force to prevent me from doing things which will physically harm myself, what methods of preventing me from harming myself does he allow?
4 Which three groups of people does Mill exempt from the Harm Principle?

5 What prerequisite does he stipulate must be met by a nation or a people before his Harm Principle can be applied to them?

MILL *ON LIBERTY*

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. For the same reason we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great that there is seldom any choice of means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end perhaps otherwise unattainable. Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one. But as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion (a period long

since reached in all nations with whom we need here concern ourselves), compulsion, either in the direct form or in that of pains and penalties for noncompliance, is no longer admissible as a means to their own good, and justifiable only for the security of others.

(Mill 1989 edn, pp. 68–9)

DISCUSSION

1 Legal penalties and the moral coercion of public opinion. An example of coercion by means of legal penalties is the law that punishes murder with imprisonment. An example of moral coercion by public opinion is the way some homosexual couples have found it impossible to live together in some blocks of flats, because of the constant hostility of other tenants. In Britain there is no law against homosexual couples living together, but in some cases public opinion can have a coercive effect, making it practically impossible without deception.

2 No. This is the only grounds for coercing responsible adults in a civilized country. See the answer to (4) below for how Mill treats those who are not adults, not fully responsible or not members of a civilized country.

3 You can remonstrate with me, reason with me, persuade me, or entreat me, but you aren't justified in compelling me to abstain from an activity that only harms myself.

4 (a) Children and young people below a legal age of consent; (b) those who need to be cared for by others to protect themselves (he has in mind here, those people, such as the certified insane, who are not in a position to make decisions concerning their own safety and need to be protected against the consequences of their actions); (c) lastly, and most controversially, he believes that it is acceptable to coerce 'backward states of society'; if you intend to improve barbarians it is acceptable to use force against them, even against their will.

5 They must 'have become capable of being improved by free and equal discussion'. Mill's reasons for believing this should become clearer when we have examined his general arguments for preserving freedom of speech.

The passage we have been examining, which occurs early in *On Liberty*, offers Mill's main conclusions. Notice that, despite the fact that the word 'conclusions' suggests that they will come at the end of a piece of writing, in many instances people setting forward a case for a position (as Mill is here) begin by stating their main conclusions. Most of the rest of Mill's book is taken up with the arguments he gives to support these conclusions, and with some examples of how the Harm Principle is to be applied in particular cases.

EXERCISE 3.2

MILL'S HARM PRINCIPLE

Which of the following would Mill probably count as unacceptable infringements of individual liberty?

1 You forcibly prevent a young child from running across the road.
2 You are prevented from entering your home by a cordon of aggressive neighbours.
3 A police officer confiscates the kitchen knife that you are carrying because she believes, with good reason, that otherwise you will very likely injure someone with it.
4 Against your will, your partner handcuffs you to your chair 'for your own good', to prevent you going out and getting drunk.
5 A dangerous criminal is locked in a prison cell.
6 You are prevented from sunbathing nude on a private beach by a local by-law.
7 You are prevented from sunbathing nude on a private beach by a group of angry locals who dislike naturists.
8 You are prevented from seeing an '18' certificate film because you are only eleven.
9 You are prevented from keeping an unexploded bomb which you dug up in your back garden.
10 The law prevents you from driving on the right-hand side of the road in Britain.
11 You are forced to take regular exercise by your boss on the grounds that it is for your own good, and that you are leading an unhealthy lifestyle.

Check your answers against those at the back of the book before reading on.

A NATURAL RIGHT TO FREEDOM?

What sort of general argument does Mill give in support of the notion that we should preserve an area of non-interference for each responsible adult in a civilized society? You might be tempted to suppose that he believes that the kind of freedom he has described in the passage above is simply a natural right. Somehow, as adult human beings in what Mill would count as a civilized society, we just have this fundamental right to freedom from intervention by the state or by the moral coercion of public opinion. However, Mill rejects outright the notion that we have any natural rights. Like his mentor, Jeremy Bentham (1748–1832), he regarded talk about the existence of natural rights as 'nonsense on stilts'. For Mill, all meaningful talk about human rights is grounded on a more basic principle, known as the Greatest Happiness Principle. According to Mill, to say that you have a right to freedom means that a law preserving your freedom will tend to maximize happiness, or 'utility' as he calls it. In order to understand this, you need to understand Mill's utilitarianism, the moral philosophy which he

thinks provides the ultimate answers to questions of how we should behave towards each other.

MILL'S UTILITARIANISM

As a utilitarian Mill believed that the morally right action in any circumstance was the one which would bring about the greatest total (or aggregate) happiness. This is the Greatest Happiness Principle, sometimes called the Principle of Utility. In other words, all moral questions boil down to the probable consequences of the various possible courses of action: 'actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness' (Mill 1991 edn, p. 137).

Because it focuses exclusively on the consequences of actions rather than on the motives of those who perform them, or on absolute rules about right and wrong regardless of consequences, utilitarianism is described as a 'consequentialist' theory. For utilitarians and other consequentialists the end (in this case, maximizing happiness) can justify the means. According to some other moral theories, such as that of Immanuel Kant (1724–1804), various actions are just right or wrong independently of consequences. For Mill, whichever action maximizes happiness is the morally right one to implement. Utilitarians use the word 'utility' in a technical sense to mean 'happiness'. So when, in *On Liberty*, Mill writes 'I regard utility as the ultimate appeal on all ethical questions', he doesn't mean 'usefulness' but rather 'tendency to maximize happiness'.

However, utilitarians differ considerably on the question of what 'happiness' or 'utility' is. Jeremy Bentham's was probably the simplest approach: what he meant by happiness was pleasure and the absence of pain. Happiness on this view is simply a blissful mental state. For Bentham it did not matter how this state was produced; he famously declared that, provided that they produce the same amount of pleasure, pushpin (a children's game) should count as highly as poetry. Mill, however, viewed happiness as more complex than this. He, for example, distinguished between types of happiness: he thought there were both higher and lower pleasures. The higher ones, which were the intellectual pleasures of thought, were always preferable to the lower sensual pleasures, such as the pleasures of eating, or the physical pleasures from sex. In his book *Utilitarianism* (published in 1863), he argued that the higher pleasures were always preferable to the lower ones, even if the lower ones were experienced with great intensity; as he put it:

> It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is of a different opinion, it is because they only know their own side of the question.
>
> (Mill 1991 edn, p. 140)

In *On Liberty* Mill makes it clear that the kind of liberty he proposes is justified on utilitarian grounds; that preserving this range of negative freedoms will maximize utility in the relevant sense. But we should not read into this the idea that preserving these freedoms would result in everyone walking around in a blissful

mental state (Bentham's account of happiness). Mill's complex notion of happiness is grounded on 'the permanent interests of man as a progressive being'.

This phrase is somewhat vague. Some commentators have taken it to imply a positive sense of freedom. They believe that Mill's ultimate justification for guaranteeing a wide range of negative liberties is that this is the best way of ensuring the possibility of the development of humans as 'progressive' beings – a kind of self-realization, perhaps. Whether or not this is so, Mill's basic justification for preserving a wide range of negative freedoms is that this will have beneficial consequences for society. In other words, *On Liberty* presents a consequentialist justification for its stance. As Mill puts it: 'Mankind are greater gainers by suffering [i.e allowing] each other to live as seems good to themselves than by compelling each to live as seems good to the rest' (Mill 1985 edn, p. 72).

The benefits of allowing people to have a wide area of choice over their own lives far outweigh any benefits which would arise from coercing them into other ways of living, even if the coercion were applied for the good of the individuals concerned. Notice that this is an empirical claim: it is a claim about the probable consequences of various negative freedoms as compared with the consequences of various kinds of coercion. It is not a necessary truth that preserving an inviolable area of individual negative freedom will maximize utility: it isn't necessarily so. It is a contingent fact, if it is a fact at all (for the distinction between necessary and contingent see Chapter 1, pp. 16–17). It is one which requires research and evidence to corroborate it.

A SUFFICIENT CONDITION FOR INTERVENTION?

At first glance it might seem that Mill is saying that if an action causes or is likely to cause harm to someone else then the state should intervene to prevent this harm. However, he is explicit that this is not what he means. The fact that an action causes harm is not alone sufficient to warrant state intervention. There can be many cases of legitimate competition in which those who lose are certainly harmed. Mill mentions free trade and competitive competition in this respect. Yet his Harm Principle is not intended to justify intervention in such cases. What Mill does say, on the most plausible interpretation of *On Liberty*, is that an action's causing harm is only a necessary condition of intervention, that is, *only* if an action causes or is likely to cause harm does the state have grounds for intervention. However, the fact of its causing or being likely to cause harm need not always lead to intervention.

EXERCISE 3.3

NECESSARY AND SUFFICIENT CONDITIONS

Fill in the blanks with either 'necessary' or 'sufficient'.

1 You have to be over 18 to vote, so being over 18 is a _____ condition of

A SUFFICIENT CONDITION FOR INTERVENTION?

voting. It is not a _____ condition, however, because you also must be eligible to vote either by your nationality or residency.

2 If you've got a ticket you can go into the stadium. So having a ticket is a _____ condition of entry. Players don't need tickets. So being a player is a _____ condition. Having a ticket, then, isn't a _____ condition of entry.

3 Causing others harm is a _____ condition for state intervention. It is not a _____ condition because there are many cases in which harm to others inevitably occurs and yet in which state intervention is not justified.

Check your answers against those at the back of the book before reading on.

MILL'S GENERAL APPROACH CRITICIZED

From the time of its first publication up to the present day Mill's *On Liberty* has been discussed and criticized. Some of Mill's critics have concentrated on relatively minor details of the book; others, however, have identified problematic aspects of his theory as a whole. In this section we'll be looking at the major criticisms of Mill's whole approach. The three sorts of criticism can be summarized in the form of three questions:

1 What exactly does Mill mean by 'harm'?
2 Are there really any actions which don't affect other people?
3 Is the Harm Principle really utilitarian?

The first of these focuses on a key term in Mill's theory; the second questions an assumption that Mill makes, one on which the whole theory depends; the third asks whether the fundamental principle of the book is consistent with the general moral framework that Mill claims to endorse. We will consider each type of criticism in turn.

CRITICISM 1: HARM

Mill is often accused of being vague about his use of the word 'harm'. The Harm Principle stipulates that only when other people are at risk of being harmed is there any justification for coercing their behaviour. When the sole person who can be harmed is the person performing the act, we can only try to talk them out of it and are never justified in intervening forcibly to prevent them doing what they, as a responsible adult, have freely chosen to do (or for that matter, freely consented to have done to them). This seems at first glance straightforward enough. Yet in order to put this principle into practice, we need to have a clear notion of what sorts of thing count as harmful.

EXERCISE 3.4

VAGUENESS AND AMBIGUITY

Vagueness is lack of precision. This is not the same as ambiguity, which is when a word or phrase has two or more possible meanings.

Which of the following answers are vague, and which ambiguous? Which, if any, are neither vague nor ambiguous? Indicate what the possible meanings are for those you think are ambiguous.

1 'What are you doing later?' asked the heron?
'I've got to go to the bank', the duck replied.

2 'Could you tell me how I get to Bank from Charing Cross station in a car?'
'Oh, it's east of here.'

3 'If you want to take out life assurance I need to know how old you are.'
'Fifty something.'

4 'I need financial help.'
'You need to see our small business expert.'

5 Bank clerk: 'I'm sorry, I must have dozed off.'
Customer: 'I hope you haven't been overworking yourself on my account.'

6 'What's your bank manager like?'
'Oh he's very fair.'

Check your answers against those at the back of this book before reading on.

Although Mill's notion of harm draws on the common meaning of the term, it is clear that this doesn't coincide completely with what he intends. For example, some people think that various kinds of blasphemy harm everyone in the society in which this occurs; but Mill is clear that, unless it is an incitement to violence against these people, the fact that some people find some views offensive doesn't count as their having been harmed. Undoubtedly many Muslims are deeply offended when, in a Muslim country, someone chooses to eat pork (a meat forbidden them by their religion); but Mill states that this sort of taking of offence wouldn't justify a ban on pork-eating, even in a Muslim country. The religious offence, no matter that it is deep and genuine, wouldn't amount to a harm. Again, after watching a rugby match in which someone was seriously injured, we might be unlikely to think of the sport as '*harmless* fun'. But for Mill, if the participants in a rugby match have given free and informed consent to play, then they cannot be harmed (in the relevant sense) by anything that occurs on the pitch, provided that their injuries occur within the rules of the game. For Mill, then, if you take offence at something it doesn't mean you've

been harmed; and if you get physically injured as a result of a risky activity to which you have given your free and informed consent, then that doesn't amount to harm either.

But these refinements of the ordinary notion of 'harm' don't provide enough detail to overcome a range of difficulties. Some of these difficulties are summarized in the following list of questions about Mill's notion of harm given by the contemporary philosopher and political theorist John Gray:

> Does he intend the reader to understand 'harm' to refer only to physical harm, or must a class of moral harms to character be included in any application of the liberty principle? Must the harm that the restriction on liberty prevents be done directly to indentifiable individuals, or may it also relevantly be done to institutions, social practices and forms of life? Can serious offence to feelings count as harm so far as the restriction of liberty is concerned, or must the harm be done to interests, or to those interests the protection of which is to be accorded the status of a right? Can a failure to benefit someone, or to perform one's obligations to the public, be construed as a case in which harm has been done?
>
> (Gray 1996, p. 49)

Mill doesn't provide straightforward answers to any of these questions in *On Liberty*, and yet most of them are questions which need to be answered before we could put Mill's Harm Principle into practice. In some cases there would be no obvious way of telling whether or not an action conflicted with the Harm Principle.

In Mill's defence, it should be pointed out that he was aware of the need for sensitivity to the sort of case in question when applying the Harm Principle. The principle itself does not, and was not intended to, give a simple, easily applied answer to every difficulty about restricting negative liberties; rather it was meant to provide an explanation of the kinds of justification which were appropriate and acceptable.

Nevertheless, Mill is certainly vaguer than he might have been about what harm is. But how serious a criticism of Mill's whole approach is this? It does have serious implications for the confident application of the theory. However, the upshot of the criticism is that *On Liberty* is in an important sense incomplete, but not that it is incoherent. The book was intended for a wide general readership, and over-concern with the definition of 'harm' would have seriously detracted from its appeal. And in many cases covered by the Harm Principle there is no difficulty in establishing that harm to others has occurred. Since its publication philosophers sympathetic to Mill's approach have tried to give a more precise formulation of the notion of harm than he gave. For instance, the philosopher of law Joel Feinberg has provided a number of what he calls 'mediating maxims' to suggest how we might weight the relative importance of the variety of things which can be considered harms when attempting to apply the Harm Principle. Some of the most important of these are:

> *The magnitude of harm*: People can be assumed to share certain basic interests in continued life, health, sustenance, shelter, procreation, political liberty, etc. (the 'welfare

interests'*). Without these basic necessities people are precluded from doing whatever else they would like to do. Other things being equal, setbacks to these interests are the most serious. Conversely, it would never be right to invoke the cumbersome machinery of the criminal law in order to address very trivial harms, even if they are capable of setting back interests in extreme cases.

The probability of harm: Where a harmful consequence is not certain, risk is the gravity of harm multiplied by the probability of its occurring. Risk has to be balanced against social utility in order to decide whether conduct is too risky to be lawful and should therefore be proscribed.

The relative importance of harm: Where competitive interests make harm of someone inevitable, the relative importance of harm can be assessed according to:

- the vitality of the interest: how important is the interest to a person's network of interests and projects? How central is it to their life?
- the extent to which the interest is reinforced by related and overlapping interests, public and private.
- the moral value of the interest. Some interests are so manifestly morally repugnant (e.g. the sadist's interest in torturing children) that they should be ascribed no weight at all in calculating the balance of interests.

*These ... include 'the interests in one's own physical health and vigour, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement ... '

(Feinberg, quoted in *Consent in the Criminal Law* [1995], p. 254)

Clearly such mediating maxims are potentially controversial. However, some such set of principles is needed if we are to put Mill's Harm Principle or its descendants into practice. But the fact that Mill's theory as expressed in *On Liberty* is incomplete in this respect does not necessarily undermine its value.

Let's turn now to the second sort of criticism levelled against Mill's general approach, namely that it relies on an untenable distinction between actions which affect other people and those which affect only the person performing the action.

CRITICISM 2: NO MAN IS AN ISLAND

Mill's Harm Principle states that the only acceptable justification for coercion of responsible adults in a civilized society is that they risk harming others by their actions. This is made clear at several points in the text. As Mill puts it in his final chapter:

> the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people, if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct.
>
> (Mill 1985 edn, p. 163)

HOME OFFICE
SCOTTISH HOME DEPARTMENT

Report

of the Committee on

Homosexual Offences

and

Prostitution

Presented to Parliament by the Secretary of State for the Home Department
and the Secretary of State for Scotland
by Command of Her Majesty
September 1957

LONDON
HER MAJESTY'S STATIONERY OFFICE
FIVE SHILLINGS NET

Cmnd. 247

but the most serious of these offences may be dealt with summarily in the Sheriff courts, with a limited maximum penalty, makes for greater uniformity of sentence than is apparent in England and Wales.

As regards prostitution, the laws relating to loitering or importuning for the purposes of prostitution which are in force in the Scottish burghs differ fundamentally from those in force in the English towns in that it is not necessary to establish, for the purposes of a conviction, that annoyance was caused to residents or passers-by.

Accordingly, some of our recommendations apply only to England and Wales; and some of our criticisms have less force, and some of our other recommendations less application, in relation to Scotland than they have in relation to England and Wales.

11. In several places in the report we have quoted decisions of the courts on the interpretation of the statutory or common law. Not all the points decided by the English courts have been decided by the Scottish courts; and while the courts on either side of the border always pay great attention to the decisions of those on the other, they do not necessarily follow them. If, therefore, a particular statute applies to both England and Scotland, or a statute which applies to England is paralleled by a similar provision applicable to Scotland, the courts will not necessarily interpret the law in the same way in the two countries. Where, however, the statutes relating to the matters with which we are concerned are similarly framed in regard both to England and to Scotland, it seems unlikely that the Scottish courts would differ substantially from the English courts in their interpretation of them.

CHAPTER II

Our Approach to the Problem

12. It will be apparent from our terms of reference that we are concerned throughout with the law and offences against it. We clearly recognise that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good; nor does our commission extend to assessing the teaching of theology, sociology or psychology on these matters, though on many points we have found their conclusions very relevant to our thinking.

13. Further, we do not consider it to be within our province or competence to make a full examination of the moral, social, psychological and biological causes of homosexuality or prostitution, or of the many theories advanced about these causes. Our primary duty has been to consider the extent to which homosexual behaviour and female prostitution should come under the condemnation of the criminal law, and this has presented us with the difficulty of deciding what are the essential elements of a criminal offence. There appears to be no unquestioned definition of what constitutes or ought to constitute a crime. To define it as "an act which is punished by the State" does not answer the question: What acts ought to be punished by the State? We have therefore worked with our own formulation of the function of the criminal law so far as it concerns the subjects of this enquiry. In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient

safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

14. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour. Certain forms of sexual behaviour are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions at the present time; for instance, adultery and fornication are not offences for which a person can be punished by the criminal law. Nor indeed is prostitution as such.

15. We appreciate that opinions will differ as to what is offensive, injurious or inimical to the common good, and also as to what constitutes exploitation or corruption; and that these opinions will be based on moral, social or cultural standards. We have been guided by our estimate of the standards of the community in general, recognising that they will not be accepted by all citizens, and that our estimate of them may be mistaken.

16. We have had to consider the relationship between the law and public opinion. It seems to us that there are two over-definite views about this. On the one hand, it is held that the law ought to follow behind public opinion, so that the law can count on the support of the community as a whole. On the other hand, it is held that a necessary purpose of the law is to lead or fortify public opinion. Certainly it is clear that if any legal enactment is markedly out of tune with public opinion it will quickly fall into disrepute. Beyond this we should not wish to dogmatise, for on the matters with which we are called upon to deal we have not succeeded in discovering an unequivocal "public opinion," and we have felt bound to try to reach conclusions for ourselves rather than to base them on what is often transient and seldom precisely ascertainable.

45. Those who have the impression of a growth in homosexual practices find it supported by at least three wider considerations. First, in the general loosening of former moral standards, it would not be surprising to find that leniency towards sexual irregularities in general included also an increased tolerance of homosexual behaviour and that greater tolerance had encouraged the practice. Secondly, the conditions of war time, with broken families and prolonged separation of the sexes, may well have occasioned homosexual behaviour which in some cases has been carried over into peace time. Thirdly, it is likely that the emotional insecurity, community instability and weakening of the family, inherent in the social changes of our civilisation, have been factors contributing to an increase in homosexual behaviour.

Most of us think it improbable that the increase in the number of offences recorded as known to the police can be explained entirely by greater police activity, though we all think it very unlikely that homosexual behaviour has increased proportionately to the dramatic rise in the number of offences recorded as known to the police.

46. Our medical evidence seems to show three things: first, that in general practice male homosexuals form a very small fraction of the doctor's patients; secondly, that in psychiatric practice male homosexuality is a primary problem in a very small proportion of the cases seen; and thirdly, that only a very small percentage of homosexuals consult doctors about their condition. It is almost impossible to compare the incidence of homosexual behaviour with the incidence of other forms of sexual irregularity, most of which are outside the purview of the criminal law and are therefore not recorded in criminal statistics; our impression is that of the total amount of irregular sexual conduct, homosexual behaviour provides only a very small proportion. It cannot, however, be ignored. The male population of Great Britain over the age of fifteen numbers nearly eighteen million, and even if the Swedish figures quoted in paragraph 39 above, which are the lowest figures relating to incidence that have come to our notice, are at all applicable to this country, the incidence of homosexuality and homosexual behaviour must be large enough to present a serious problem.

47. Our conclusion is that homosexual behaviour is practised by a small minority of the population, and should be seen in proper perspective, neither ignored nor given a disproportionate amount of public attention. Especially are we concerned that the principles we have enunciated above on the function of the law should apply to those involved in homosexual behaviour no more and no less than to other persons.

CHAPTER V

The Present Law and Practice

(i) General Review

48. It is against the foregoing background that we have reviewed the existing provisions of the law in relation to homosexual behaviour between male persons. We have found that with the great majority of these provisions we are in complete agreement. We believe that it is part of the function of the law to safeguard those who need protection by reason of their youth or some mental defect, and we do not wish to see any change in the law that would weaken this protection. Men who commit offences against such persons should be treated as criminal offenders. Whatever may be the causes

of their disposition or the proper treatment for it, the law must assume that the responsibility for the overt acts remains theirs, except where there are circumstances which it accepts as exempting from accountability. Offences of this kind are particularly reprehensible when the men who commit them are in positions of special responsibility or trust. We have been made aware that where a man is involved in an offence with a boy or youth the invitation to the commission of the act sometimes comes from him rather than from the man. But we believe that even when this is so that fact does not serve to exculpate the man.

49. It is also part of the function of the law to preserve public order and decency. We therefore hold that when homosexual behaviour between males takes place in public it should continue to be dealt with by the criminal law. Not all the elements in the apprehension of offenders, or in their trial, seem to us to be satisfactory, and on these points we comment later. But so far as the law itself is concerned we should not wish to see any major change in relation to this type of offence.

50. Besides the two categories of offence we have just mentioned, namely, offences committed by adults with juveniles and offences committed in public places, there is a third class of offence to which we have had to give long and careful consideration. It is that of homosexual acts committed between adults in private.

51. In England and Wales, during the three years ended March 1956, 480 men aged twenty-one or over were convicted of offences committed in private with consenting partners also aged twenty-one or over. Of these, however, 121 were also convicted of, or admitted, offences in public places (parks, open spaces, lavatories, &c.), and 59 were also convicted of, or admitted, offences with partners under twenty-one. In Scotland, during the same period, 9 men over twenty-one were convicted of offences committed in private with consenting adult partners. Of these, one also admitted offences in public places and one admitted offences with a partner under twenty-one. Thus 307 men (300 in England and Wales and 7 in Scotland), guilty as far as is known only of offences committed in private with consenting adult partners, were convicted by the courts during this period. Tables VI and XI in Appendix I show how the 307 offenders were dealt with by the courts.

52. We have indicated (in Chapter II above) our opinion as to the province of the law and its sanctions, and how far it properly applies to the sexual behaviour of the individual citizen. On the basis of the considerations there advanced we have reached the conclusion that legislation which covers acts in the third category we have mentioned goes beyond the proper sphere of the law's concern. We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.

53. In considering whether homosexual acts between consenting adults in private should cease to be criminal offences we have examined the more serious arguments in favour of retaining them as such. We now set out these arguments and our reasons for disagreement with them. In favour of retaining the present law, it has been contended that homosexual behaviour between adult males, in private no less than in public, is contrary to the public good on the grounds that—

(i) it menaces the health of society;

(ii) it has damaging effects on family life;

(iii) a man who indulges in these practices with another man may turn his attention to boys.

54. As regards the first of these arguments, it is held that conduct of this kind is a cause of the demoralisation and decay of civilisations, and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped, by every possible means. We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind. It is held also that if such men are employed in certain professions or certain branches of the public service their private habits may render them liable to threats of blackmail or to other pressures which may make them "bad security risks." If this is true, it is true also of some other categories of person: for example, drunkards, gamblers and those who become involved in compromising situations of a heterosexual kind; and while it may be a valid ground for excluding from certain forms of employment men who indulge in homosexual behaviour, it does not, in our view, constitute a sufficient reason for making their private sexual behaviour an offence in itself.

55. The second contention, that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed, we have had evidence that it often is; cases in which homosexual behaviour on the part of the husband has broken up a marriage are by no means rare, and there are also cases in which a man in whom the homosexual component is relatively weak nevertheless derives such satisfaction from homosexual outlets that he does not enter upon a marriage which might have been successfully and happily consummated. We deplore this damage to what we regard as the basic unit of society; but cases are also frequently encountered in which a marriage has been broken up by homosexual behaviour on the part of the wife, and no doubt some women, too, derive sufficient satisfaction from homosexual outlets to prevent their marrying. We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offence. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offences there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it has to be recognised that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster.

56. We have given anxious consideration to the third argument, that an adult male who has sought as his partner another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offences against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors

we should not make it. But in this matter we have been much influenced by our expert witnesses. They are in no doubt that whatever may be the origins of the homosexual condition, there are two recognisably different categories among adult male homosexuals. There are those who seek as partners other adult males, and there are paedophiliacs, that is to say men who seek as partners boys who have not reached puberty.(1)

57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and *vice-versa*, though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen. A survey of 155 prisoners diagnosed as being homosexuals on reception into Brixton prison during the period 1st January, 1954, to 31st May, 1955, indicated that 107 (69 per cent.) were attracted to adults, 43 (27·7 per cent.) were attracted to boys, and 5 (3·3 per cent.) were attracted to both boys and adults. This last figure of 3·3 per cent. is strikingly confirmed by another investigation of 200 patients outside prison. But paedophiliacs, together with the comparatively few who are indiscriminate, will continue to be liable to the sanctions of criminal law, exactly as they are now. And the others would be very unlikely to change their practices and turn to boys simply because their present practices were made legal. It would be paradoxical if the making legal of an act at present illegal were to turn men towards another kind of act which is, and would remain, contrary to the law. Indeed, it has been put to us that to remove homosexual behaviour between adult males from the listed crimes may serve to protect minors; with the law as it is there may be some men who would prefer an adult partner but who at present turn their attention to boys because they consider that this course is less likely to lay them open to prosecution or to blackmail than if they sought other adults as their partners. If the law were changed in the way we suggest, it is at least possible that such men would prefer to seek relations with older persons which would not render them liable to prosecution. In this connection, information we have received from the police authorities in the Netherlands suggests that practising homosexuals in that country are to some extent turning from those practices which are punishable under the criminal law to other practices which are not. Our evidence, in short, indicates that the fear that the legalisation of homosexual acts between adults will lead to similar acts with boys has not enough substance to justify the treatment of adult homosexual behaviour in private as a criminal offence, and suggests that it would be more likely that such a change in the law would protect boys rather than endanger them.

58. In addition, an argument of a more general character in favour of retaining the present law has been put to us by some of our witnesses. It is that to change the law in such a way that homosexual acts between consenting adults in private ceased to be criminal offences must suggest to the average citizen a degree of toleration by the Legislature of homosexual behaviour, and that such a change would "open the floodgates" and result in unbridled licence. It is true that a change of this sort would amount to a limited degree of such toleration, but we do not share the fears of our witnesses that the change would have the effect they expect. This expectation seems to us to exaggerate the effect of the law on human behaviour. It may well be true that the present law deters from homosexual acts some who would otherwise

(1) There are reasons for supposing that paedophilia differs from other manifestations of homosexuality. For example, it would seem that in some cases the propensity is for partners of a particular age rather than for partners of a particular sex. An examination of the records of the offences covered by the Cambridge survey reveals that 8 per cent. of the men convicted of sexual offences against children had previous convictions for both heterosexual and homosexual offences.

commit them, and to that extent an increase in homosexual behaviour can be expected. But it is no less true that if the amount of homosexual behaviour has, in fact, increased in recent years, then the law has failed to act as an effective deterrent. It seems to us that the law itself probably makes little difference to the amount of homosexual behaviour which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behaviour. It is highly improbable that the man to whom homosexual behaviour is repugnant would find it any less repugnant because the law permitted it in certain circumstances; so that even if, as has been suggested to us, homosexuals tend to proselytise, there is no valid reason for supposing that any considerable number of conversions would follow the change in the law.

59. As will be observed from Appendix III, in only very few European countries does the criminal law now take cognisance of homosexual behaviour between consenting parties in private. It is not possible to make any useful statistical comparison between the situation in countries where the law tolerates such behaviour and that in countries where all male homosexuals acts are punishable, if only because in the former the acts do not reflect themselves in criminal statistics. We have, however, caused enquiry to be made in Sweden, where homosexual acts between consenting adults in private ceased to be criminal offences in consequence of an amendment of the law in 1944. We asked particularly whether the amendment of the law had had any discernible effect on the prevalence of homosexual practices, and on this point the authorities were able to say no more than that very little was known about the prevalence of such practices either before or after the change in the law. We think it reasonable to assume that if the change in the law had produced any appreciable increase in homosexual behaviour or any large-scale proselytising, these would have become apparent to the authorities.

60. We recognise that a proposal to change a law which has operated for many years so as to make legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated *de novo*, any provision making these acts illegal. To reverse a long-standing tradition is a serious matter and not to be suggested lightly. But the task entrusted to us, as we conceive it, is to state what we regard as a just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure.

61. Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibilty which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

62.(1) We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offence.

63. This proposal immediately raises three questions: What is meant by "consenting"; What is meant by "in private"; What is meant by "adult"?

So far as concerns the first of these, we should expect that the question whether or not there has been "consent" in a particular case would be decided by the same criteria as apply to heterosexual acts between adults. We should expect, for example, that a "consent" which had been obtained by fraud or threats of violence would be no defence to a criminal charge; and that a criminal charge would also lie where drugs had been used to render the partner incapable of giving or withholding consent, or where the partner was incapable for some other reason (for example, mental defect) of giving a valid consent.

We are aware that the quality of the consent may vary; consent may amount to anything from an eager response to a grudging submission. We are aware, too, that money, gifts or hospitality are sometimes used to induce consent. But these considerations apply equally to heterosexual relationships, and we find in them no ground for differentiating, so far as the behaviour of adults is concerned, between homosexual and heterosexual relationships.

64.(2) Our words "in private" are not intended to provide a legal definition. Many heterosexual acts are not criminal if committed in private but are punishable if committed in circumstances which outrage public decency, and we should expect the same criteria to apply to homosexual acts. It is our intention that the law should continue to regard as criminal any indecent act committed in a place where members of the public may be likely to see and be offended by it, but where there is no possibility of public offence of this nature it becomes a matter of the private responsibility of the persons concerned and as such, in our opinion, is outside the proper purview of the criminal law. It will be for the courts to decide, in cases of doubt, whether or not public decency has been outraged, and we cannot see that there would be any greater difficulty about establishing this in the case of homosexual acts than there is at present in the case of heterosexual acts.

65. The question of the age at which a man is to be regarded as "adult" is much more difficult. A wide range of ages has been covered by proposals made in the evidence which has been offered to us by our witnesses. On the analogy of heterosexual behaviour there is a case for making the age sixteen, for heterosexual acts committed by consenting partners over that age in private are not criminal. At the other end of the scale an age as high as thirty was suggested. Within these two extremes, the ages most frequently suggested to us have been eighteen and twenty-one.

66. It seems to us that there are four sets of considerations which should govern the decision on this point. The first is connected with the need to protect young and immature persons; the second is connected with the age at which the pattern of a man's sexual development can be said to be fixed; the third is connected with the meaning of the word "adult" in the sense of "responsible for his own actions"; and the fourth is connected with the consequences which would follow from the fixing of any particular age. Unfortunately, these various considerations may not all lead to the same answer.

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(1) See Reservation I (*a*), page 117.
(2) See Reservation I (*b*), page 121.

67. So far as concerns the first set of considerations, we have made it clear throughout our report that we recognise the need for protecting the young and immature. But this argument can be pressed too far; there comes a time when a young man can properly be expected to " stand on his own feet " in this as in other matters, and we find it hard to believe that he needs to be protected from would-be seducers more carefully than a girl does. It could indeed be argued that in a simply physical sense he is better able to look after himself than she is. On this view, there would be some ground for making sixteen the age of " adulthood," since sexual intercourse with a willing girl of this age is not unlawful.

68. We have given special attention to the evidence which has been given to us in connection with the second set of considerations—those which relate the notion of " adulthood " to a recognisable age in the fixation of a young man's sexual pattern—for we should not wish to see legalised any forms of behaviour which would swing towards a permanent habit of homosexual behaviour a young man who without such encouragement would still be capable of developing a normal habit of heterosexual adult life. On this point we have been offered many and conflicting opinions which agree however in admitting the difficulty of equating stabilisation of sexual pattern with a precise chronological age. Our medical witnesses were unanimously of the view that the main sexual pattern is laid down in the early years of life, and the majority of them held that it was usually fixed, in main outline, by the age of sixteen. Many held that it was fixed much earlier. On this ground again, then, it would seem that sixteen would be an appropriate age.

69. We now turn to the third set of considerations, that is, the age at which a person may be regarded as sufficiently adult to take decisions about his private conduct and to carry the responsibility for their consequences. In other fields of behaviour the law recognises the age of twenty-one as being appropriate for decisions of this kind; for example, this is the age at which a man is deemed to be capable of entering into legal contracts, including (in England and Wales) the contract of marriage, on his own responsibility. Apart altogether from legal or medical technicalities, we believe that it would be generally accepted, as a matter of ordinary usage, that " adult " means, broadly speaking, " of the age of twenty-one or more "; and we believe that it is, as a matter of common sense, reasonable to accept this as designating the age at which a man is regarded as being maturely responsible for his actions.

70. To suggest that the age of adulthood for the purposes we have in mind should be twenty-one leads us to the fourth set of considerations we have mentioned, namely, the consequences which would follow from the decision about any particular age. To fix the age at twenty-one (or indeed at any age above seventeen) raises particular difficulties in this connection, for it involves leaving liable to prosecution a young man of almost twenty-one for actions which in a few days' time he could perform without breaking the law. This difficulty would admittedly arise whatever age was decided upon, for it would always be the case that an action would be illegal a few days below that age and legal above it. But this difficulty would present itself in a less acute form if the age were fixed at eighteen, which is the other age most frequently suggested to us. For whereas it would be difficult to regard a young man of nearly twenty-one charged with a homosexual offence as a suitable subject for " care or protection " under the provisions of the Children and Young Persons Acts, it would not be entirely inappropriate so to regard a youth under eighteen. If the age of adulthood for the purposes of our amendment were fixed at eighteen, and if the " care or protection " provisions

ally wish to enjoy whatever benefits marijuana use may have. If the negative effects of marijuana use can be shown to be self-regarding, it is difficult to see how our respect for the importance of freedom can be reconciled with the urge to paternalistically limit access to a substance whose use is harmless to others. The bulk of Dworkin's essay examines the conditions under which impure paternalism might create so much good that it could outweigh the harm it does to the freedom of persons who do not clearly benefit from it. Dworkin offers a variety of observations about Mill's understanding of freedom and autonomy, and powerful arguments designed to show that "[p]aternalism is justified only to preserve a wider range of freedom for the individual in question."[5]

3. H.L.A. Hart and Lord Devlin on Legal Moralism

If you have read the chapters on the nature of law, you will be aware that the relation between law and morality is a matter of enduring controversy and confusion. One area of controversy is the question of "legal moralism." Roughly, legal moralism concerns whether the law does in fact or ought to enforce moral standards—the conclusions of moral philosophy. The famous Hart-Devlin debate involves questions about the nature and purpose of law, and the nature and role of morality in law.

In Section I, Chapter 2, a brief sketch of H.L.A. Hart is offered, so we will proceed directly to Lord Devlin. Patrick Devlin was a senior judge in England, well known also for his writing in jurisprudence. The debate between Hart and Devlin rose out of Devlin's arguments in a lecture later published as *The Enforcement of Morals*, from which our selection is taken. In his lecture in 1959, Devlin disputed the conclusion of the Wolfenden Report of 1957, which contained the results of a committee investigation into homosexuality and prostitution. The writers of that report recommended to the United Kingdom Parliament that the English law prohibiting homosexual behaviour between consenting adults in private should be repealed.[6] According to the writers of the report, such private conduct is not the proper concern of the criminal law. The proper concern of the criminal law is to protect individual citizens. Devlin criticized the findings of the report, and argued for a much different conclusion: the proper concern of the criminal law is to protect society, and that concern may require prohibition of immoral acts, even those carried out in private and with no outward other-regarding effects. Let us examine more closely some important parts of the reasoning behind Devlin's view, before turning to Hart's response.

3.1 Morality in the Criminal Law

According to Devlin, moral purposes may be found in a large number of criminal laws, and this fact is simply a mirror of the further fact that a society requires a shared morality in order to survive. More importantly, the moral purpose of the criminal law is not limited to laws aimed at protecting individuals from other individuals' conduct. Rather, the criminal law serves to protect certain accepted social values which make up the moral fabric of an enduring society. To illustrate his claim, Devlin points to the fact that no one can consent to being murdered. At first glance, it seems to be a very good thing that a murderer cannot defend herself in court by claiming that the victim consented. On the other hand, however, it seems that this rejection of the possibility of consenting to murder does not exist simply to protect

5 "Paternalism," §V.

6 This debate over homosexuality may seem to be merely a part of ancient history. It is worth considering, however, that significant political groups in the USA, Canada and the UK vigorously deny the right to freedom from discrimination on the basis of sexual orientation. It may be useful for you to look into the ongoing debate over the issue of "gay marriage."

prospective murder victims. In fact, the legal rejection of possibility of consenting to murder makes it impossible for terminally ill persons who need help in committing suicide to receive help. The person who helps will likely be charged and found guilty of murder, regardless of the fact that the "victim" consented to her murder. The law, in rejecting the "consent" defence, refuses to permit assisted suicide, despite the fact that assisted suicide is self-regarding and may be carried out privately without offense or harm to others. The law, Devlin claims, plainly has the purpose of advancing the moral principle of respect for human life, and will not tolerate immoral lack of respect for human life, even in private, self-regarding conduct.

3.2 Morality and Preservation of Society

Devlin argues that a society requires agreement on moral values. As Devlin puts it, "... society means a community of ideas; without shared ideas on politics, morals, and ethics, no society can exist." If a society comes to lack shared acceptance of a group of ideas, that society will not survive. Devlin explains, "If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate."[7] Unfortunately, Devlin does not point to any examples of a society disintegrating under the weight of disagreement about what is good and evil, but the general thread of his argument can still be understood: societies need morality if they are to avoid chaos. Yet, as you will see in Hart's criticisms, Devlin's argument appears to be incomplete. He does not specify clearly just what a society is. Nor does he explain how a change in public morality can be tolerated by a system which requires agreement in order to survive.

3.3 What Morality Should the Criminal Law Enforce?

Devlin offers an account of morality which diverges significantly from what you may have learned in a course in moral philosophy. According to Devlin, the public morality of England is composed of its Christian heritage, and the standard of the "reasonable man" or "right minded man" as developed by the courts. What is morally right or morally wrong, for the purposes of the courts, is what the reasonable man, in England, views as morally right or morally wrong.

Devlin accepts without question the historical role of the established church in the formation of English morality. By "established church" Devlin means the Church of England, also called the Anglican Church, tied constitutionally to the government of England. This situation is unfamiliar to the context of Canadian and American law where separation of church and state is more clearly drawn. Yet Devlin's view need not be rejected in Canada and the USA simply because the church does not play the same role in public life. Devlin simply points to the church as a source of moral values, and Christian moral views are very often used in the same way in Canada and the USA, as standards for criticism and evaluation. Given this understanding of the historical and contemporary importance of Christian values in Canada and the USA, Devlin's assertion that the law needs the church may be understood as the claim that the law needs some set of accepted moral values as its underpinning. Devlin argues that "... the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail."[8]

7 "Morals and the Criminal Law."

8 "Morals and the Criminal Law."

We may now assemble the full train of Devlin's argument against repeal of the law prohibiting homosexual activities conducted in private between consenting adults. The criminal law is and has long been concerned to enforce the moral standards which must be maintained if English society is to survive. For better or for worse, English society and the historical interpretation of Christian values has resulted in a public morality which feels repugnance toward the very idea of homosexual activities—even those activities conducted in private between consenting adults. Even an atheist who rejects the existence of the Christian God may recognize that this view is in fact held in England, and the atheist may also recognize that this view is part of the moral fabric which binds English society. Homosexual activities are therefore justifiably made illegal, according to Devlin, because they are a threat to the public morality which preserves English society, and they are the sort of activities which are properly controlled by law.

4. Hart's Response

Let us turn now to Hart's criticism of Devlin. In *Law, Liberty and Morality*, the short book from which our excerpt is taken, Hart challenges the arguments of Lord Devlin and a famous judge and writer of the Victorian era, James Fitzjames Stephen. This introduction and our excerpt will not be concerned with Stephen's arguments, since the core of the debate is between Hart and Devlin.

4.1 Moral Criticism of Social Institutions

Hart's main dispute with Devlin concerns Devlin's claim that a society is justified in taking whatever measures are required for its continued existence. Yet, Hart argues, it is surely still possible to argue that certain societies pursue such horrible goals that it is better for that society to collapse. It seems, then, that the activity in which Devlin participates as he offers his argument is an activity at two levels: an argument about the measures the society of England ought to take to preserve itself, and an argument that preservation of a society is a worthwhile goal. Devlin has begun a legitimate critical activity which Hart may join on the same basis: on the assumption that it is possible to reason about the nature and limits of the steps societies ought to take to govern themselves.

The nature of this critical activity can be explained further by Hart's distinction between "positive" morality, "the morality actually accepted and shared by a given social group," and "critical" morality, the "general moral principles used in the criticism of actual social institutions including positive morality." In our common activity of critical discussion of social institutions such as law, we readily understand the difference between the social norms of some group and what on reflection we suppose are the standards by which that group's norms may be evaluated. We understand, for example, that North American social standards or "positive morality" regarding premarital sex have changed dramatically between 1950 and now. We use standards of critical morality when we discuss whether these changes reflect a general worsening of moral character amongst North Americans, or perhaps instead a badly needed loosening of misguided restrictions.

4.2 Justifying Legal Moralism

What does reasoning according to the standards of critical morality have to do with legal enforcement of morality? According to Hart, the legal moralism Devlin proposes needs to be carefully justified, because it proposes to punish certain conduct with a variety of significant punishments, and because it limits freedom of choice and the happiness which freedom of choices has the potential to produce. As Hart explains, "This is of particular importance in the case of laws enforcing a sexual morality. They may create misery of a quite special degree... [since] suppression of sexual impulses generally is something which affects the development or balances of

the individual's emotional life, happiness, and personality."[9] If Devlin proposes such miserable penalties against immoral behaviour, Devlin must show that this behaviour really is so seriously wrong as to justify the harshness of the proposed punishments.

4.3 Moral Purposes in the Criminal Law

Devlin argues that it is justifiable to prohibit and punish even private, self-regarding immorality, on the grounds that it threatens the fabric of society. And he asserts that the law already contains measures whose only purpose is to enforce a moral principle. An important part of Hart's argument disputes this assertion. It is an error, Hart supposes, to think that laws such as those prohibiting the possibility of consenting to one's own murder can only be understood as enforcing a moral principle (perhaps the principle of respect for life). It is more plausible to understand such laws as instances of paternalism, where individuals are protected against themselves and their weaknesses as human beings. Regardless of whether such paternalism is good or bad, paternalism itself is quite different from enforcement of a particular principle of morality. Devlin's assertion that the criminal law serves only to enforce moral principles seems to be an exaggeration, since many laws which appear to involve enforcement of moral principles are in fact instances of paternalism or legal advancement of other goals.

4.4 Shared Morality and Society

Finally, let us consider Hart's criticism of Devlin's idea that a society requires a shared morality for survival, and is justified in prohibiting even private conduct which weakens that shared morality. Hart observes that Devlin provides little evidence that a society tends to be worse off when private, self-regarding conduct strays from that society's positive morality. In particular, Hart claims, tolerance of homosexual activity conducted in private between consenting adults does not seem to have led to a moral breakdown in those European societies which tolerate it. Further, Hart claims, there are problems with Devlin's understanding of the idea of "society" as meaning "a group whose members hold in common a shared morality." If a society is simply a shared morality, Devlin cannot explain shifts in a society's morality without also admitting that the original society has changed and has been replaced by a new society corresponding to the changed morality. Yet this view runs contrary to our ordinary observation that a society may remain the same society despite changes in its positive morality.

Let us sum up Hart's argument. Devlin has failed to distinguish between positive and critical morality, and has left open the possibility that a society might be justified in following standards of morality which are terribly immoral according to the standards of critical morality. Such a society might inflict painful punishment on persons whose actions are seen to be immoral yet are plainly self-regarding. Contrary to Devlin's assertion that English criminal law enforces moral principles of this sort in order to preserve English society, such criminal laws seem to serve other purposes, such as paternalistic intervention to protect persons from themselves. Finally, tolerance of activities Devlin construes as immoral does not seem to lead to moral chaos of the sort Devlin predicts.

What is the end of this debate? It is not easy to see whether Hart or Devlin won. Devlin's argument has likely not survived Hart's criticisms without a scratch. Nor, however, has Hart offered a complete defence of Mill's distinction between other-regarding action which is justifiably limited by law, and self-regarding action which is properly the private business of individual persons and no one else. The problems Hart and Devlin engage are sufficiently complex that it is very difficult to determine what an acceptable final solution might consist of. Yet these problems *require* that we at least attempt to provide answers if we are to avoid mistaken toleration or un-

9 *Law, Liberty, and Morality.*

PATRICK DEVLIN

"Morals and the Criminal Law,"* from *The Enforcement of Morals*

The Report of the Committee on Homosexual Offences and Prostitution, generally known as the Wolfenden Report, is recognized to be an excellent study of two very difficult legal and social problems. But it has also a particular claim to the respect of those interested in jurisprudence; it does what law reformers so rarely do; it sets out clearly and carefully what in relation to its subjects it considers the function of the law to be.[1] Statutory additions to the criminal law are too often made on the simple principle that "there ought to be a law against it." The greater part of the law relating to sexual offences is the creation of statute and it is difficult to ascertain any logical relationship between it and the moral ideas which most of us uphold. Adultery, fornication, and prostitution are not, as the Report[2] points out, criminal offences: homosexuality between males is a criminal offence, but between females it is not. Incest was not an offence until it was declared so by statute only fifty years ago. Does the legislature select these offences haphazardly or are there some principles which can be used to determine what part of the moral law should be embodied in the criminal? There is, for example, being now considered a proposal to make A.I.D., that is, the practice of artificial insemination of a woman with the seed of a man who is not her husband, a criminal offence; if, as is usually the case, the woman is married, this is in substance, if not in form, adultery. Ought it to be made punishable when adultery is not? This sort of question is of practical importance, for a law that appears to be arbitrary and illogical, in the end and after the wave of moral indignation that has put it on the statute book subsides, forfeits respect. As a practical question it arises more frequently in the field of sexual morals than in any other, but there is no special answer to be found in that field. The inquiry must be general and fundamental. What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?

The statements of principle in the Wolfenden Report provide an admirable and modern starting-point for such an inquiry. In the course of my examination of them I shall find matter for criticism. If my criticisms are sound, it must not be imagined that they point to any shortcomings in the Report. Its authors were not, as I am trying to do, composing a paper on the jurisprudence of morality; they were evolving a working formula to use for reaching a number of practical conclusions. I do not intend to express any opinion one way or the other about these; that would be outside the scope of a lecture on jurisprudence. I am concerned only with general principles; the statement of these in the Report illuminates the entry into the subject and I hope that its authors will forgive me if I carry the lamp with me into places where it was not intended to go.

Early in the Report[3] the Committee put forward:

* Maccabaean Lecture in Jurisprudence read at the British Academy on 18 March 1959 and printed in the *Proceedings of the British Academy*, vol xlv, under the title "The Enforcement of Morals."

1 The Committee's "statement of juristic philosophy" (to quote Lord Pakenham) was considered by him in a debate in the House of Lords on 4 December 1957, reported in *Hansard Lords Debates*, vol. ccvi at 738; and also in the same debate by the Archbishop of Canterbury at 753 and Lord Denning at 806. The subject has also been considered by Mr. J.E. Hall Williams in the *Law Quarterly Review*, January 1958, vol. lxxiv, p.76.

2 Para. 14.

3 Para. 13.

> Our own formulation of the function of the criminal law so far as it concerns the subjects of this enquiry. In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.
>
> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

The Committee preface their most important recommendation[4]

> that homosexual behaviour between consenting adults in private should no longer be a criminal offence, [by stating the argument[5]] which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.

Similar statements of principle are set out in the chapters of the Report which deal with prostitution. No case can be sustained, the Report says, for attempting to make prostitution itself illegal.[6] The Committee refer to the general reasons already given and add: "We are agreed that private immorality should not be the concern of the criminal law except in the special circumstances therein mentioned." They quote[7] with approval the report of the Street Offences Committee,[8] which says: "As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions." It will be observed that the emphasis is on *private* immorality. By this is meant immorality which is not offensive or injurious to the public in the ways defined or described in the first passage which I quoted. In other words, no act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption, or exploitation. This is clearly brought out in relation to prostitution: "It is not the duty of the law to concern itself with immorality as such ... it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious."[9]

These statements of principle are naturally restricted to the subject-matter of the Report. But they are made in general terms and there seems to be no reason why, if they are valid, they should not be applied to the criminal law in general. They separate very decisively crime from sin, the divine law from the secular, and the moral from the criminal. They do not signify any lack of support for the law, moral or criminal, and they do not represent an attitude that can be called either religious or irreligious. There are many schools of thought among those who may think that morals are not the law's business. There is first of all the agnostic or free-thinker. He does not of course disbelieve in morals, nor in sin if it be given the wider of the two meanings assigned to it

4 Para. 62.
5 Para. 61.
6 Para. 224.
7 Para. 227.
8 Cmd. 3231 (1928).
9 Para. 257.

in the *Oxford English Dictionary* where it is defined as "transgression against divine law or the principles of morality." He cannot accept the divine law; that does not mean that he might not view with suspicion any departure from moral principles that have for generations been accepted by the society in which he lives; but in the end he judges for himself. Then there is the deeply religious person who feels that the criminal law is sometimes more of a hindrance than a help in the sphere of morality, and that the reform of the sinner—at any rate when he injures only himself—should be a spiritual rather than a temporal work. Then there is the man who without any strong feeling cannot see why, where there is freedom in religious belief, there should not logically be freedom in morality as well. All these are powerfully allied against the equating of crime with sin.

I must disclose at the outset that I have as a judge an interest in the result of the inquiry which I am seeking to make as a jurisprudent. As a judge who administers the criminal law and who has often to pass sentence in a criminal court, I should feel handicapped in my task if I thought that I was addressing an audience which had no sense of sin or which thought of crime as something quite different. Ought one, for example, in passing sentence upon a female abortionist to treat her simply as if she were an unlicensed midwife? If not, why not? But if so, is all the panoply of the law erected over a set of social regulations? I must admit that I begin with a feeling that a complete separation of crime from sin (I use the term throughout this lecture in the wider meaning) would not be good for the moral law and might be disastrous for the criminal. But can this sort of feeling be justified as a matter of jurisprudence? And if it be a right feeling, how should the relationship between the criminal and the moral law be stated? Is there a good theoretical basis for it, or is it just a practical working alliance, or is it a bit of both? That is the problem which I want to examine, and I shall begin by considering the standpoint of the strict logician. It can be supported by cogent arguments, some of which I believe to be unanswerable and which I put as follows.

Morals and religion are inextricably joined—the moral standards generally accepted in Western civilization being those belonging to Christianity. Outside Christendom other standards derive from other religions. None of these moral codes can claim any validity except by virtue of the religion on which it is based. Old Testament morals differ in some respects from New Testament morals. Even within Christianity there are differences. Some hold that contraception is an immoral practice and that a man who has carnal knowledge of another woman while his wife is alive is in all circumstances a fornicator; others, including most of the English-speaking world, deny both these propositions. Between the great religions of the world, of which Christianity is only one, there are much wider differences. It may or may not be right for the State to adopt one of these religions as the truth, to found itself upon its doctrines, and to deny to any of its citizens the liberty to practise any other. If it does, it is logical that it should use the secular law wherever it thinks it necessary to enforce the divine. If it does not, it is illogical that it should concern itself with morals as such. But if it leaves matters of religion to private judgement, it should logically leave matters of morals also. A State which refuses to enforce Christian beliefs has lost the right to enforce Christian morals.

If this view is sound, it means that the criminal law cannot justify any of its provisions by reference to the moral law. It cannot say, for example, that murder and theft are prohibited because they are immoral or sinful. The State must justify in some other way the punishments which it imposes on wrongdoers and a function for the criminal law independent of morals must be found. This is not difficult to do. The smooth functioning of society and the preservation of order require that a number of activities should be regulated. The rules that are made for that purpose and are enforced by the criminal law are often designed simply to achieve uniformity and

convenience and rarely involve any choice between good and evil. Rules that impose a speed limit or prevent obstruction on the highway have nothing to do with morals. Since so much of the criminal law is composed of rules of this sort, why bring morals into it at all? Why not define the function of the criminal law in simple terms as the preservation of order and decency and the protection of the lives and property of citizens, and elaborate those terms in relation to any particular subject in the way in which it is done in the Wolfenden Report? The criminal law in carrying out these objects will undoubtedly overlap the moral law. Crimes of violence are morally wrong and they are also offences against good order; therefore they offend against both laws. But this is simply because the two laws in pursuit of different objectives happen to cover the same area. Such is the argument.

Is the argument consistent or inconsistent with the fundamental principles of English criminal law as it exists today? That is the first way of testing it, though by no means a conclusive one. In the field of jurisprudence one is at liberty to overturn even fundamental conceptions if they are theoretically unsound. But to see how the argument fares under the existing law is a good starting-point.

It is true that for many centuries the criminal law was much concerned with keeping the peace and little, if at all, with sexual morals. But it would be wrong to infer from that that it had no moral content or that it would ever have tolerated the idea of a man being left to judge for himself in matters of morals. The criminal law of England has from the very first concerned itself with moral principles. A simple way of testing this point is to consider the attitude which the criminal law adopts towards consent.

Subject to certain exceptions inherent in the nature of particular crimes, the criminal law has never permitted consent of the victim to be used as a defence. In rape, for example, consent negatives an essential element. But consent of the victim is no defence to a charge of murder. It is not a defence to any form of assault that the victim thought his punishment well deserved and submitted to it; to make a good defence the accused must prove that the law gave him the right to chastise and that he exercised it reasonably. Likewise, the victim may not forgive the aggressor and require the prosecution to desist; the right to enter a *nolle prosequi* belongs to the Attorney-General alone.

Now, if the law existed for the protection of the individual, there would be no reason why he should avail himself of it if he did not want it. The reason why a man may not consent to the commission of an offence against himself beforehand or forgive it afterwards is because it is an offence against society. It is not that society is physically injured; that would be impossible. Nor need any individual be shocked, corrupted, or exploited; everything may be done in private. Nor can it be explained on the practical ground that a violent man is a potential danger to others in the community who have therefore a direct interest in his apprehension and punishment as being necessary to their own protection. That would be true of a man whom the victim is prepared to forgive but not of one who gets his consent first; a murderer who acts only upon the consent, and maybe the request, of his victim is no menace to others, but he does threaten one of the great moral principles upon which society is based, that is, the sanctity of human life. There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.

Thus, if the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens (including the protection of youth from corruption), it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his

own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principle. It must be remembered also that although there is much immorality that is not punished by the law, there is none that is condoned by the law. The law will not allow its processes to be used by those engaged in immorality of any sort. For example, a house may not be let for immoral purposes; the lease is invalid and would not be enforced. But if what goes on inside there is a matter of private morality and not the law's business, why does the law inquire into it at all?

I think it is clear that the criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else. The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where does it get its authority to do this and how does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derived both from Christian teaching. But I think that the strict logician is right when he says that the law can no longer rely on doctrines in which citizens are entitled to disbelieve. It is necessary therefore to look for some other source.

In jurisprudence, as I have said, everything is thrown open to discussion and, in the belief that they cover the whole field, I have framed three interrogatories addressed to myself to answer:

1. Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement?

2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?

3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?

I shall begin with the first interrogatory and consider what is meant by the right of society to pass a moral judgement, that is, a judgement about what is good and what is evil. The fact that a majority of people may disapprove of a practice does not of itself make it a matter for society as a whole. Nine men out of ten may disapprove of what the tenth man is doing and still say that it is not their business. There is a case for a collective judgement (as distinct from a large number of individual opinions which sensible people may even refrain from pronouncing at all if it is upon somebody else's private affairs) only if society is affected. Without a collective judgement there can be no case at all for intervention. Let me take as an illustration the Englishman's attitude to religion as it is now and as it has been in the past. His attitude now is that a man's religion is his private affair; he may think of another man's religion that it is right or wrong, true or untrue, but not that it is good or bad. In earlier times that was not so; a man was denied the right to practise what was thought of as heresy, and heresy was thought of as destructive of society.

The language used in the passages I have quoted from the Wolfenden Report suggests the view that there ought not to be a collective judgement about immorality *per se.* Is this what is meant by "private morality" and "individual freedom of choice and action"? Some people sincerely believe that homosexuality is neither immoral nor unnatural. Is the "freedom of choice and action" that is offered to the individual, freedom to decide for himself what is moral or immoral, society remaining neutral; or is it freedom to be immoral if he wants to be? The language of the Report may be open to question, but the conclusions at which the Committee arrive

answer this question unambiguously. If society is not prepared to say that homosexuality is morally wrong, there would be no basis for a law protecting youth from "corruption" or punishing a man for living on the "immoral" earnings of a homosexual prostitute, as the Report recommends.[10] This attitude the Committee make even clearer when they come to deal with prostitution. In truth, the Report takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution. What the Report seems to mean by private morality might perhaps be better described as private behaviour in matters of morals.

This view—that there is such a thing as public morality—can also be justified by *a priori* argument. What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one: or rather, since that might suggest two independent systems, I should say that the structure of every society is made up both of politics and morals. Take, for example, the institution of marriage. Whether a man should be allowed to take more than one wife is something about which every society has to make up its mind one way or the other. In England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society. It is there not because it is Christian. It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down. The great majority of those who live in this country accept it because it is the Christian idea of marriage and for them the only true one. But a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives. It would be useless for him to stage a debate designed to prove that polygamy was theologically more correct and socially preferable; if he wants to live in the house, he must accept it as built in the way in which it is.

We see this more clearly if we think of ideas or institutions that are purely political. Society cannot tolerate rebellion; it will not allow argument about the rightness of the cause. Historians a century later may say that the rebels were right and the Government was wrong and a percipient and conscientious subject of the State may think so at the time. But it is not a matter which can be left to individual judgement.

The institution of marriage is a good example for my purpose because it bridges the division, if there is one, between politics and morals. Marriage is part of the structure of our society and it is also the basis of a moral code which condemns fornication and adultery. The institution of marriage would be gravely threatened if individual judgements were permitted about the morality of adultery; on these points there must be a public morality. But public morality is not to be confined to those moral principles which support institutions such as marriage. People do not think of monogamy as something which has to be supported because our society has chosen to organize itself upon it; they think of it as something that is good in itself and offering a good way of life and that it is for that reason that our society has adopted it. I return to the statement that I have already made, that society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift

10 Para. 76.

apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

Common lawyers used to say that Christianity was part of the law of the land. That was never more than a piece of rhetoric as Lord Sumner said in *Bowman v. The Secular Society.*[11] What lay behind it was the notion which I have been seeking to expound, namely that morals—and up till a century or so ago no one thought it worth distinguishing between religion and morals—were necessary to the temporal order. In 1675 Chief Justice Hale said: "To say that religion is a cheat is to dissolve all those obligations whereby civil society is preserved."[12] In 1797 Mr. Justice Ashurst said of blasphemy that it was "not only an offence against God but against all law and government from its tendency to dissolve all the bonds and obligations of civil society."[13] By 1908 Mr. Justice Phillimore was able to say: "A man is free to think, to speak and to teach what he pleases as to religious matters, but not as to morals."[14]

You may think that I have taken far too long in contending that there is such a thing as public morality, a proposition which most people would readily accept, and may have left myself too little time to discuss the next question which to many minds may cause greater difficulty: to what extent should society use the law to enforce its moral judgements? But I believe that the answer to the first question determines the way in which the second should be approached and may indeed very nearly dictate the answer to the second question. If society has no right to make judgements on morals, the law must find some special justification for entering the field of morality: if homosexuality and prostitution are not in themselves wrong, then the onus is very clearly on the lawgiver who wants to frame a law against certain aspects of them to justify the exceptional treatment. But if society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.

The Wolfenden Report, notwithstanding that it seems to admit the right of society to condemn homosexuality and prostitution as immoral, requires special circumstances to be shown to justify the intervention of the law. I think that this is wrong in principle and that any attempt to approach my second interrogatory on these lines is bound to break down. I think that the attempt by the Committee does break down and that this is shown by the fact that it has to define or describe its special circumstances so widely that they can be supported only if it is accepted that the law *is* concerned with immorality as such.

The widest of the special circumstances are described as the provision of "sufficient" safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[15] The corruption of youth is a well-recognized ground for intervention by the State and for the purpose of any legislation the young can easily be defined. But if similar protection were to be extended to every other citizen, there would be no limit to the reach of the law. The "corruption and exploitation of others" is so wide that it could be used to cover any sort of immorality which involves, as most do, the co-operation of another person. Even if the phrase is taken as limited to the categories that are particularized as "specially vulnerable," it is so elastic as to be practically no restriction. This is not

11 (1917), A.C. 406, at 457.
12 *Taylor's Case*, 1 Vent. 293.
13 *R.* v. *Williams*, 26 St. Tr. 653, at 715.
14 *R.* v. *Boulter*, 72 J.P. 188.
15 Para. 13.

merely a matter of words. For if the words used are stretched almost beyond breaking-point, they still are not wide enough to cover the recommendations which the Committee make about prostitution.

Prostitution is not in itself illegal and the Committee do not think that it ought to be made so.[16] If prostitution is private immorality and not the law's business, what concern has the law with the ponce or the brothel-keeper or the householder who permits habitual prostitution? The Report recommends that the laws which make these activities criminal offences should be maintained or strengthened and brings them (so far as it goes into principle; with regard to brothels it says simply that the law rightly frowns on them) under the head of exploitation.[17] There may be cases of exploitation in this trade, as there are or used to be in many others, but in general a ponce exploits a prostitute no more than an impresario exploits an actress. The Report finds that "the great majority of prostitutes are women whose psychological makeup is such that they choose this life because they find in it a style of living which is to them easier, freer and more profitable than would be provided by any other occupation.... In the main the association between prostitute and ponce is voluntary and operates to mutual advantage."[18] The Committee would agree that this could not be called exploitation in the ordinary sense. They say: "It is in our view an over-simplification to think that those who live on the earnings of prostitution are exploiting the prostitute as such. What they are really exploiting is the whole complex of the relationship between prostitute and customer; they are, in effect, exploiting the human weaknesses which cause the customer to seek the prostitute and the prostitute to meet the demand."[19]

All sexual immorality involves the exploitation of human weaknesses. The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute. If the exploitation of human weaknesses is considered to create a special circumstance, there is virtually no field of morality which can be defined in such a way as to exclude the law.

I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here again I think that the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.[20] The

16 Paras. 224, 285, and 318.

17 Paras. 302 and 320.

18 Para. 223.

19 Para. 306.

20 It is somewhere about this point in the argument that Professor Hart in *Law, Liberty and Morality* discerns a proposition which he describes as central to my thought. He states the proposition and his objection to it as follows (p.51). "He appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society [this I take to be the proposition on p.12] to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible

suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality. You may argue that if a man's sins affect only himself it cannot be the concern of society. If he chooses to get drunk every night in the privacy of his own home, is any one except himself the worse, for it? But suppose a quarter or a half of the population got drunk every night, what sort of society would it be? You cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate against drunkenness. The same may be said of gambling. The Royal Commission on Betting, Lotteries, and Gaming took as their test the character of the citizen as a member of society. They said: "Our concern with the ethical significance of gambling is confined to the effect which it may have on the character of the gambler as a member of society. If we were convinced that whatever the degree of gambling this effect must be harmful we should be inclined to think that it was the duty of the state to restrict gambling to the greatest extent practicable."[21]

In what circumstances the State should exercise its power is the third of the interrogatories I have framed. But before I get to it I must raise a point which might have been brought up in any one of

definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence." In conclusion (p.82) Professor Hart condemns the whole thesis in the lecture as based on "a confused definition of what a society is."

I do not assert that *any* deviation from a society's shared morality threatens its existence any more than I assert that *any* subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.

For the rest, the objection appears to me to be all a matter of words. I would venture to assert, for example, that you cannot have a game without rules and that if there were no rules there would be no game. If I am asked whether that means that the game is "identical" with the rules, I would be willing for the question to be answered either way in the belief that the answer would lead to nowhere. If I am asked whether a change in the rules means that one game has disappeared and another has taken its place, I would reply probably not, but that it would depend on the extent of the change.

Likewise I should venture to assert that there cannot be a contract without terms. Does this mean that an "amended" contract is a "new" contract in the eyes of the law? I once listened to an argument by an ingenious counsel that a contract, because of the substitution of one clause for another, had "ceased to have effect" within the meaning of a statutory provision. The judge did not accept the argument; but if most of the fundamental terms had been changed, I dare say he would have done.

The proposition that I make in the text is that if (as I understand Professor Hart to agree, at any rate for the purposes of the argument) you cannot have a society without "morality," the law can be used to enforce morality as something that is essential to a society. I cannot see why this proposition (whether it is right or wrong) should mean that morality can never be changed without the destruction of society. If morality is changed, the law can be changed. Professor Hart refers (p.72) to the proposition as "the use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence." One might as well say that the inclusion of a penal section into a statute prohibiting certain acts freezes the whole statute into immobility and prevents the prohibitions from ever being modified.

These points are elaborated in the sixth lecture at pp. 115–16.

21 (1951) Cmd. 8190, para. 159.

the three. How are the moral judgements of society to be ascertained? By leaving it until now, I can ask it in the more limited form that is now sufficient for my purpose. How is the law-maker to ascertain the moral judgements of society? It is surely not enough that they should be reached by the opinion of the majority; it would be too much to require the individual assent of every citizen. English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street—or to use an archaism familiar to all lawyers—the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. This was the standard the judges applied in the days before Parliament was as active as it is now and when they laid down rules of public policy. They did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid. It is what Pollock called "practical morality," which is based not on theological or philosophical foundations but "in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense." He called it also "a certain way of thinking on questions of morality which we expect to find in a reasonable civilized man or a reasonable Englishman, taken at random."[22]

Immorality then for the purpose of the law, is what every right-minded person presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its *locus standi.* It cannot be shut out. But—and this brings me to the third question—the individual has a *locus standi* too; he cannot be expected to surrender to the judgement of society the whole conduct of his life. It is the old and familiar question of striking a balance between the rights and interests of society and those of the individual. This is something which the law is constantly doing in matters large and small. To take a very down-to-earth example, let me consider the right of the individual whose house adjoins the highway to have access to it; that means in these days the right to have vehicles stationary in the highway, sometimes for a considerable time if there is a lot of loading or unloading. There are many cases in which the courts have had to balance the private right of access against the public right to use the highway without obstruction. It cannot be done by carving up the highway into public and private areas. It is done by recognizing that each have rights over the whole; that if each were to exercise their rights to the full, they would come into conflict; and therefore that the rights of each must be curtailed so as to ensure as far as possible that the essential needs of each are safeguarded.

I do not think that one can talk sensibly of a public and private morality any more than one can of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the lawmaking power but to guide those who have to apply it. While every decision which a court of law makes when it balances the public against the private interest is an *ad hoc* decision, the cases contain statements of principle to which the court should have regard when it reaches its decision. In the same way it is possible to make general statements of prin-

22 *Essays in Jurisprudence and Ethics* (1882), Macmillan, pp. 278 and 353.

ciple which it may be thought the legislature should bear in mind when it is considering the enactment of laws enforcing morals.

I believe that most people would agree upon the chief of these elastic principles. There must be toleration of the maximum individual freedom that is consistent with the integrity of society. It cannot be said that this is a principle that runs all through the criminal law. Much of the criminal law that is regulatory in character—the part of it that deals with *malum prohibitum* rather than *malum in se*—is based upon the opposite principle, that is, that the choice of the individual must give way to the convenience of the many. But in all matters of conscience the principle I have stated is generally held to prevail. It is not confined to thought and speech; it extends to action, as is shown by the recognition of the right to conscientious objection in war-time; this example shows also that conscience will be respected even in times of national danger. The principle appears to me to be peculiarly appropriate to all questions of morals. Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation. Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust;[23] they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice. I suppose that there is hardly anyone nowadays who would not be disgusted by the thought of deliberate cruelty to animals. No one proposes to relegate that or any other form of sadism to the realm of private morality or to allow it to be practised in public or in private. It would be possible no doubt to point out that until a comparatively short while ago nobody thought very much of cruelty to animals and also that pity and kindliness and the unwillingness to inflict pain are virtues more generally esteemed now than they have ever been in the past. But matters of this sort are not determined by rational argument. Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting that he was doing wrong. It is the power of a common sense and not the power of reason that is behind the judgements of society. But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society. There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusions is manifest.

The limits of tolerance shift. This is supplementary to what I have been saying but of sufficient importance in itself to deserve statement as a separate principle which law-makers have to bear in mind. I suppose that moral standards do not shift; so far as

23 These words which have been much criticized, are considered again in the Preface at p. viii.

they come from divine revelation they do not, and I am willing to assume that the moral judgements made by a society always remain good for that society. But the extent to which society will tolerate—I mean tolerate, not approve—departures from moral standards varies from generation to generation. It may be that over-all tolerance is always increasing. The pressure of the human mind, always seeking greater freedom of thought, is outwards against the bonds of society forcing their gradual relaxation. It may be that history is a tale of contraction and expansion and that all developed societies are on their way to dissolution. I must not speak of things I do not know; and anyway as a practical matter no society is willing to make provision for its own decay. I return therefore to the simple and observable fact that in matters of morals the limits of tolerance shift. Laws, especially those which are based on morals, are less easily moved. It follows as another good working principle that in any new matter of morals the law should be slow to act. By the next generation the swell of indignation may have abated and the law be left without the strong backing which it needs. But it is then difficult to alter the law without giving the impression that moral judgement is being weakened. This is now one of the factors that is strongly militating against any alteration to the law on homosexuality.

A third elastic principle must be advanced more tentatively. It is that as far as possible privacy should be respected. This is not an idea that has ever been made explicit in the criminal law. Acts or words done or said in public or in private are all brought within its scope without distinction in principle. But there goes with this a strong reluctance on the part of judges and legislators to sanction invasions of privacy in the detection of crime. The police have no more right to trespass than the ordinary citizen has; there is no general right of search; to this extent an Englishman's home is still his castle. The Government is extremely careful in the exercise even of those powers which it claims to be undisputed. Telephone tapping and interference with the mails afford a good illustration of this. A Committee of three Privy Councillors who recently inquired[24] into these activities found that the Home Secretary and his predecessors had already formulated strict rules governing the exercise of these powers and the Committee were able to recommend that they should be continued to be exercised substantially on the same terms. But they reported that the power was "regarded with general disfavour."

This indicates a general sentiment that the right to privacy is something to be put in the balance against the enforcement of the law. Ought the same sort of consideration to play any part in the formation of the law? Clearly only in a very limited number of cases. When the help of the law is invoked by an injured citizen, privacy must be irrelevant; the individual cannot ask that his right to privacy should be measured against injury criminally done to another. But when all who are involved in the deed are consenting parties and the injury is done to morals, the public interest in the moral order can be balanced against the claims of privacy. The restriction on police powers of investigation goes further than the affording of a parallel; it means that the detection of crime committed in private and when there is no complaint is bound to be rather haphazard and this is an additional reason for moderation. These considerations do not justify the exclusion of all private immorality from the scope of the law. I think that, as I have already suggested, the test of "private behaviour" should be substituted for "private morality" and the influence of the factor should be reduced from that of a definite limitation to that of a matter to be taken into account. Since the gravity of the crime is also a proper consideration, a distinction might well be made in the case of homosexuality between the lesser acts of indecency and the full offence, which on the principles of the Wolfenden Report it would be illogical to do.

24 (1957) Cmd. 283.

The last and the biggest thing to be remembered is that the law is concerned with the minimum and not with the maximum; there is much in the Sermon on the Mount that would be out of place in the Ten Commandments. We all recognize the gap between the moral law and the law of the land. No man is worth much who regulates his conduct with the sole object of escaping punishment, and every worthy society sets for its members standards which are above those of the law. We recognize the existence of such higher standards when we use expressions such as "moral obligation" and "morally bound." The distinction was well put in the judgement of African elders in a family dispute: "We have power to make you divide the crops, for this is our law, and we will see this is done. But we have not power to make you behave like an upright man."[25]

It can only be because this point is so obvious that it is so frequently ignored. Discussion among law-makers, both professional and amateur, is too often limited to what is right or wrong and good or bad for society. There is a failure to keep separate the two questions I have earlier posed—the question of society's right to pass a moral judgement and the question of whether the arm of the law should be used to enforce the judgement. The criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave; good citizens are not expected to come within reach of it or to set their sights by it, and every enactment should be framed accordingly.

The arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one. Since it is an instrument, it is wise before deciding to use it to have regard to the tools with which it can be fitted and to the machinery which operates it. Its tools are fines, imprisonment, or lesser forms of supervision (such as Borstal and probation) and—not to be ignored—the degradation that often follows upon the publication of the crime. Are any of these suited to the job of dealing with sexual immorality? The fact that there is so much immorality which has never been brought within the law shows that there can be no general rule. It is a matter for decision in each case; but in the case of homosexuality the Wolfenden Report rightly has regard to the views of those who are experienced in dealing with this sort of crime and to those of the clergy who are the natural guardians of public morals.

The machinery which sets the criminal law in motion ends with the verdict and the sentence; and a verdict is given either by magistrates or by a jury. As a general rule, whenever a crime is sufficiently serious to justify a maximum punishment of more than three months, the accused has the right to the verdict of a jury. The result is that magistrates administer mostly what I have called the regulatory part of the law. They deal extensively with drunkenness, gambling, and prostitution, which are matters of morals or close to them, but not with any of the graver moral offences. They are more responsive than juries to the ideas of the legislature; it may not be accidental that the Wolfenden Report, in recommending increased penalties for solicitation, did not go above the limit of three months. Juries tend to dilute the decrees of Parliament with their own ideas of what should be punishable. Their province of course is fact and not law, and I do not mean that they often deliberately disregard the law. But if they think it is too stringent, they sometimes take a very merciful view of the facts. Let me take one example out of many that could be given. It is an offence to have carnal knowledge of a girl under the age of sixteen years. Consent on her part is no defence; if she did not consent, it would of course amount to rape. The law makes special provision for the situation when a boy and girl are near in age. If a man under twenty-four can prove that he had reasonable cause to believe that the girl was over the age of sixteen

25 A case in the Saa-Katengo Kuta at Lialiu, August 1942, quoted in *The Judicial Process among the Barotse of Northern Rhodesia* by Max Gluckman, Manchester University Press, 1955, p. 172.

years, he has a good defence. The law regards the offence as sufficiently serious to make it one that is triable only by a judge at assizes. "Reasonable cause" means not merely that the boy honestly believed that the girl was over sixteen but also that he must have had reasonable grounds for his belief. In theory it ought not to be an easy defence to make out but in fact it is extremely rare for anyone who advances it to be convicted. The fact is that the girl is often as much to blame as the boy. The object of the law, as judges repeatedly tell juries, is to protect young girls against themselves; but juries are not impressed.

The part that the jury plays in the enforcement of the criminal law, the fact that no grave offence against morals is punishable without their verdict, these are of great importance in relation to the statements of principle that I have been making. They turn what might otherwise be pure exhortation to the legislature into something like rules that the lawmakers cannot safely ignore. The man in the jury box is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him.

This then is how I believe my third interrogatory should be answered—not by the formulation of hard and fast rules, but by a judgement in each case taking into account the sort of factors I have been mentioning. The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle. It is like a line that divides land and sea, a coastline of irregularities and indentations. There are gaps and promontories, such as adultery and fornication, which the law has for centuries left substantially untouched. Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment. All that the law can do with fornication is to act against its worst manifestations; there is a general abhorrence of the commercialization of vice, and that sentiment gives strength to the law against brothels and immoral earnings. There is no logic to be found in this. The boundary between the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sort of considerations I have been outlining. The fact that adultery, fornication, and lesbianism are untouched by the criminal law does not prove that homosexuality ought not to be touched. The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.

I have said that the morals which underly the law must be derived from the sense of right and wrong which resides in the community as a whole; it does not matter whence the community of thought comes, whether from one body of doctrine or another or from the knowledge of good and evil which no man is without. If the reasonable man believes that a practice is immoral and believes also—no matter whether the belief is right or wrong, so be it that it is honest and dispassionate—that no right-minded member of his society could think otherwise, then for the purpose of the

law it is immoral. This, you may say, makes immorality a question of fact—what the law would consider as self-evident fact no doubt, but still with no higher authority than any other doctrine of public policy. I think that that is so, and indeed the law does not distinguish between an act that is immoral and one that is contrary to public policy. But the law has never yet had occasion to inquire into the differences between Christian morals and those which every right-minded member of society is expected to hold. The inquiry would, I believe, be academic. Moralists would find differences; indeed they would find them between different branches of the Christian faith on subjects such as divorce and birth-control. But for the purpose of the limited entry which the law makes into the field of morals, there is no practical difference. It seems to me therefore that the free-thinker and the non-Christian can accept, without offence to his convictions, the fact that Christian morals are the basis of the criminal law and that he can recognize, also without taking offence, that without the support of the churches the moral order, which has its origin in and takes its strength from Christian beliefs, would collapse.

This brings me back in the end to a question I posed at the beginning. What is the relationship between crime and sin, between the Church and the Law? I do not think that you can equate crime with sin. The divine law and the secular have been disunited, but they are brought together again by the need which each has for the other. It is not my function to emphasize the Church's need of the secular law; it can be put tersely by saying that you cannot have a ceiling without a floor. I am very clear about the law's need for the Church. I have spoken of the criminal law as dealing with the minimum standards of human conduct and the moral law with the maximum. The instrument of the criminal law is punishment; those of the moral law are teaching, training, and exhortation. If the whole dead weight of sin were ever to be allowed to fall upon the law, it could not take the strain. If at any point there is a lack of clear and convincing moral teaching, the administration of the law suffers. Let me take as an illustration of this the law on abortion. I believe that a great many people nowadays do not understand why abortion is wrong. If it is right to prevent conception, at what point does it become sinful to prevent birth and why? I doubt if anyone who has not had a theological training would give a satisfactory answer to that question. Many people regard abortion as the next step when by accident birth-control has failed; and many more people are deterred from abortion not because they think it sinful or illegal but because of the difficulty which illegality puts in the way of obtaining it. The law is powerless to deal with abortion *per se*; unless a tragedy occurs or a "professional" abortionist is involved—the parallel between the "professional" in abortions and the "professional" in fornication is quite close—it has to leave it alone. Without one or other of these features the crime is rarely detected; and when detected, the plea *ad misericordiam* is often too strong. The "professional" abortionist is usually the unskilled person who for a small reward helps girls in trouble; the man and the girl involved are essential witnesses for the prosecution and therefore go free; the paid abortionist generally receives a very severe sentence, much more severe than that usually given to the paid assistant in immorality, such as the ponce or the brothel-keeper. The reason is because unskilled abortion endangers life. In a case in 1949,[26] Lord Chief Justice Goddard said: "It is because the unskilful attentions of ignorant people in cases of this kind often result in death that attempts to produce abortion are regarded by the law as very serious offences." This gives the law a twist which disassociates it from morality and, I think, to some extent from sound sense. The act is being punished because it is dangerous, and it is dangerous largely because it is illegal and therefore performed only by the unskilled.

26 *R.* v. *Tate*, *The Times*, 22 June 1949.

The object of what I have said is not to criticize theology or law in relation to abortion. That is a large subject and beyond my present scope. It is to show what happens to the law in matters of morality about which the community as a whole is not deeply imbued with a sense of sin; the law sags under a weight which it is not constructed to bear and may become permanently warped.

I return now to the main thread of my argument and summarize it. Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves. A rational man, who is also a good man, may have other standards. If he has no standards at all he is not a good man and need not be further considered. If he has standards, they may be very different; he may, for example, not disapprove of homosexuality or abortion. In that case he will not share in the common morality; but that should not make him deny that it is a social necessity. A rebel may be rational in thinking that he is right but he is irrational if he thinks that society can leave him free to rebel.

A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law. If morals could be taught simply on the basis that they are necessary to society, there would be no social need for religion; it could be left as a purely personal affair. But morality cannot be taught in that way. Loyalty is not taught in that way either. No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail.

♦ ♦ ♦ ♦ ♦

H.L.A. HART

from *Law, Liberty and Morality*

... Much dissatisfaction has for long been felt in England with the criminal law relating to both prostitution and homosexuality, and in 1954 the committee well known as the Wolfenden Committee was appointed to consider the state of the law. This committee reported[1] in September 1957 and recommended certain changes in the law on both topics. As to homosexuality they recommended by a majority of 12 to 1 that homosexual practices between consenting adults in private should no longer be a crime; as to prostitution they unanimously recommended that, though it should not itself be made illegal, legislation should be passed "to drive it off the streets" on the ground that public soliciting was an offensive nuisance to ordinary citizens. The government eventually introduced legislation[2] to give effect to the Committee's recommendations concerning prostitution but not to that concerning homosexuality, and attempts by private members to introduce legislation modifying the law on this subject have so far failed.

What concerns us here is less the fate of the Wolfenden Committee's recommendations than the principles by which these were supported. These are strikingly similar to those expounded by Mill in his essay *On Liberty*. Thus section 13 of the Committee's Report reads:

> [The] function [of the criminal law], as we see it, is to preserve public order and

1 Report of the Committee on Homosexual Offences and Prostitution (CMD 247) 1957.

2 The Street Offences Act 1959.

> decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind or inexperienced …

This conception of the positive functions of the criminal law was the Committee's main ground for its recommendation concerning prostitution that legislation should be passed to suppress the offensive public manifestations of prostitution, but not to make prostitution itself illegal. Its recommendation that the law against homosexual practices between consenting adults in private should be relaxed was based on the principle stated simply in section 61 of the Report as follows: "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

It is of some interest that these developments in England have had near counterparts in America. In 1955 the American Law Institute published with its draft Model Penal Code a recommendation that all consensual relations between adults in private should be excluded from the scope of the criminal law. Its grounds were (*inter alia*) that "no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners";[3] and "there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others."[4] This recommendation had been approved by the Advisory Committee of the Institute but rejected by a majority vote of its Council. The issue was therefore referred to the annual meeting of the Institute at Washington in May 1955, and the recommendation, supported by an eloquent speech of the late Justice Learned Hand, was, after a hot debate, accepted by a majority of 35 to 24.[5]

It is perhaps clear from the foregoing that Mill's principles are still very much alive in the criticism of law, whatever their theoretical deficiencies may be. But twice in one hundred years they have been challenged by two masters of the Common Law. The first of these was the great Victorian judge and historian of the Criminal Law, James Fitzjames Stephen. His criticism of Mill is to be found in the sombre and impressive book *Liberty, Equality, Fraternity*,[6] which he wrote as a direct reply to Mill's essay On Liberty. It is evident from the tone of this book that Stephen thought he had found crushing arguments against Mill and had demonstrated that the law might justifiably enforce morality as such or, as he said, that the law should be "a persecution of the grosser forms of vice."[7] Nearly a century later, on the publication of the Wolfenden Committee's report, Lord Devlin, now a member of the House of Lords and a most distinguished writer on the criminal law, in his essay on *The Enforcement of Morals*[8] took as his target the Report's contention "that there must be a realm of morality and immorality which is not the law's business" and argued in opposition to it that "the suppression of vice is as much the law's business as the suppression of subversive activities."

Though a century divides these two legal writers, the similarity in the general tone and sometimes in the detail of their arguments is very great. I shall devote the remainder of these lectures to an examination of them. I do this because, though their arguments are at points confused, they certainly still deserve the compliment of rational opposition. They are not only admirably stocked with concrete examples, but they express the considered views of skilled, sophisticated lawyers experienced in the ad-

3 American Law Institute Model Penal Code, Tentative Draft No. 4, p. 277.

4 *Ibid.*, p. 278.

5 An account of the debate is given in *Time*, May 30, 1955, p. 13.

6 2nd edition, London, 1874.

7 *Ibid.*, p. 162.

8 Oxford University Press, 1959.

ministration of the criminal law. Views such as theirs are still quite widely held especially by lawyers both in England and in this country; it may indeed be that they are more popular, in both countries, than Mill's doctrine of Liberty.

Positive and Critical Morality

Before we consider the detail of these arguments, it is, I think, necessary to appreciate three different but connected features of the question with which we are concerned.

[*Ed. note:* Earlier in his lecture Hart states that his goal is to consider a question which "...concerns the legal enforcement of morality and has been formulated in many different ways: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such be a crime?"]

In all the three formulations given ... it is plain that the question is one *about* morality, but it is important to observe that it is also itself a question of morality. It is the question whether the enforcement *of* morality is morally justified; so morality enters into the question in two ways. The importance of this feature of the question is that it would plainly be no sufficient answer to show that in fact in some society—our own or others—it was widely regarded as morally quite right and proper to enforce, by legal punishment, compliance with the accepted morality. No one who seriously debates this question would regard Mill as refuted by the simple demonstration that there are some societies in which the generally shared morality endorses its own enforcement by law, and does so even in those cases where the immorality was thought harmless to others. The existence of societies which condemn association between white and coloured persons as immoral and punish it by law still leaves our question to be argued. It is true that Mill's critics have often made much of the fact that English law does in several instances, apparently with the support of popular morality, punish immorality as such, especially in sexual matters; but they have usually admitted that this is where the argument begins, not where it ends. I shall indeed later claim that the play made by some legal writers with what they treat as examples of the legal enforcement of morality "as such" is sometimes confused. But they do not, at any rate, put forward their case as simply proved by pointing to these social facts. Instead they attempt to base their own conclusion that it is morally justifiable to use the criminal law in this way on principles which they believe to be universally applicable, and which they think are either quite obviously rational or will be seen to be so after discussion.

Thus Lord Devlin bases his affirmative answer to the question on the quite general principle that it is permissible for any society to take the steps needed to preserve its own existence as an organized society,[9] and he thinks that immorality—even private sexual immorality—may, like treason, be something which jeopardizes a society's existence. Of course many of us may doubt this general principle, and not merely the suggested analogy with treason. We might wish to argue that whether or not a society is justified in taking steps to preserve itself must depend both on what sort of society it is and what the steps to be taken are. If a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the "disintegration"[10] of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it. Nonetheless Lord Devlin's principle that a society may take the steps required to preserve its organized existence is not itself tendered as an item of English popular morality, deriving its cogency from its status as part of our institutions. He puts it forward as a principle,

9 *The Enforcement of Morals*, pp. 13–14.
10 *Ibid*. pp. 14–15.

rationally acceptable, to be used in the evaluation or criticism of social institutions generally. And it is surely clear that anyone who holds the question whether a society has the "right" to enforce morality, or whether it is morally permissible for any society to enforce its morality by law, to be discussable at all, must be prepared to deploy some such general principles of critical morality.[11] In asking the question, we are assuming the legitimacy of a standpoint which permits criticism of the institutions of any society, in the light of general principles and knowledge of the facts.

To make this point clear, I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished "positive morality," the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including positive morality. We may call such general principles "critical morality" and say that our question is one of critical morality about the legal enforcement of positive morality.

A second feature of our question worth attention is simply that it is a question of *justification*. In asking it we are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good. For where there is no *prima facie* objection, wrong, or evil, men do not ask for or give justifications of social practices, though they may ask for and give *explanations* of these practices or may attempt to demonstrate their value.

11 Lord Devlin has been criticised for asking the question whether society has a *right* to enforce its judgment in matters of morality on the ground that to talk of "right" in such a context is meaningless. See Graham Hughes, "Morals and the Criminal Law," 71 *Yale L.J.* (1962) at 672. This criticism is mistaken, just because Lord Devlin invokes some general critical principle in support of his affirmative answer to the question.

It is salutary to inquire precisely what it is that is *prima facie* objectionable in the legal enforcement of morality; for the idea of legal enforcement is in fact less simple than is often assumed. It has two different but related aspects. One is the actual punishment of the offender. This characteristically involves depriving him of liberty of movement or of property or of association with family or friends, or the infliction upon him of physical pain or even death. All these are things which are assumed to be wrong to inflict on others without special justification, and in fact they are so regarded by the law and morality of all developed societies. To put it as a lawyer would, these are things which, if they are not justified as sanctions, are delicts or wrongs.

The second aspect of legal enforcement bears on those who may never offend against the law, but are coerced into obedience by the threat of legal punishment. This rather than physical restrictions is what is normally meant in the discussion of political arrangements by restrictions on liberty. Such restrictions, it is to be noted, may be thought of as calling for justification for several quite distinct reasons. The unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere; or it may be thought valuable because it enables individuals to experiment—even with living—and to discover things valuable both to themselves and to others. But interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering—often very acute—on those whose desires are frustrated by the fear of punishment. This is of particular importance in the case of laws enforcing a sexual morality. They may create misery of a quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from "ordinary" crime. Unlike sexual impulses, the impulse to steal or to wound or even kill is not,

except in a minority of mentally abnormal cases, a recurrent and insistent part of daily life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, something which affects the development or balance of the individual's emotional life, happiness, and personality.

Thirdly, the distinction already made, between positive morality and principles of critical morality, may serve to dissipate a certain misunderstanding of the question and to clarify its central point. It is sometimes said that the question is not whether it is morally justifiable to enforce morality as such, but only *which* morality may be enforced. Is it only a utilitarian morality condemning activities which are harmful to others? Or is it a morality which also condemns certain activities whether they are harmful or not? This way of regarding the question misrepresents the character of, at any rate, modern controversy. A utilitarian who insists that the law should only punish activities which are harmful adopts this as a critical principle, and, in so doing, he is quite unconcerned with the question whether a utilitarian morality is or is not already accepted as the positive morality of the society to which he applies his critical principles. If it is so accepted, that is not, in his view, the reason why it should be enforced. It is true that if he is successful in preaching his message to a given society, members of it will then be compelled to behave as utilitarians in certain ways, but these facts do not mean that the vital difference between him and his opponent is only as to the content of the morality to be enforced. For as may be seen from the main criticisms of Mill, the Utilitarian's opponent, who insists that it is morally permissible to enforce morality as such, believes that the mere fact that certain rules or standards of behaviour enjoy the status of a society's positive morality is the reason—or at least part of the reason—which justifies their enforcement by law. No doubt in older controversies the opposed positions were different: the question may have been whether the state could punish only activities causing secular harm or also acts of disobedience to what were believed to be divine commands or prescriptions of Natural Law. But what is crucial to the dispute in its modern form is the significance to be attached to the historical fact that certain conduct, no matter what, is prohibited by a positive morality. The utilitarian denies that this has any significance sufficient to justify its enforcement; his opponent asserts that it has. These are divergent critical principles which do not differ merely over the content of the morality to be enforced, but over a more fundamental and, surely, more interesting issue.

The Use and Abuse of Examples

Both in England and in America the criminal law still contains rules which can only be explained as attempts to enforce morality as such: to suppress practices condemned as immoral by positive morality though they involve nothing that would ordinarily be thought of as harm to other persons. Most of the examples come from the sphere of sexual morals, and in England they include laws against various forms of homosexual behaviour between males, sodomy between persons of different sex even if married, bestiality, incest, living on the earnings of prostitution, keeping a house for prostitution, and also, since the decision in Shaw's case, a conspiracy to corrupt public morals, interpreted to mean, in substance, leading others (in the opinion of a jury) "morally astray." To this list some would add further cases: the laws against abortion, against those forms of bigamy or polygamy which do not involve deception, against suicide and the practice of euthanasia. But, as I shall later argue, the treatment of some of these latter as attempts to enforce morality as such, is a mistake due to the neglect of certain important distinctions....

Paternalism and the Enforcement of Morality

I shall start with an example stressed by Lord Devlin. He points out that,[12] subject to certain exceptions such as rape, the criminal law has never admitted the consent of the victim as a defence. It is not a defence to a charge of murder or a deliberate assault, and this is why euthanasia or mercy killing terminating a man's life at his own request is still murder. This is a rule of criminal law which many now would wish to retain, though they would also wish to object to the legal punishment of offences against positive morality which harm no one. Lord Devlin thinks that these attitudes are inconsistent, for he asserts of the rule under discussion, "There is only one explanation," and this is that "there are certain standards of behaviour or moral principles which society requires to be observed."[13] Among these are the sanctity of human life and presumably (since the rule applies to assaults) the physical integrity of the person. So in the case of this rule and a number of others Lord Devlin claims that the "function" of the criminal law is "to enforce a moral principle and nothing else."[14]

But this argument is not really cogent, for Lord Devlin's statement that "there is only one explanation" is simply not true. The rules excluding the victim's consent as a defence to charges of murder or assault may perfectly well be explained as a piece of paternalism, designed to protect individuals against themselves. Mill no doubt might have protested against a paternalistic policy of using the law to protect even a consenting victim from bodily harm nearly as much as he protested against laws used merely to enforce positive morality; but this does not mean that these two policies are identical. Indeed, Mill himself was very well aware of the difference between them: for in condemning interference with individual liberty except to prevent harm to others he mentions *separate* types of inadequate ground which have been proffered for the use of compulsion. He distinguishes "because it will be better for him" and "because it will make him happier" from "because in the opinion of others it would be right."[15]

Lord Devlin says of the attitude of the criminal law to the victim's consent that if the law existed for the protection of the individual there would be no reason why he should avail himself of it if he did not want it.[16] But paternalism—the protection of people against themselves—is a perfectly coherent policy. Indeed, it seems very strange in mid-twentieth century to insist upon this, for the wane of laissez faire since Mill's day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil. The supply of drugs or narcotics, even to adults, except under medical prescription is punishable by the criminal law, and it would seem very dogmatic to say of the law creating this offence that "there is only one explanation," namely, that the law was concerned not with the protection of the would-be purchasers against themselves, but only with the punishment of the seller for his immorality. If, as seems obvious, paternalism is a possible explanation of such laws, it is also possible in the case of the rule excluding the consent of the victim as a defence to a charge of assault. In neither case are we forced to conclude with Lord Devlin that the law's "function is to enforce a moral principle and nothing else."[17]

In Chapter 5 of his essay Mill carried his protests against paternalism to lengths that may now appear to us fantastic. He cites the example of restrictions of the sale of drugs, and criticises them as interferences with the liberty of the would-be purchaser rather than with that of the seller. No doubt if we no longer sympathise with this criticism this is due,

12 *The Enforcement of Morals*, p. 8.
13 *Ibid.*
14 *Ibid.*, p. 9.
15 *On Liberty*, Chapter I.
16 *The Enforcement of Morals*, p. 8.
17 See, for other possible explanations of these rules, Hughes, "Morals and the Criminal Law," p. 670.

in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts. Mill, in fact, endows him with too much of the psychology of a middle-aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences; who knows what he wants and what gives him satisfaction or happiness; and who pursues these things when he can.

Certainly a modification in Mill's principles is required, if they are to accommodate the rule of criminal law under discussion or other instances of paternalism. But the modified principles would not abandon the objection to the use of the criminal law merely to enforce positive morality. They would only have to provide that harming others is something we may still seek to prevent by use of the criminal law, even when the victims consent to or assist in the acts which are harmful to them. The neglect of the distinction between paternalism and what I have termed legal moralism is important as a form of a more general error. It is too often assumed that if a law is not designed to protect one man from another its only rationale can be that it is designed to punish moral wickedness or, in Lord Devlin's words, "to enforce a moral principle." Thus it is often urged that statutes punishing cruelty to animals can only be explained in that way. But it is certainly intelligible, both as an account of the original motives inspiring such legislation and as the specification of an aim widely held to be worth pursuing, to say that the law is here concerned with the *suffering*, albeit only of animals, rather than with the immorality of torturing them.[18] Certainly no one who supports this use of the criminal law is thereby bound in consistency to admit that the law may punish forms of immorality which involve no suffering to any sentient being....

The Moderate and the Extreme Thesis

When we turn from these examples which are certainly disputable to the positive grounds held to justify the legal enforcement of morality it is important to distinguish a moderate and an extreme thesis, though critics of Mill have sometimes moved from one to the other without marking the transition. Lord Devlin seems to me to maintain, for most of his essay, the moderate thesis and Stephen the extreme one.

According to the moderate thesis, a shared morality is the cement of society; without it there would be aggregates of individuals but no society. "A recognized morality" is, in Lord Devlin's words, "as necessary to society's existence as a recognized government,"[19] and though a particular act of immorality may not harm or endanger or corrupt others nor, when done in private, either shock or give offence to others, this does not conclude the matter. For we must not view conduct in isolation from its effect on the moral code: if we remember this, we can see that one who is "no menace to others" nonetheless may by his immoral conduct "threaten one of the great moral principles on which society is based."[20] In this sense the breach of moral principle is an offence "against society as a whole,"[21] and society may use the

18 Lord Devlin seems quite unaccountably to ignore this point in his brief reference to cruelty to animals, *The Enforcement of Morals*, p. 17.

19 *The Enforcement of Morals*, p. 13.

20 *Ibid.*, p. 8.

21 *Ibid.*

law to preserve its morality as it uses it to safeguard anything else essential to its existence. This is why "the suppression of vice is as much the law's business as the suppression of subversive activities."[22]

By contrast, the extreme thesis does not look upon a shared morality as of merely instrumental value analogous to ordered government, and it does not justify the punishment of immorality as a step taken, like the punishment of treason, to preserve society from dissolution or collapse. Instead, the enforcement of morality is regarded as a thing of value, even if immoral acts harm no one directly, or indirectly by weakening the moral cement of society. I do not say that it is possible to allot to one or other of these two theses every argument used, but they do, I think, characterise the main critical positions at the root of most arguments, and they incidentally exhibit an ambiguity in the expression "enforcing morality as such." Perhaps the clearest way of distinguishing the two theses is to see that there are always two levels at which we may ask whether some breach of positive morality is harmful. We may ask first, Does this act harm anyone independently of its repercussion on the shared morality of society? And secondly we may ask, Does this act affect the shared morality and thereby weaken society? The moderate thesis requires, if the punishment of the act is to be justified, an affirmative answer at least at the second level. The extreme thesis does not require an affirmative answer at either level.

Lord Devlin appears to defend the moderate thesis. I say "appears" because, though he says that society has the right to enforce a morality as such on the ground that a shared morality is essential to society's existence, it is not at all clear that for him the statement that immorality jeopardizes or weakens society is a statement of empirical fact. It seems sometimes to be an *a priori* assumption, and sometimes a necessary truth and a very odd one. The most important indication that this is so is that, apart from one vague reference to "history" showing that "the loosening of moral bonds is often the first stage of disintegration,"[23] no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes.[24] Lord Devlin's belief in it, and his apparent indifference to the question of evidence, are at points traceable to an undiscussed assumption. This is that all morality—sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty—forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole. It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others. But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.

There seems, however, to be central to Lord Devlin's thought something more interesting, though no more convincing, than the conception of social morality as a seamless web. For he appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical[25] with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary

22 *Ibid.*, p. 15.

23 *The Enforcement of Morals*, pp. 14-15.

24 *Novels*, 77 Cap. 1 and 141.

25 See, for this important point, Richard Wollheim, "Crime, Sin, and Mr. Justice Devlin," *Encounter*, November 1959, p. 34.

rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence.

It is clear that only this tacit identification of a society with its shared morality supports Lord Devlin's denial that there could be such a thing as private immorality and his comparison of sexual immorality, even when it takes place "in private," with treason. No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction, though this does not seem to be the case with homosexuality in those European countries where it is not punishable by law. But even if the conventional morality did so change, the society in question would not have been destroyed or "subverted." We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance.

Conclusion

I have from the beginning assumed that anyone who raises, or is willing to debate, the question whether it is justifiable to enforce morality, accepts the view that the actual institutions of any society, including its positive morality, are open to criticism. Hence the proposition that it is justifiable to enforce morality is, like its negation, a thesis of critical morality requiring for its support some general critical principle. It cannot be established or refuted simply by pointing to the actual practices or morality of a particular society or societies. Lord Devlin, whose thesis I termed the moderate thesis, seems to accept this position, but I have argued that the general critical principle which he deploys, namely, that a society has the right to take any step necessary for its preservation, is inadequate for his purpose. There is no evidence that the preservation of a society requires the enforcement of its morality "as such." His position only appears to escape this criticism by a confused definition of what a society is.

I have also assumed from the beginning that anyone who regards this question as open to discussion necessarily accepts the critical principle, central to all morality, that human misery and the restriction of freedom are evils; for that is why the legal enforcement of morality calls for justification. I then endeavoured to extricate, and to free from ambiguity of statement, the general principles underlying several varieties of the more extreme thesis that the enforcement of morality or its preservation from change were valuable apart from their beneficial consequences in preserving society. These principles in fact invite us to consider as values, for the sake of which we should restrict human freedom and inflict the misery of punishment on human beings, things which seem to belong to the prehistory of morality and to be quite hostile to its general spirit. They include mere outward conformity to moral rules induced simply by fear; the gratification of feelings of hatred for the wrongdoer or his "retributory" punishment, even where there has been no victim to be avenged or to call for justice; the infliction of punishment as a symbol or expression of moral condemnation: the mere insulation from change of any social morality however repressive or barbarous. No doubt I have not *proved* these things not to be values worth their price in human suffering and loss of freedom; it may be enough to have shown what it is that is offered for the price.

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