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LAW, LIBERTY AND MORALITY

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ever 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,*[19] 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."[20] 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*[21] 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 re-

[19] 2nd edition, London, 1874.
[20] *Ibid.*, p. 162.
[21] Oxford University Press, 1959.

mainder 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 administration 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.

In all the three formulations given on page 4 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,[22] 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"[23] 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, 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

[22] *The Enforcement of Morals*, pp. 13–14.
[23] *Ibid.*, pp. 14–15.

morality.[24] 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

[24] 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.

may ask for and give *explanations* of these practices or may attempt to demonstrate their value.

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.

II

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.

In America a glance at the penal statutes of the various states of the Union reveals something quite astonishing to English eyes. For in addition to such offences as are punishable under English law, there seems to be no sexual practice, except "normal" relations between husband and wife and solitary acts of masturbation, which is not forbidden by the law of some state. In a very large number of states adultery, which has not been criminally punishable in England since Cromwell's time, is a crime, though, in a minority of states, this is so only if it is open, notorious, or continuous. Fornication is not a criminal offence in England or in most countries of the civilized world, but only a minority of American states do not have statutes making fornication under certain conditions punishable, and some states make even a single act punishable.[1] Besides these statutory provisions there is an unknown quantity of local or municipal enactments which, in some cases, are more restrictive than the state laws, and though these are for that reason of doubtful validity, they have been enforced. In California the penal code does not make prostitution or fornication a crime, yet for many years

[1] See, for a short summary, the American Law Institute, Model Penal Code, Tentative Draft No. 4, pp. 204–10.

persons have been convicted in Los Angeles under a local ordinance of the offence commonly known as "resorting," solely on proof that they used a room for fornication.[2]

No doubt much, and perhaps most, of this American legislation against sexual immorality is as dead a letter as it is commonly said to be. But the facts as to law enforcement are at present very hard to establish. In many states, California among them, the annual criminal statistics do not usually break down figures for sex crimes further than the two heads of "Rape" and "Other sexual offences." But in Boston as late as 1954 the sex laws were reported to receive "normal" enforcement, and in 1948 there were 248 arrests for adultery in that city.[3] No one, I think, should contemplate this situation with complacency, for in combination with inadequate published statistics the existence of criminal laws which are generally not enforced places formidable discriminatory powers in the hands of the police and prosecuting authorities.

Mill's critics have always pointed to the actual existence of laws punishing mere immorality as if this in some way threw doubt on his claim that the criminal law should not

[2] The State Supreme Court in December 1961 held the ordinance to be in conflict with the state laws and void. See in re *Carol Lane*, Crim. No. 6929, 57 A.C. 103, 18 *Cal. Rptr.* 33. This was confirmed after a rehearing on June 28, 1962. 22 *Cal. Rptr.* 857.

[3] American Law Institute, Model Penal Code, Tentative Draft No. 4, p. 205, n. 16.

be used for this purpose. His defenders have indeed complained that the critics were here guilty of fallacious reasoning or irrelevance. John Morley, for example, in a vivid phrase said that in Stephen's book "a good deal of bustling ponderosity is devoted" to establishing the existence of laws of this sort; he thought that Stephen had simply failed to see that "the actual existence of laws of any given kind is wholly irrelevant to Mr. Mill's contention, which is that it would be better if laws of such a kind did not exist."[4] In fact, neither Stephen (except in one place[5]) nor Lord Devlin, who also appeals to the actual content of English criminal law, is guilty of this form of the fallacy of arguing from what is to what should be, nor are they guilty of irrelevance. Stephen, when forced by Morley to state why he regarded his examples as relevant to the argument, explained that he thought it "not irrelevant to show that Mill was at issue with the practical conclusions to which most nations had been led by experience." In somewhat similar fashion Lord Devlin said:

> Is the argument consistent or inconsistent with the fundamental principles of English 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.[6]

[4] Quoted in *Liberty, Equality, Fraternity*, p. 166 n.
[5] *Ibid.*, pp. 171–72.

Both writers, I think, in these perhaps not very perspicuous remarks, intend to invoke only the innocuous conservative principle that there is a presumption that common and long established institutions are likely to have merits not apparent to the rationalist philosopher. Nonetheless, when we examine some of the particular rules or principles of criminal law discussed at length by these writers, it is apparent that the use made of them is both confused and confusing. These examples are not drawn from the area of sexual morals, and certainly many, who would wish to align themselves with Mill and protest against the use of the criminal law to punish practices simply because they offend positive morality, might hesitate or refuse to jettison the particular rules of criminal law instanced by these writers. So if they are correctly classed as rules which can only be explained as designed to enforce morality their persuasive force is very considerable. We may indeed, to use Stephen's words, "be disposed to doubt" whether a principle that would condemn these particular rules could be right. But there are, I think, good reasons for disputing these writers' treatment of these rules as examples of the use of the law solely to enforce morality. We are not forced to choose between jettisoning them or assenting to

[6] *The Enforcement of Morals*, p. 7.

the principle that the criminal law may be used for that purpose. Some closer analysis than these authors give to these examples is, however, required, and to this I now turn.

PATERNALISM AND THE ENFORCEMENT OF MORALITY

I shall start with an example stressed by Lord Devlin. He points out[7] that, 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."[8] 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 crimi-

[7] *The Enforcement of Morals*, p. 8. [8] *Ibid.*

nal law is "to enforce a moral principle and nothing else."[9]

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."[10]

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.[11] But paternalism —the protection of people against themselves—is a per-

[9] *Ibid.*, p. 9.
[10] *On Liberty*, Chapter 1.
[11] *The Enforcement of Morals*, p. 8.

fectly 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."[12]

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, in part, to a general decline in the belief that individuals know their own interests best, and to an

[12] See, for other possible explanations of these rules, Hughes, "Morals and the Criminal Law," p. 670.

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.[13] 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 MORAL GRADATION OF PUNISHMENT

I now turn back to a very different and perhaps more illuminating error made by Stephen, in his effort to show that the criminal law not only should be but actually was a "persecution of the grosser forms of vice,"[14] and not merely an instrument for the prevention of suffering or

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

[14] *Liberty, Equality, Fraternity*, p. 162.

harm. He claimed that certain principles "universally admitted and acted upon as regulating the amount of punishment"[15] showed this to be the case. His argument is simply this. When the question is how severely an offender should be punished, an estimate of the degree of moral wickedness involved in the crime is always relevant. This is why the strength of temptation, diminishing the moral guilt, in most cases operates in mitigation of punishment; whereas if the object of legal punishment were simply to prevent harmful acts this would not be so.

> A judge has before him two criminals, one of whom appears from the circumstances of the case to be ignorant and depraved, and to have given way to a very strong temptation under the influence of the other, who is a man of rank and education, and who committed the offence of which both are convicted under comparatively slight temptation. I will venture to say that if he made any difference between them at all every judge on the English bench would give the first man a lighter sentence than the second.[16]

There is, of course, little doubt that Stephen here accurately portrays conventional views, frequently applied by Courts in administering the criminal law, though perhaps with less agreement now than when Stephen wrote. Certainly many who would protest against the legal enforcement of sexual morality might yet admit or even insist that

[15] *Ibid.* [16] *Ibid.*, p. 163.

greater wickedness should aggravate, and lesser wickedness should mitigate, the severity of punishment. But from this fact Stephen, like many others, inferred too much. He claimed that if we attach importance to the principle that the moral difference between offences should be reflected in the gradation of legal punishments, this showed that the *object* of such punishment was not merely to prevent acts "dangerous to society" but "to be a persecution of the grosser forms of vice."[17] And if the object of the criminal law is (or includes) "promoting virtue" and "preventing vice,"[18] it follows, he thought, that "it ought to put a restraint upon vice not to such an extent merely as is necessary for definite self-protection but generally on the ground that vice is a bad thing."[19] So we may make punishable by law actions which are condemned by society as immoral, even if they are not harmful.

Surely this argument is a *non sequitur* generated by Stephen's failure to see that the questions "What sort of conduct may justifiably be punished?" and "How severely should we punish different offenses?" are distinct and independent questions. There are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utili-

[17] *Liberty, Equality, Fraternity*, p. 162.
[18] *Ibid.*, p. 159. [19] *Ibid.*, pp. 147–48.

tarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice or fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike. These principles are still widely respected, although it is also true that there is a growing disinclination to insist on their application where this conflicts with the forward-looking aims of punishment, such as prevention or reform. But those who concede that we should attempt to adjust the severity of punishment to the moral gravity of offences are not thereby committed to the view that punishment merely for immorality is justified. For they can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of the *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.

It is in general true that we cannot infer from principles applied in deciding the severity of punishment what the aims of the system of punishment are or what sorts of conduct may justifiably be punished. For some of these principles, e.g., the exclusion of torture or cruel punishments, may represent other values with which we may wish to