cepted morality needs no argument to justify it, because it is a morality which is enforced. But Mill's critics have not fallen back upon this brute assertion. They have in fact advanced many different arguments to justify the enforcement of morality, but these all, as I shall attempt to show, rest on unwarranted assumptions as to matters of fact, or on certain evaluations whose plausibility, due in large measure to ambiguity or vagueness or inaccuracy of statement, dwindles (even if it does not altogether vanish) when exposed to critical scrutiny.

CONSPIRACY TO CORRUPT PUBLIC MORALS

In England in the last few years the question whether the criminal law should be used to punish immorality "as such" has acquired a new practical importance; for there has, I think, been a revival there of what might be termed *legal moralism*. Judges both in their judicial capacity and in extra-judicial statements have gone out of their way to express the view that the enforcement of sexual morality is a proper part of the law's business—as much its business, so one judge has argued, as the suppression of treason. It is not clear what has provoked this resurgence of legal moralism: there must have been many factors at work, and among them, perhaps, has been the idea that a general stiffening of the sanctions attached to any form of immorality may be one way to meet the general increase in crime by

which we are all vastly disturbed. But whatever its cause, this movement of judicial opinion has gone far. Last year the House of Lords in the case of *Shaw* v. *Director of Public Prosecutions*[4] conjured up, from what many had thought was its grave the eighteenth century, the conception (itself a creature of the Star Chamber) that "a conspiracy to corrupt public morals" is a common law offence. As a result of this decision the prosecuting authorities in England can now face their complex problems equipped with Lord Mansfield's dictum of 1774 which some of the judges in Shaw's case invoked in their speeches.

> Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.[5]

Of course the penal code of California, like that of many states of the Union, includes in its calendar of crimes a conspiracy to injure public morals, and it may seem strange to Americans to hear the recognition of this offence by the English House of Lords represented as a new development. But Americans are accustomed, as the English are not, to the inclusion among their statutes of much legal lumber in the form of penal provisions no longer enforced, and I am assured that, in California at least, the provision making a conspiracy to corrupt public morals a crime may safely

[4] (1961) 2 A.E.R. 446. (1962) A.C. 223.
[5] Jones v. Randall (1774). Lofft. at p. 385.

be regarded as a dead letter. This is now not so with the English, and both the use actually made of the law in Shaw's case and the future use envisaged for it by the House of Lords are worth consideration.

The facts in Shaw's case are not such as to excite sympathy for the accused. What Shaw had done was to compose and procure the publication of a magazine called the *Ladies Directory* giving the names and addresses of prostitutes, in some cases nude photographs, and an indication in code of their practices. For this Shaw was charged and found guilty of three offences: (1) publishing an obscene article, (2) living on the earnings of the prostitutes who paid for the insertion of their advertisements in the *Ladies Directory,* (3) conspiring to corrupt public morals by means of the *Ladies Directory.*

All this may seem a somewhat ponderous three-handed engine to use merely to ensure the conviction and imprisonment of Shaw; but English law has always preferred the policy of thorough. The judges in the House of Lords not only raised no objection to the inclusion of the charge of conspiracy to corrupt public morals, but with one dissentient (Lord Reid) they confirmed the prosecution's contention that this was an offence still known to English law and insisted that it was a salutary thing that this should be so. They made indeed an excursion, rare for English judges, into the area of policy in order to emphasise this.

To show the contemporary need for the newly resusci-

tated penal law one of the judges (Lord Simonds), a former Lord Chancellor, made the following remarkable statement:

> When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores,* he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance . . . Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait till Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event then we should no longer do her reverence. But I say that her hand is still powerful and that it is for her Majesty's Judges to play the part which Lord Mansfield pointed out to them.[6]

[6] Shaw v. Director of Public Prosecutions (1961) 2 A.E.R. at pp. 452–53. (1962) A.C. at p. 268.

This is no doubt a fine specimen of English judicial rhetoric in the baroque manner. Later judges may dismiss much of it as *obiter dictum*. But the interpretation given by the House of Lords to the exceedingly vague and indeed obscure idea of corrupting public morals has fashioned a very formidable weapon for punishing immorality as such. For it is clear from the form of direction to the jury which the House of Lords approved in this case that no limits are in practice imposed by the need to establish anything which would be ordinarily thought of as a "conspiracy" or as "corruption." These strong words have, as Lord Reid said, been "watered down," and all that has to be established is that the accused agreed to do or say something which in the opinion of a jury might "lead another morally astray."[7] There need moreover be no approach to the "public" nor need the morality in question be "public" in any sense other than being the generally accepted morality.

Legal writers in England have not yet worked out the relation between this vastly comprehensive common law offence and those statutes which define certain specific offences concerned with sexual morality. But it is certainly arguable that the prosecuting authorities may now avail themselves of this common law offence to avoid the restrictions imposed by statute or statutory defences. Thus the statute[8] under which the publishers of D. H. Lawrence's

[7] (1961) 2 A.E.R. at pp. 461, 466. (1962) A.C. at p. 282.
[8] The Obscene Publications Act 1959.

Lady Chatterley's Lover were unsuccessfully prosecuted in England last year provides that the interests of science, literature, and art or learning shall be taken into consideration, and if it is proved that on these grounds publication is justified as being for the public good, no offence under the statute is committed. Evidence as to these merits was accordingly received in that case. Had the publishers been charged with conspiring to corrupt public morals, the literary or artistic merits of the book would have been irrelevant, and the prosecution might very well have succeeded. In the same way, though Parliament in recent legislation has refrained from making prostitution itself a crime, as distinct from soliciting in a street or public place,[9] it seems that it is open to the Courts under the doctrine of Shaw's case to do what Parliament has not done. Some apprehension that it may be so used has already been expressed.[10]

The importance attached by the judges in Shaw's case to the revival of the idea that the Courts should function as the *custos morum* or "the general censor and guardian of the public manners" may be gauged from two things. The first is that this revival was plainly a deliberate act of policy; for the antique cases relied upon as precedents plainly permitted, even under the rigorous English doc-

[9] The Street Offences Act 1959.

[10] *Manchester Guardian,* January 31, 1962; comment on Weisz v. Monahan (1962) 2 W.L.R. 262. Cf. also R. v. Quinn (1961) 3 W.L.R. 611.

trine of precedent, a decision either way. Secondly, the judges seemed willing to pay a high price in terms of the sacrifice of other values for the establishment—or re-establishment—of the Courts as *custos morum*. The particular value which they sacrificed is the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not. As a result of Shaw's case, virtually any cooperative conduct is criminal if a jury consider it *ex post facto* to have been immoral. Perhaps the nearest counterpart to this in modern European jurisprudence is the idea to be found in German statutes of the Nazi period that anything is punishable if it is deserving of punishment according "to the fundamental conceptions of a penal law and sound popular feeling."[11] So while Mill would have shuddered at the law laid down in Shaw's case as authorising gross invasions of individual liberty, Bentham[12] would have been horrified at its disregard of the legal values of certainty and its extension of what he termed "ex post facto law."[13]

[11] Act of June 28, 1935.

[12] *Principles of the Civil Code,* Part I, Chapter 17 (I [Bowring ed.] *Works* 326).

[13] Shaw's case has been criticised on these grounds by Glanville Williams, "Conspiring to Corrupt," *The Listener,* August 24, 1961, p. 275; Hall Williams, 24 *Mod. L.R.* 631 (1961): "judicial folly"; D. Seaborne Davies, "The House of Lords and the Criminal Law," *J. Soc. Public Teachers of Law* (1961), p. 105: "an egregious per-

There are other points of interest in Shaw's case. What after all is it to corrupt *morals* or a *morality*? But I shall defer further consideration of this point in order to outline another issue which in England has recently provoked discussion of the law's enforcement of morality and has stimulated efforts to clarify the principles at stake.

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[14] 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 legisla-

formance." It was welcomed as "an important contribution to the development of the criminal law" by A. L. Goodhart, 77 *Law. Q.R.* 567 (1961).

[14] Report of the Committee on Homosexual Offences and Prostitution (CMD 247) 1957.

tion[15] 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 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

[15] The Street Offences Act 1959.

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";[16] 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."[17] 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.[18]

It is perhaps clear from the foregoing that Mill's principles are still very much alive in the criticism of law, what-

[16] American Law Institute Model Penal Code, Tentative Draft No. 4, p. 277.

[17] *Ibid.*, p. 278.

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

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.