

Lord Patrick Devlin

Morals and the Criminal Law

- 24 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 Report² 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

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This essay "Morals and the Criminal Law" is based upon the Maccabaeen lecture in jurisprudence, 1959, of the British Academy, entitled "The Enforcement of Morals." The lecture was published under the same title in 1959. It was reprinted, with some changes, under its present title in 1965, in a collection of essays by Lord Devlin entitled *The Enforcement of Morals*. The essay is reprinted here with the permission of Lord Devlin and the Oxford University Press.

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 808. 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.

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 Report³ the Committee put forward:

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.

³ Para. 13.

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 recommendation⁴

that homosexual behaviour between consenting adults in private should no longer be a criminal offence, [by stating the argument⁵] 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 quote⁷ 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

⁴ Para. 62.

⁵ Para. 61.

⁶ Para. 224.

⁷ Para. 227.

⁸ Cmd. 3231 (1928).

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 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 jurist. 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 feel-

⁹ Para. 257.

ing 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 *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 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

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.

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 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

¹⁵ Para. 13.

¹⁶ Paras. 224, 285, and 318.

¹⁷ Paras. 302 and 320.

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

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 definition of

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

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 daresay 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.

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 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 question of morality which we expect to find in a reasonable civilized man or a reasonable Englishman, taken at random.'²²

²¹ (1951) Cmd. 8190, para. 159.

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

Immorality then, for the purpose of the law, is what every right-minded person is 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 law-making 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 principle 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; 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 kindness 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 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 inquired²³ 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.

The last and the biggest thing to be remembered is that the law is concerned with the minimum and not with the maximum;

²³ (1957) Cmd. 283.

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.'²⁴

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

²⁴ A case in the Saa-Katengo Kuta at Liallu, August 1942, quoted in *The Judicial Process among the Barotse of Northern Rhodesia* by Max Gluckman, Manchester University Press, 1955, p. 172.

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 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 law-makers 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 formation 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 underlie 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 pre-

vent 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 1949²⁵ 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.

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 disap-

²⁵ *R. v. Tate*, *The Times*, 22 June 1949.

prove 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.