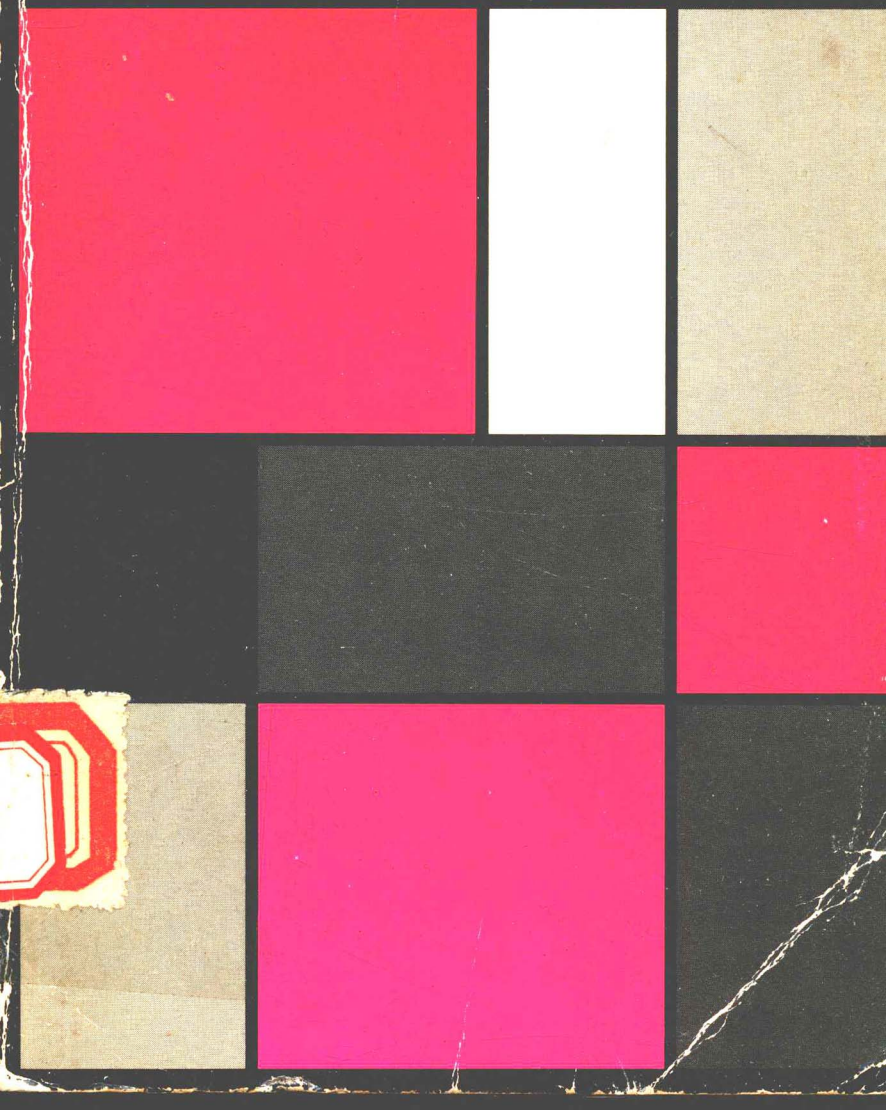
PATRICK DEVLIN

THE ENFORCEMENT OF MORALS



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Preface

In 1958 I was invited to deliver the second Maccabaean Lecture in Jurisprudence of the British Academy, the first having been delivered by Lord Evershed, then Master of the Rolls. It was an honour not to be declined but yet to be accepted only with much misgiving. A man who has passed his life in the practice of the law is not as a rule well equipped to discourse on questions of jurisprudence and I was certainly no exception to that rule. Fortunately, as it seemed to me, there was a subject which was both topical and within my powers to handle. In September 1957 the Wolfenden Committee had made its report recommending that homosexual practices in private between consenting adults should no longer be a crime. I had read with complete approval its formulation of the functions of the criminal law in matters of morality.

I had in fact given evidence before the Committee. Lord Goddard, then Lord Chief Justice, thought it desirable that evidence should be given by one judge of the Queen's Bench who thought that the law should not be altered and by another who was in favour of reform. I was in favour of reform. I agree with everyone who has written or spoken on the subject that homosexuality is usually a miserable way of life and that it is the duty of society, if it can, to save any youth from being led into it. I think that that duty has to be discharged although it may mean much suffering by incurable perverts who seem unable to resist the corruption of boys. But if there is no danger of corruption, I do not think that there is any good the law can do that outweighs the misery that exposure and imprisonment causes to addicts who cannot find satisfaction in any other way of life. Punishment will not cure and because it is haphazard in its incidence I doubt if it deters. Those who are detected and prosecuted are unlucky; and the full offence is frequently proved only because one or the other in his weakness confesses. I do not think that any judge now imposes a severe sentence in such cases. I cannot myself recollect ever having passed a sentence of imprisonment at all.

There is to my mind only one really powerful argument against reform and I put it in the form of a question. Can homosexuals be divided into those who corrupt youth and those who do not? If

they cannot, is there a danger that the abolition of the offence between consenting adults might lead to an increase in corruption? The Wolfenden Committee thought that there was a division of this sort.[1] Some judges of great experience for whose views I have a deep respect think otherwise. There is room for a more comprehensive study of case histories on this point than has, so far as I know, yet been made.

At any rate what I proposed to the Committee was one of those illogical compromises that would be rejected out of hand in any system of law that was not English. I suggested that, while the full offence of buggery should be retained, the lesser offences of indecent assault and gross indecency should be abolished unless the acts were committed on youths. It seemed to me that this compromise might go some way towards meeting the fears of those who thought that the repeal of the Act would be an admission that buggery should be tolerated. It would afford time to see whether offences against youths increased and, if it were found to be so, the way back would be less difficult than if the Act had been totally repealed. It would result, I thought, in prosecutions for buggery being brought only in clear and flagrant cases, since the alternative of a conviction for the lesser offence would no longer be available. Anyway, it seemed to me as much as public opinion would be at all likely to support. The proposal was not favoured by the Committee and I dare say they were quite right.

All this of course has nothing to do with jurisprudence, and the only part of the Report relevant to that was the statement which, as I have said, I completely approved, that there was a realm of private morality which was not the law's business, and the distinction between crime and sin. I had never before thought about this distinction otherwise than superficially. I was aware that it derived its force from the teachings of Bentham and Mill. What I knew about their work was not very much and acquired at second-hand about a quarter of a century before. I had never read Mill's *On Liberty* from beginning to end and certainly could not have put my finger on his celebrated definition of the function of the criminal law. But Mill's ideas, even when absorbed at second-hand, are so clear and definitive that they are likely to make a permanent impression on the least attentive student. That was their effect on me.

As to the subject-matter of my lecture, what I had in mind to do

[1] Wolfenden, paras. 56 and 57.

was to take other examples of private immorality and to show how they were affected by the criminal law and to consider what amendments would be necessary to make the law conform with the statement of principle in the Report. But study destroyed instead of confirming the simple faith in which I had begun my task; and the Maccabaean Lecture, the first in this book, is a statement of the reasons which persuaded me that I was wrong.

I did not then know that the same ground had already been covered by Mr. Justice Stephen in his book *Liberty, Equality, Fraternity* published in 1873. It was not until much later that I was with great difficulty able to obtain from the Holborn Public Library a copy of the book held together with an elastic band. I hope that, as a result of Professor Hart's criticism of it, more interest will now be aroused in a valuable work. Although I missed altogether one cogent argument advanced by Stephen, I find great similarity between his view and mine on the principles which should affect the use of the criminal law for the enforcement of morals.[1] Commenting on the work of Mr. Justice Stephen and myself, Professor Hart noted that 'the similarity in the general tone and sometimes in the detail of their argument is very great'.[2] The fact that we reached our conclusions independently gives additional force to Professor Hart's comment (which, however it may have been intended, I regard as complimentary) that they reveal 'the outlook characteristic of the English judiciary'.[3]

The Maccabaean Lecture aroused an interest greater than it deserved. There is a number of reasons for this. It was delivered by a judge and judges in their rare extra-judicial utterances usually confine themselves to the working of the law. I have explained how it was that I was driven into deeper waters. It was almost immediately denounced in rather strong language by the distinguished jurist Professor Hart in a piece which has been given a place among the masterpieces of English legal prose in *The Law as Literature*. It was an expression of orthodox views on a subject in which orthodoxy is more seldom found in print than it is in common behaviour. Although not itself concerned with any particular morality, it came at a time when the conflict between old and new moralities was being given a sharper edge.

[1] Stephen, at p. 172, sets out four 'great leading principles'.
[2] H. L. A. Hart, *Law, Liberty and Morality*, Oxford University Press, 1963, p. 16.
[3] ibid. p. 63.

Consequently it has since been referred to in a number of articles and I have listed at page xiii all of them known to me. I have of course paid great attention to the criticisms they contain. I do not want to alter anything that I wrote but I think that at one point the emphasis might be reduced. That is the emphasis on the part which 'feeling' plays in the judgement of the reasonable man. I put the word in quotation marks because I am not sure that I use it in its correct philosophical sense. I find that I used the words 'right' and 'ought' in a sense which would be likely to be understood by most readers of the law reports, but not by philosophers.[1] What I want is a word that would clarify the distinction between 'rational' and 'reasonable'. The reasonable man is to be expected not to hold an irrational belief. The Emperor Justinian, Professor Hart says, stated that homosexuality was the cause of earthquakes.[2] That may have been a rational belief in the Emperor's time, but now that we know a good deal more about earthquakes and a little more about homosexuality, we can safely say that it would be irrational so to believe. But when the irrational is excluded, there is, as any judge and juryman knows, a number of conclusions left for all of which some good reasons can be urged. The exclusion of the irrational is usually an easy and comparatively unimportant process. For the difficult choice between a number of rational conclusions the ordinary man has to rely upon a 'feeling' for the right answer. Reasoning will get him nowhere.

It may be that the language I used put too much emphasis on feeling and too little on reason. Even so, I think that the intense criticism which has been focused on the words 'intolerance, indignation and disgust' (which I do not wish to modify) was on any view excessive. To assert or to imply—both assertion and implication have been very frequently employed—that the author would like to see the criminal law used to stamp out whatever makes the ordinary man sick hardly does justice to the argument.

The phrase is not used in that part of the argument which discusses how the common morality should be ascertained but in that part of it which enumerates the factors which should restrict the use of the criminal law. It comes into the discussion of the first factor which is that there must be toleration of the maximum individual freedom that is consistent with the integrity of society.

[1] See, for example, the article by Professor Wollheim, listed in the bibliography, p. xiv.

[2] Hart, *Law, Liberty and Morality*, p. 50.

It must be read in subjection to the statement that the judgement which the community passes on a practice which it dislikes must be calm and dispassionate and that mere disapproval is not enough to justify interference. There may be some who think that intolerance and disgust can never be the product of calm and dispassionate consideration and if so I would disagree. I do not know any sensible person who does not occasionally get indignant and disgusted about something, even if it is only at the idea of somebody else's disgust about something that does not disgust him. If there is not that intensity of feeling, so my argument runs, the collective judgement should not be given the force of law. There are to be found in any community individuals, always the most vocal, who are easily swayed and perhaps irrationally moved to indignation and disgust. But my experience of the average Englishman, which may differ from that of my critics, but which is founded on long observation of the juryman who personifies the average Englishman operating in surroundings which induce to calmness and dispassion, is that he is not easily moved to indignation and disgust. At least there can be no doubt that the number of those who strongly disapprove of a practice such as homosexuality would be far greater than the number of those who view it with disgust or indignation; and that is the point of the paragraph.

The other lectures all stem from the Maccabaean Lecture and discuss different aspects of the relationship between law and morals that are suggested by it. The Maccabæan Lecture discussed the relationship between the moral law and the criminal law but was confined to those sorts of crime that can also be called sins. The second, third, and fourth lectures consider the moral law in relation to other branches of English law—the quasi-criminal law, the law of tort, the laws of contract and of marriage. Some of the points made in the second lecture have been blunted by subsequent judicial activity in which I have participated. The fifth lecture discusses the difficult question of how to determine for the purposes of the secular law what the moral law is. The sixth examines once again Mill's teaching, which, although as a whole it has never been adopted, is still the mainspring of liberal thought on this subject. The seventh, which is perhaps of interest only to controversialists, inquires what sort of doctrine, if any, is likely to replace Mill's.

The two themes in the lectures that have attracted most criticism are, firstly, the denial that there is a private realm of morality into

which the law cannot enter; and secondly, the assertion that the morality which the law enforces must be popular morality. So far the criticism has been destructive in character, offering an opening for some further positive thought on both these points.

The criticism of the denial that there is a private realm has been conducted in accordance with the principle that attack is the best form of defence. It has not thrown any light upon what exactly the realm is and what it contains. The doctrine is known to be derived from Mill but few of its supporters accept the whole of Mill's teaching. I should like to see someone better equipped than myself take up the task which I began, before (as the critics would have it) I fell into error; and explain how far the doctrine goes and what its impact would be on the existing criminal law. There is need for some heavy constructive work here. As I suggest in the last lecture in this book, what is likely to emerge is a radical restatement.

On the second point I should not care, any more than my critics would, to have my personal morality equated with that which gains the highest measure of popular approval. But the question is not how a person is to ascertain the morality which he adopts and follows, but how the law is to ascertain the morality which it enforces. The question is not evaded by saying that the law ought not to enforce any morality at all because everyone is agreed that it ought to protect the morals of youth. It is not answered by saying that the law ought to enforce the morality taught by some religion unless adherence to that religious belief is made compulsory. Nor is it answered by substituting reason for revelation unless it can be asserted that there is only one sort of morality that can be arrived at rationally. I attempt an answer in the fifth lecture in this book. It is now the turn of those who find the answer unacceptable to say what the right answer is.

Indeed, the best justification for printing this collection of lectures is the possibility that it may stimulate the professionals to undertake not merely the demolition of amateur work but the construction of something better.

Only the first and second lectures have previously appeared in print in Britain. The fifth and sixth have appeared in print in the United States. I must acknowledge in each case the courtesy of those bodies under whose auspices the lectures were given and my gratitude to those who have given permission to reprint where that was necessary.

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[1] So that the citations may more easily be identified in other editions, I give below the chapter numbers and paging in the Everyman edition.

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St. John-Stevas, Norman. *Life, Death and the Law*. Eyre and Spottiswoode, 1961.

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Contents

I

Morals and the Criminal Law*

The Report of the Committee on Homosexual Offences and Prostitution, generally known as the Wolfenden Report, is recognized to be an excellent study of two very difficult legal and social problems. But it has also a particular claim to the respect of those interested in jurisprudence; it does what law reformers so rarely do; it sets out clearly and carefully what in relation to its subjects it considers the function of the law to be.[1] Statutory additions to the criminal law are too often made on the simple principle that 'there ought to be a law against it'. The greater part of the law relating to sexual offences is the creation of statute and it is difficult to ascertain any logical relationship between it and the moral ideas which most of us uphold. Adultery, fornication, and prostitution are not, as the Report[2] points out, criminal offences: homosexuality between males is a criminal offence, but between females it is not. Incest was not an offence until it was declared so by statute only fifty years ago. Does the legislature select these offences haphazardly or are there some principles which can be used to determine what part of the moral law should be embodied in the criminal? There is, for example, being now considered a proposal to make A.I.D., that is, the practice of artificial insemination of a woman with the seed of a man who is not her husband, a criminal offence; if, as is usually the case, the woman is married, this is in substance, if not in form, adultery. Ought it to be made punishable when adultery is not? This sort of

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

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

[2] Para. 14.

question is of practical importance, for a law that appears to be arbitrary and illogical, in the end and after the wave of moral indignation that has put it on the statute book subsides, forfeits respect. As a practical question it arises more frequently in the field of sexual morals than in any other, but there is no special answer to be found in that field. The inquiry must be general and fundamental. What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?

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

Early in the Report[1] 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.
>
> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

The Committee preface their most important recommendation[2]

> that homosexual behaviour between consenting adults in private should no longer be a criminal offence, [by stating the argument[3]] 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

[1] Para. 13. [2] Para. 62. [3] Para. 61.

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.[1] The Committee refer to the general reasons already given and add: 'We are agreed that private immorality should not be the concern of the criminal law except in the special circumstances therein mentioned.' They quote[2] with approval the report of the Street Offences Committee,[3] which says: 'As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions.' It will be observed that the emphasis is on *private* immorality. By this is meant immorality which is not offensive or injurious to the public in the ways defined or described in the first passage which I quoted. In other words, no act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption, or exploitation. This is clearly brought out in relation to prostitution: 'It is not the duty of the law to concern itself with immorality as such . . . it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious.'[4]

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

[1] Para. 224. [2] Para. 227. [3] Cmd. 3231 (1928). [4] Para. 257.

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

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

Morals and religion are inextricably joined—the moral standards generally accepted in Western civilization being those belonging to Christianity. Outside Christendom other standards derive from other religions. None of these moral codes can claim any validity except by virtue of the religion on which it is based. Old Testament morals differ in some respects from New Testament morals. Even within Christianity there are differences. Some hold that contraception is an immoral practice and that a man who has carnal knowledge

of another woman while his wife is alive is in all circumstances a fornicator; others, including most of the English-speaking world, deny both these propositions. Between the great religions of the world, of which Christianity is only one, there are much wider differences. It may or may not be right for the State to adopt one of these religions as the truth, to found itself upon its doctrines, and to deny to any of its citizens the liberty to practise any other. If it does, it is logical that it should use the secular law wherever it thinks it necessary to enforce the divine. If it does not, it is illogical that it should concern itself with morals as such. But if it leaves matters of religion to private judgement, it should logically leave matters of morals also. A State which refuses to enforce Christian beliefs has lost the right to enforce Christian morals.

If this view is sound, it means that the criminal law cannot justify any of its provisions by reference to the moral law. It cannot say, for example, that murder and theft are prohibited because they are immoral or sinful. The State must justify in some other way the punishments which it imposes on wrongdoers and a function for the criminal law independent of morals must be found. This is not difficult to do. The smooth functioning of society and the preservation of order require that a number of activities should be regulated. The rules that are made for that purpose and are enforced by the criminal law are often designed simply to achieve uniformity and convenience and rarely involve any choice between good and evil. Rules that impose a speed limit or prevent obstruction on the highway have nothing to do with morals. Since so much of the criminal law is composed of rules of this sort, why bring morals into it at all? Why not define the function of the criminal law in simple terms as the preservation of order and decency and the protection of the lives and property of citizens, and elaborate those terms in relation to any particular subject in the way in which it is done in the Wolfenden Report? The criminal law in carrying out these objects will undoubtedly overlap the moral law. Crimes of violence are morally wrong and they are also offences against good order; therefore they offend against both laws. But this is simply because the two laws in pursuit of different objectives happen to cover the same area. Such is the argument.

Is the argument consistent or inconsistent with the fundamental principles of English criminal law as it exists today? That is the first way of testing it, though by no means a conclusive one. In the field