

THE ENFORCEMENT OF MORALS. By the Hon. Sir Patrick Devlin. [1959, London: Oxford University Press, for the British Academy; from the Proceedings of the British Academy, Vol. XLV. 3s. 6d. 25 pp.]

“To preach morality is easy, to give it a foundation is difficult.”² Philosophers used to speak of “moral science,” as though it were possible to build up a system of moral truths from factual propositions concerning human nature or the nature of “the universe.” But morality, like legislation, is concerned only with situations in which it is possible for people to behave in different ways. If the nature of man or of anything else dictated certain modes of behaviour as gravitational laws “dictate” the behaviour of falling bodies, moral and legal prescription would be pointless. We do not tell a man that he ought to do that which he cannot help doing. If the *jus*

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2. Arthur Schopenhauer: *Grundprobleme der Ethik*, section 1.

naturalis or the *Tao* were truly a law of nature then there would be no point in exhorting or commanding anyone to follow it. Men have exhorted or commanded obedience to moral and legal norms precisely because these norms are not part of the “nature of things,” because there are no universal ends or standards which we all *must* follow. Neither does it help to say, as some have said, that morality is the science which divides those actions which are fitting from those which are not. The world we know, whether human or non-human, is a world of conflicts; it points to no ultimate harmony, carries within it no recommendations of what is fitting and what is unfitting. To decide what is fitting is already to make a moral choice.

The whole concept of normative science, of a science which tells us what ought to be, is a contradiction in terms. Science is concerned with what is, and what is can never imply what ought to be. In fact, the central concept of normative morality — the concept of absolute obligation — is illogical and confused. Obligation, like recommendation and command, is a relational term; something obliges, something recommends, something commands. To speak, as some moralists have done, of a *categorical* imperative, of an *absolute* command, is not to justify ethics but deliberately to obscure it. If a morality is — as in fact it must be — a system of demands, then these cannot be absolute, but must be the demands of something or someone: of a person or group of persons, of a form of social organisation, of a tradition or way of life. But persons, social organisations, traditions and ways of life differ. Nor is there any ultimate authority to which these commands can be brought back. Authorities — no matter how heavily disguised behind vague labels like “conscience,” “God,” “practical reason,” “society” or “the purpose of Man” — conflict. Always we find men disagreeing over what conscience, God or reason demands; always, too, there remains the open question: “Why ought I to do what your authority commands?”

Considerations like these led me to write in a law students’ journal some time ago:

“The common practice of moralism, politics and the law is all too often a fraudulent and distasteful activity. In theory, it leans far too readily on the dangerous myth that there are values implicit in things, that a mythical creator or the whole nature of the universe makes the demands of some human beings or institutions ‘right’ and the rest ‘wrong.’ In practice, it can lead to the rigid suppression that characterises theocratic totalitarianism, or to the vulgar mediocrity of those societies where the alleged ‘will of the people’ is supreme. To be morally and politically adult is to recognise that human demands and moralities conflict. It is to see that there is no single social interest or ‘will of the people,’ no way of showing that the nature of the universe proves your demands right and other people’s wrong. It is to reject the fraudulent and ultimately enervating illusions of ‘the public interest,’ ‘true morality,’ ‘natural law’ and the ‘national welfare’...

“It is because men are afraid to stand on their own feet, to support a way of life or tradition without assurance of universal support or success, that they invoke the illusions of ‘natural morality’ and ‘natural law.’ For the spontaneous co-operation that characterises free activities, they seek to substitute the servile submission to authority and to bind opposition within illusions. The maintenance of these illusions demands not only more and more physical suppression, but increasing intellectual blindness.

“This, no doubt, is why so many ‘great’ jurists have combined considerable legal acumen and ability with the most appalling self-righteousness and moral insensitivity. To the man of moral insight, indignation is not always an easy emotion and the need for punishment and repression is not always obvious. That curious combination of legal insight and imagination with utter lack of moral insight or imagination —

displayed so markedly, for instance, by one of England's abler Chief Justices, Lord Goddard — is not easily matched in other intellectual professions. It is obviously an occupational hazard."

When I wrote these words, a number of persons and organisations protested vehemently.² They considered such views subversive, presumably not only of morality, but also of law. They were anxious they should be suppressed. They were not so anxious, or at any rate ready, to refute such views in print, to show how any particular moral "law" could be justified.

In his Maccabean Lecture in Jurisprudence to the British Academy in 1959 — "The Enforcement of Morals" — Sir Patrick Devlin seeks to do publicly what these people sought to do privately, for the same reasons and with the same limitations. He wants to show that moral scepticism, or even the belief that morality is a private matter, is necessarily unacceptable to law; he is not prepared to show that moral scepticism can be refuted or that morality can be placed on solid logical foundations. He takes as the butt of his criticism the "liberal" view of the relation of law and morality accepted as a working principle of legal reform by the authors of the Wolfenden Report. The authors, putting a view that has had widespread support since John Stuart Mill formulated it in his *Essay on Liberty*, state:

"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."³

In recommending that homosexual behaviour between consenting adults in private should no longer be a criminal offence, the Committee again prefaces its recommendation with an argument from Mill, an argument

"which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality."⁴

The last sentence makes it clear enough that the authors of Wolfenden Report are not themselves taking up a position of moral scepticism. They are simply insisting — with Mill — that an action must be injurious to others or to "society" before "society" has a right to interfere. To say this, of course, is not to state a "truth," but to make a moral demand. It is to value individual freedom and choice of action above, say, humility and obedience — two characteristics which have been valued highly in other moralities. I have already suggested that there is no "ultimate" way of proving one of these valuations superior to the other, though we might certainly say that the insistence on freedom is closely linked with enquiry and the pursuit of knowledge, with the cultured and creative way of life. Neither can we

2. But privately, to the Vice-Chancellor.

3. *Report of the Committee on Homosexual Offences and Prostitution* (Wolfenden Report), para. 13.

4. *Ibid.*, para. 61.

claim Mill's principle as one of logical precision and exactitude — what is injurious or offensive can always become a matter of argument between people espousing different moralities. Mill's principle, in fact, corresponds closely with the presumption, in the interpretation of statutes, against interference with the liberty of the subject. The principle, like the presumption, can never by itself conclusively rule out anything; but it does throw the onus of establishing reasons on those who propose to interfere. This is the, to my view, commendable position adopted by the authors of the Wolfenden Report; it is the position which Sir Patrick wants to weaken, if not entirely destroy. Basically, Sir Patrick's reason is a simple one — "society," if it is to hang together, cannot allow defiance of its fundamental moral principles. He does, of course, make the usual attack on the imprecision of Mill's principle — "you cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate against drunkenness" (p. 15) — but this, as we have seen, is beside the point: the same argument could be used to destroy every one of the rebuttable legal presumptions which Sir Patrick applies day after day from the bench. The only genuine argument in his lecture is the pragmatic 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 judgment." (Pp. 10-11.)

But how is the law-maker to ascertain the moral judgments of society? "English law," Sir Patrick replies, "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 judgment may be largely a matter of feeling." (P. 15.) He is the ordinary man in the jury box, the representative of what Pollock called "practical morality" — "a certain way of thinking on questions of morality which we expect to find in a reasonable civilised man or a reasonable Englishman, taken at random."⁵ The outstanding feature of this man for Sir Patrick, however, is that he is allegedly not a utilitarian. He has a deep sense of right and wrong. There might be differences between what the reasonable or right-thinking member of society thinks about morals and what specific Christian sects proclaim, but these differences are academic (p. 23). At rock-

5. Pollock: *Essays in Jurisprudence and Ethics* (1882), Macmillan, p. 353; cited by Devlin at p. 16.

bottom he is a man with a Christian sense of values, which he holds not because they are useful to society but because he believes them right. Thus we are led to Sir Patrick's peroration:

"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 which are taught by the established Church — on these points the law recognises the right to dissent — but for the compelling reason that without the help of Christian teaching the law will fail." (P. 25.)

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Two things are noteworthy about Sir Patrick's position. One is the fact that in order to save morality Sir Patrick has become a complete moral sceptic. No person who accepts an absolute distinction between right and wrong is willing to say that "Society" is always right, that debates about the rightness or wrongness of polygamy are irrelevant once "society" has made up its mind, and that rebellion is always wrong. The very Christian morality which Sir Patrick espouses began and spread through a bitter struggle against the established religions, moral opinions and legal systems around it; even to-day only a moral sceptic could hold the differences between Christian morality (of whatever brand) and the morality of the "right-thinking citizen" (however determined) purely academic. One has only to consider the question of divorce to know how real the conflicts are, even within Christianity, and how utterly unprepared anyone with moral convictions would be to accept either the verdict of the majority or of the "reasonable man," drawn at random. If Sir Patrick is right in thinking that the moral fabric of society must be based on a non-utilitarian sense of the absolute distinction between right and wrong, then he must accept the consequence that those who hold this conviction are not prepared to accept the verdict of "society," but insist on clinging to their own. It is no accident that those who give the law "most trouble" are those with absolutist moral convictions, from the *Staroveroy* of Czarist Russia to the Jehovah's Witnesses and Christian pacifists of to-day.

The second point is more fundamental. Sir Patrick's main argument is simply this: Any society has a moral structure, a set of moral principles; to allow violation of these principles is to destroy the structure, to pull down the house in which you live. What Sir Patrick fails to realise is that people live in different kinds of houses at different times; they make structural alterations, throw out old furniture, add new wings, pull down old walls. In some houses — Sir Patrick's kind of house — all the rooms have to have the same wallpaper and every one must gather in the hall for prayers and the observance of family customs; in other houses people have their own rooms with different wallpaper, and gather in the hall only when they have to solve a problem of common concern. Sir Patrick fails to show how re-allocating the rooms and changing the wallpaper will make the house fall down. When adultery ceased to be a crime, English society did not collapse; there is not even any evidence that the incidence of adultery increased as a result. Will legalising homosexual acts between consenting males in private make society collapse, or even increase the incidence of homosexuality? Does treating abortion as a sin as well as a crime preserve the structure of society in some way that treating it only as a crime would not? Are societies in which abortion is legal any more different from England to-day than England to-day is from its own society 400 years ago?

That the common law has embodied within its principles certain standards of value (*e.g.* public policy and reasonableness) is perfectly true; but these standards have only been successful, as Professor G. W. Paton points out,⁶ because their content is always changing. They change because some people attack, criticise and reject them; because the “moral climate” of a community is not some rigid steel structure, but a fluid weather map of pressures and counter-pressures, some widespread, some more confined, held together not by a common direction shared by all, but by their very interaction and conflict. It is wrong to treat law, as Sir Patrick does, as though it were a passive reflection of this moral climate. Often law reflects moral principles that were widespread 100 years ago but are not to-day; sometimes, it reflects moral principles that will become widespread, through its influence, to-morrow. The tremendous impact that Bentham had on English public life and its moral climate probably stemmed more from his specifically legal reforms than from his general moral writings; he strove not to reflect, but to educate “the man in the jury box.” One of the things Bentham helped to teach him was that law need not rest on religious authority; English society has not collapsed as the result of that view. Sir Patrick does nothing to show that it will; or that the separation of religion from law will weaken anything — except religion.

6. "Law, Logic and Ethics," 14 *Australasian Journal of Psychology and Philosophy*, 270, at p. 279.

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