

The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy

Yves Caron *

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The enforcement of morals through legal sanctions is not a new topic to legal philosophers. It has, in the past decade, been the object of a new and thorough examination, though it is still open to further discussion. The "new morality" of the second half of the twentieth century will also contribute to keep the fire alive as a result of the widening gap between the traditional Christian morality and the morals that modern society seems increasingly prepared to accept and tolerate.

Morality implies a basic reference to the distinction of what is right from what is wrong. Various moralities differ as to the extent of what is right and what is wrong, or good and bad, and therefore, each community, nation or society may have its own morality, according to the local beliefs, whether social, political, religious or other. Moreover, the expressions "morals" and "morality", though broad in meaning, have too often been understood to have a close connexion with sexual morality. Legal and philosophical writers are not always careful to indicate that although the main illustrations of moral problems are generally taken from sexual morality, morality remains fundamentally a classification of what is right and wrong.

More sophisticated definitions of morality have also been worked out in the debate on the distinction between law and morals. Following the utilitarians of the last century,¹ Professor H.L.A. Hart proposes two working definitions of morality:² "positive morality", or the morality actually accepted and shared by a given social group, and "critical morality", which may be defined as "the general moral principles used in the criticism of actual social institutions including positive morality". Hart then proceeds to examine the question of

* D. Phil. (Oxon), Associate Professor, Faculty of Law, McGill University.

¹ Austin, J., *The Province of Jurisprudence Determined*, (London, 1954), ed. by Hart, pp. 11-12, 125-127.

² Hart, H.L.A., *Law, Liberty and Morality*, (1963), Vintage Book ed., p. 20, hereinafter cited as Hart.

the legal enforcement of morals as one of "critical morality about the legal enforcement of positive morality".³

The term "enforcement" also needs some clarification. The legal enforcement of morals means, in practice, the separation of crimes from sins. There are two main instruments to ensure the enforcement of morals: statutory legislation and judge-made law. When the legislator adopts a statute regulating some aspect of morality, the enforcement of morals is seen as a matter of policy at the political level: no government is likely to adopt a law that does not satisfy the moral conscience of the population. The actual enforcement of such a law can also be a matter of policy, either political or merely administrative. But when the legislator remains silent on some aspects of the legal enforcement of morals, the courts have often stepped in, and reaffirmed their right and duty as *custos morum* of the people. In those cases, the legal enforcement of morals is not a matter of political policy but of mere interpretation of what is right and wrong, as assessed by expert witnesses and stated by a jury, subject to the revision of the higher courts. Their judgement and opinion will, therefore, constitute the yardstick that will be used to measure what society is or will be prepared to tolerate in the field of morality, and to what extent it is prepared to accept the legal enforcement of morals.

But why should society care for the legal enforcement of morals in the first place? Is the right to punish or to impose sanctions an essential or natural right of society? What is the purpose of punishment, and, in any event, does punishment yield sufficiently good results to warrant its use and that of the legal apparatus needed to administer it? In some instances, as it will be shown, the legal enforcement of morals is a farce, and sometimes a nuisance, because certain crimes are undetectable and certain prohibitions are simply unenforceable. It would, therefore, seem right to say that however necessary it is to legally enforce some aspects of morality, if the law cannot supply the appropriate weapons, it is better to leave the area unregulated rather than to adopt unenforceable rules. But let us face the question as a whole, and see how the problems of legal enforcement of morals actually arise.

The recent years have provided legal philosophers with many good cases and problems concerning the legal enforcement of morals: the most famous are the *Wolfenden Report*⁴ and the *Ladies' Directory*

³ Those definitions are further considered *infra*, at pp. 27 ff.

⁴ *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247, (London, 1957).

case⁵ (also herein referred to as the *Shaw* case), which have been used as guideposts in the debate, and have been widely publicized.

However, as an illustration of the fact that this question is far from settled, a freshly rendered judgment of the Supreme Court of Canada in the case of *Klippert v. The Queen*⁶ will be used as the starting point of the present analysis. It shows how, just when the Parliament of the United Kingdom was acting upon the Wolfenden Committee's recommendations after ten years by repealing the criminal prohibition against homosexual acts between consenting adults in private, the Supreme Court of Canada affirmed a judgment which not only applied the *Criminal Code* of Canada concerning homosexual acts, but also interpreted its terms so as to include homosexuals in the category of "dangerous sexual offenders."⁷ Consequently, it sentenced the accused to preventive detention that could last for life.

Klippert v. The Queen

The facts of the case were very simple. The defendant, Klippert, was not caught in an indecent act, but had told the police, while being questioned about some other matter, that he had been a homosexual for twenty-four years. He was subsequently convicted on four charges of gross indecency involving homosexual acts with four different persons. His first sentence of three years was later replaced by a sentence of indefinite (preventive) detention. At no point was there any suggestion of violence or offences against children, or offenses committed in public, though the defendant admitted being a homosexual for so many years. All convictions against him stemmed from *private acts with consenting adult males*.⁸

The argument before the Supreme Court of Canada centered around the definition of a "dangerous sexual offender" in the *Criminal Code* of Canada, as a result of which the preventive detention sentence could be administered. The final decision was

⁵ *Shaw v. Director of Public Prosecution*, [1962] A.C. 220 (H.L.); [1961] 2 All E.R. 446 (H.L.); [1961] 1 All E.R. 330 (C.A.), *sub nomine, Regina v. Shaw*; see also the recent obscenity and pornography cases in the U.S.A.: *Roth v. United States*, (1966), 354 U.S. 413; *Memoirs v. Massachusetts*, (1966), 383 U.S. 413; *Ginzburg v. U.S.*, (1966), 383 U.S. 463; *Mishkin v. New York*, (1966), 383 U.S. 502; Magrath, C.P., *The Obscenity Cases: Grapes of Roth*, [1966] *The Supreme Court Review*, 7; Elias, E.A., *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, (1967), 9 *William & Mary L. Rev.* 302.

⁶ *Klippert v. The Queen*, [1967] S.C.R. 822.

⁷ S. 659 (b) Cr. C.

⁸ See the medical evidence, cited by Cartwright, J., at pp. 827-828.

reached by a majority of the Court (three to two), based on an interpretation of the terms "dangerous sexual offender". The *Code* provides that the provision is aimed at persons who constitute a "danger to others", but the majority found that the *Code's* reference to further sexual offences⁹ that might be committed by a previously convicted person was an "alternative element" to that of the danger of injury to others. Mr. Justice Fauteux, speaking for the majority, said:

With deference, I cannot either agree with the view that the intent and object of the provisions dealing with *dangerous sexual offenders*, is solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger and that to apply the definition to a person, who is not to be a source of danger, would give the definition an effect inconsistent with the intent or object of these provisions.¹⁰

On the other hand, the two dissenting judges found that the *Code's* reference to further sexual offences must read as relating to danger to others; otherwise, it would be tantamount to saying that a person who is not dangerous must nevertheless be regarded as dangerous:

It would be with reluctance and regret that I would have found myself compelled by the words used to impute to Parliament the intention of enacting that the words 'dangerous sexual offender' shall include in their meaning 'a sexual offender who is not dangerous'.¹¹

Cartwright, J., dissenting, cites lengthy extracts from the medical and psychiatric evidence, showing that doctors had agreed that "there was no danger of the appellant using violence of any sort or attempting coercion of anyone", though they did foresee "the likelihood of the appellant committing further acts of gross indecency with other consenting adult males".¹²

⁹ Canadian *Criminal Code*: "s. 569 (b): 'dangerous sexual offender' means a person who, (i) by his own conduct in any sexual matter, has shown a failure to control his sexual impulses, and (ii) who (a) is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or (b) is likely to commit a further sexual offence..." S. 661 (3): "Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired."

¹⁰ Fauteux, J., at pp. 834-835.

¹¹ Cartwright, J., at p. 831.

¹² At p. 829. *Maxwell on Interpretation of Statutes*, 11th ed., at pp. 58-59, is also cited in support of the dissenting judges' interpretation of the *Criminal Code*; see Cartwright, J., at p. 830.

The result, however, is that a homosexual is not only regarded as a criminal by the Canadian *Criminal Code*, but also treated as a dangerous sexual offender, and is being incarcerated for life as if he constituted a danger to others and had no control over his sexual impulses, although he was convicted for acts committed with consenting adults in private.¹³

One might say that the decision is a result of a narrow and literal interpretation of the *Criminal Code*. Cries of "dark-ages dungeon", "ridiculous justice" and others have been heard in the House of Commons as a result of the Court's decision. Reference was made to the *Wolfenden Report* and the new *Act* on sexual offences in the United Kingdom,¹⁴ but the majority was left unmoved by such precedents, in a case where it could have rendered a more lenient interpretation of the *Criminal Code*.

Whether the criminal law, with respect to sexual misconduct of the sort in which appellant has indulged for nearly twenty-five years, should be changed to the extent to which it has been recently in England, by the *Sexual Offences Act, 1967* (c. 60), is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.¹⁵

Whether the view of the Supreme Court of Canada is that of the majority of the Canadian population (criminal law being a matter of federal jurisdiction in Canada) remains to be seen. A few weeks following the *Klippert* decision, the Minister of Justice introduced a series of new amendments to the *Criminal Code*, which would have the effect, *inter alia*, of making the Canadian law relating to homosexual practices identical with the new English *Act* of 1967,¹⁶ and of liberalizing the law relating to abortion. At the time of the writing of this paper, Parliament had not yet studied this Bill, but comments from the press and other organized social, professional and religious groups suggest that the new reform might be the object of stormy debates before it is carried out.^{16a} It will be yet another occasion for

¹³ "If the law on this subject matter is as interpreted by the Courts below, it means that every man in Canada who indulges in sexual misconduct of the sort forbidden by s. 149 of the *Criminal Code* with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life. However loathsome conduct of the sort mentioned may appear to all normal persons, I think it improbable that Parliament should have intended such a result." Cartwright, J., at p. 831.

¹⁴ *Sexual Offences Act, 1967*, c. 60.

¹⁵ Fauteux, J., at p. 836.

¹⁶ See *infra* and the *Wolfenden Report*.

^{16a} The House of Commons has now started the study of the Bill, which has been presented as one and undivided (*omnibus*) block, and has indeed been the object of stormy and biased debates. Ed.'s note.

Canada to review its common morality and decide whether it is prepared to allow a maximum of freedom to its citizens, or will, as a result of social or religious bias, require that the activities of the individuals, although seemingly of a private character, be investigated and perhaps punished by the arm of the law. The Canadian Parliament has just recently started this review by finally liberalizing the law concerning the death penalty.¹⁷ In the meantime, however, the Supreme Court's decision in the *Klippert* case remains as an example of extremely stringent policy in the legal enforcement of morals, which was perhaps not clearly foreseen by those who enacted the criminal laws. This will be a good occasion for reshaping the Canadian concepts on the relation between law and morality. This essay purports to suggest some ideas and criticism concerning the legal enforcement of morals.

Report of the (Wolfenden) Committee on Homosexual Offences and Prostitution

The legal enforcement of morals was discussed by the Committee on Homosexual Offences and Prostitution;¹⁸ the actual recommendations of the Committee, though relevant here, yield in value to the actual principles upon which they rested. The Committee proceeded to define what it considered was the nature and function of the law. Through extensive examination of witnesses, however, it had to admit that opinions differ so much as to what the law is, or as to what is regarded as offensive, injurious or inimical to the common good, or as to what moral, social or cultural standards are, that it had to adopt standards acceptable to the community in general, though not accepted by many citizens. The Committee has found itself unable to succeed in discovering an "unequivocal public opinion", although several persons had suggested that there is a direct relationship between the law and public opinion. The members had therefore to reach "conclusions for ourselves rather than to base them on what is often transient and seldom precisely ascertainable".¹⁹

The subject matter of morality, whether sexual or not, is not always easily debated, and the conclusion of the Wolfenden Committee reflects such a state of facts: this area is still one where the limits of religious belief, political and social principles and behaviour have not been determined, or at least not fully investigated, and where

¹⁷ See *infra*, n. 92.

¹⁸ The Committee was appointed on August 24, 1954, and reported on August 12, 1957; legislation followed in 1967, see, *supra*, n. 14.

¹⁹ *Wolfenden Report*, para. 16.

the individuals are not prepared to state their views with the knowledge that their opinion is founded upon ascertained principles or even upon reasonable information. In the past, what was good according to religion was accepted as socially good; but nowadays, since morality and religion have been separated to a greater extent, both philosophers and lawyers experience difficulties in ascertaining the public good (public order) and the general moral sense (common morality).

The Wolfenden Committee adopts the view that laws must be acceptable to the general moral sense (as determined by their own search),²⁰ and that laws should not enter the field of "private moral conduct" unless such conduct affects public good. On the other hand, however, the report does not supply a definition of "crime", or of "public opinion." To define a crime as "an act which is punished by State" does not answer the question;²¹ the notion of "crime", as distinguished from "sin", will therefore be based on the purpose and function of the law in the field of morals, that is,

(T)o 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.²²

The law is the guardian of the public good, and has no function "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" of preserving public order.²³ This general concept of the law has led the Committee to further distinguish between "public morality" and "private morality" or immorality that is the private life of individuals as such:

There remains one additional counter-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. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the private

²⁰ *Idem.*

²¹ *Ibid.*, para. 13.

²² *Idem.*

²³ *Ibid.*, paras. 14, 52. In a famous quip, The Minister of Justice and now Prime Minister of Canada said that: "The State has no business in the bedrooms of the Nation".

and personal responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.²⁴

As a consequence, the Wolfenden Committee recommended, *inter alia*, "that homosexual behaviour between consenting adults in private should no longer be a criminal offence",²⁵ because of the so-called area of private morality. Apart from its own reasons, the Committee cites the *Report of the Street Offences Committee*,²⁶ which stated that criminal law "is not concerned with private morals or with ethical sanctions".²⁷

But whatever the merits of the *Wolfenden Report* may be, and notwithstanding its appeal to many (the report was finally implemented by legislation in 1967), its underlying philosophical reasoning has not been convincing. The purpose is real; there is a need for reforms in the legal enforcement of morals, but the jurisprudential basis of the report is indeed a weak one. For example, the existence of a so-called distinction between public and private morality or immorality has yet to be demonstrated or even justified. The main feature of morality relates to the distinction between right and wrong; unless the legal enforcement of morals purports to regulate the private lives of individuals, all morality is necessarily public, whether the act is done in private or in public. "Private morality" does not exist; "wrongful" acts done in private relate to "public" morality. The Committee's position would be indefensible if its main principle was applied to some other fields of morality and of legal enforcement of morals; such crimes as incest between consenting adults in private, euthanasia or murder voluntarily consented to by the victims, and attempted suicide are examples of "wrongful" (*i.e.* for the purposes of the debate) acts between consenting adults in private which would fall within the Committee's notion of private morality. Yet, our legal system has been allowed to intrude into those areas of would be private immorality to bring such acts under the effects of the law. It is not too early to say here that the Wolfenden Committee's underlying distinction between public and private morality did not lie on proper foundations, and that indeed it constitutes an artificial theory.

On the other hand, it is useful to mention here that the Committee did not believe in the decay of society and civilization as a

²⁴ *Ibid.*, para. 61.

²⁵ *Ibid.*, para. 62.

²⁶ Cmd. 3231 (London, 1928).

²⁷ *Wolfenden Report*, para. 226.

result of a relaxation of morals; an idea which was put forward in the *Shaw* case and by some legal writers.²⁸

Although the *Wolfenden Report* was not implemented until more than a decade following its publication, it was obvious that this report, together with the report of the Street Offences Committee, would provide enough substance for lawyers and philosophers, and indeed for the general population, to think about during those past years. The Wolfenden Committee actually predicted the need for a new interpretation of the notion of enforcement of morals as a result of the recommendations. For example, the ban on street-walking resulted in an increase of other means of advertising prostitution.²⁹ The *Ladies' Directory* case came in its place in the evolution of the legal enforcement of morals. However, the outcome of the *Shaw* case does fit into the pattern suggested by the Wolfenden Committee.

Shaw v. Director of Public Prosecution.³⁰

It may be said that the decision of the House of Lords in the *Shaw* case is the ultimate result of a zealous performance by the Director of Public Prosecution. Not long after the adoption of the new *Street Offences Act*, 1956, Shaw published a *Ladies' Directory* which contained not only the names and addresses of prostitutes, but also nude photographs and various notes relating to the repertoire and perverse capabilities of the advertisers. If Shaw had been remunerating himself by the proceeds from the sale of a magazine containing only the names, addresses and telephone numbers of prostitutes, he would have committed no specific offence; but the directory also contained materials which made it an obscene libel. By taking payment from the prostitutes themselves, Shaw committed the statutory offence of living "wholly or in part on the earnings of prostitution".³¹ As the publisher of the magazine, Shaw was prosecuted under three separate counts: (a) living on the earnings of prostitution; (b) publishing obscene materials; (c) conspiracy to corrupt public morals. The last count was very likely added by the Director of Public Prosecution because it was felt that the first two

²⁸ *Ibid.*, para. 54; see *infra*, *Shaw v. D.P.P.*

²⁹ "Another possible consequence is an increase in small advertisements in shops or local newspapers, offering the services of 'masseuses', 'models' or 'companions'; but we think that this would be less injurious than the presence of prostitutes in the streets." *Wolfenden Report*, para. 286.

³⁰ *Shaw v. D.P.P.*, [1961] 2 All E.R. 446 (H.L.), (hereinafter referred to also as: the *Ladies' Directory* case or the *Shaw* case).

³¹ *Sexual Offences Act*, 1956, 4-5 Eliz. 2, c. 69, s. 30(1); Devlin, P., *The Enforcement of Morals*, (London, 1965), pp. 87-89, hereinafter cited as Devlin; Hart, *op. cit.*, pp. 7 ff.

were weak, and to make sure that the accused could be cornered by a broad interpretation of the law. The final outcome may have been a surprise, however, for Shaw was convicted under all three counts.

The main instrument of his conviction was said to be the jury, and many judges were happy to rely upon the jurors' opinion as being the only solution to this case:

(I)n the case of a charge of conspiracy to corrupt public morals, the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them.³²

This case was commented upon in various reviews and articles, and it is not intended to duplicate those materials. However, it will be useful for our purposes to restate some of its major themes. The Courts, and especially the House of Lords, felt that the creation of new (criminal) offences does not fall within their competence, mainly because the citizens have a right to know in advance what the law is, particularly the criminal law, and what deeds are prohibited and punished.

On the other hand, the courts claimed a residual power to enforce the supreme and fundamental purpose of the law, and saw themselves as the *custos morum* of the state, as they were in the earlier days of the Star Chamber, a power which, so they said, was maintained well after the Chamber had been abolished.³³ The courts must therefore be the guardian of public morals and cannot tolerate those forms of immorality that could lead to the moral decay of society. In the *Shaw* case, the House of Lords defined the "fundamental purpose of the law" in connexion with the needs of morality; it did not commit itself to drawing a division line between religious and social belief, but in effect took for granted that religious principles and Christian morality were an undivided part of the English society.

In order to protect those principles and maintain the social order, the English law has retained such an offence as the conspiracy to corrupt public morals, and it is the duty of the Court to see that the law is obeyed. The majority of the judges did not think it necessary to question the respective limits of "sin" and "crime";

³² *Per* Viscount Simonds, [1961] 2 All E.R. 446, at 453.

³³ "When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare." *Per* Viscount Simonds, *ibid.*, at p. 452.

they were content with the principle that morality is a part of the social or public order, and that an offence against morals was an attack against society. Therefore, it was only natural to protect society through the legal weapons available, and it was the duty of the Court to act as the guardian of morality and social order. In such cases as that under study, where it was necessary to apply to a given set of facts the vagueness of such broad principles, the judges were happy to leave the interpretation of the terms and the application of the rule of law in the hands of a jury.

The judges seem to have had more concern for the adaptation of the common law offence, namely conspiracy to corrupt public morals, to the present situation. In this instance, the offence did not "consist of the publication" of the directory, but of "an agreement to corrupt public morals by means of the magazines which might never have been published".³⁴ They tended to adopt the narrow-minded attitude of the trial judge who sees no other alternative but to apply the law as it stands in the statute book to a clear-cut situation.

Lord Reid, dissenting in the House of Lords, pointed out that the Lords were reversing their own view, and were expanding the very crime of conspiracy after they had ceased to extend offences by individuals.³⁵ The Court is in fact creating a new offence by the extension of the doctrine of conspiracy; it must, according to the Court's reasoning, be a crime today to conspire to seduce a particular man, and the offence cannot be limited to a conspiracy to corrupt public morals.³⁶ Owing to differences in opinions as to how far the law ought to punish immoral acts which are not done in the face of the public, the Court is not the proper place to settle that type of argument. Parliament is the proper authority to deal with such matters, and "where Parliament fears to tread it is not for the courts to rush in".³⁷

Consequently, it is impossible to agree with the idea that the law is whatever a jury thinks it ought to be. One must query whether society as a whole is affected by the offence or conspiracy, or only those who actually read the publication, or only a limited number of persons among those readers. If there is no possible corruption, there is no conspiracy at all, though conspiracy might have existed without actual corruption if it was technically possible. Lord Reid does not, however, complete his argument by a consideration of the fact that

³⁴ *Per* Lord Tucker, *ibid.*, at p. 466.

³⁵ *Per* Lord Reid, *ibid.*, at p. 457.

³⁶ *Ibid.*, at p. 458.

³⁷ *Ibid.*, at p. 457.

prostitution and perverse practices are not prohibited as such;³⁸ the prohibition affects socially injurious manifestations of such practices as, for instance, streetwalking and bawdy-house keeping. Therefore, it is not a crime to indulge in prostitution, but it is an offence to advertise oneself as a prostitute. One aspect of this case was left undiscussed by the judges: it seems that if the directory had contained only the names and addresses of prostitutes, there would have been no conviction under the third count (or on the second, for that matter). The nature of the document was changed as a result of the addition of photographs and other mentions (not reported or detailed in the Law Reports) (sic) relating to perverse practices and individual specialties. It would then seem that the publication of an ordinary directory would not constitute a conspiracy to corrupt public morals — no more than the mere fact of prostitution — whereas the publication of obscene photographs and literature would. Fortunately, no one claims that there is any logic to be found in such reasoning.

This case has, obviously, been under severe attacks, mainly because of the stand of the House of Lords in the interpretation of its own function as *custos morum*, and of the ancient Common law offence of conspiring to corrupt public morals. Critics have noted the small amount of discussion on the boundaries between crime and sin, on the concept of morality and on the contemporary function of the law as a weapon to enforce morals.³⁹

The So-Called Hart-Devlin Controversy

Lord Devlin and Professor H.L.A. Hart have exposed their personal views on modern morality and the enforcement of morals in a number of writings.⁴⁰ The reader benefits from those essays in many ways, since both writers have had the opportunity of comment-

³⁸ With such exceptions as sodomy and bestiality.

³⁹ On the *Shaw* case, see further: Hart, *op. cit.*, pp. 7 ff.; Hall Williams, J.E., *The Ladies' Directory and Criminal Conspiracy: The Judge as Custos Morum*, (1961), 24 Mod. L. Rev. 626; Goodhart, A.L., *The Shaw Case, the Law and Public Morals*, (1961), 77 L. Q. Rev. 560; Mewett, A.W., *Morality and the Criminal Law*, (1961-62), 14 U. of T. L. J. 213; Devlin, *op. cit.*, pp. 87 ff.

⁴⁰ See generally: Devlin, *op. cit.*, pp. 1 ff., 86 ff., 102 ff.; Devlin's book *The Enforcement of Morals* includes the original conferences which had previously been published elsewhere; chapters I, V and VI are especially reviewed here; Devlin, P., *Law and Morality*, (1962-65), 1 Manit. L. S. J. 243; Hart, *op. cit.*; Hart, *Positivism and the Separation of Law and Morals*, (1958), 71 Harv. L. Rev. 593; Hart, *Social Solidarity and the Enforcement of Morality*, (1967), 35 U. of Chi. L. Rev. 1; Hart, *The Use and Abuse of Criminal Law*, (1965), 8 The Lawyer 47.

ing on one another's comments of one's own comments. The danger in that type of debate is to enter into a mere battle of words;⁴¹ other commentators have also joined the band-wagon, and at one point the so-called controversy on the enforcement of morals could have turned into a debate similar to the famous corporate personality battle of earlier years.

But after all, is there such a thing as a Hart-Devlin controversy, and if so, is it just a battle of words? The author takes the view here, after an examination of both propositions, that the prevailing conclusion is that Lord Devlin and Professor Hart, and a few of their followers, do not even speak the same language, and that it is a juridical and philosophical error to try and reduce to a single concept the premises of a given system. Excessive "labelism" is one of the abuses of contemporary jurisprudence. It is submitted that too much energy has been devoted to the interpretation of the underlying meaning of the opponents' words, and too little has been oriented to constructive analysis and to the observation of facts. In this area, however, Lord Devlin would emerge as the best contributor.⁴²

Comparing Hart and Devlin is tantamount to opposing two different systems; their approach to morality, their purpose and even their vocabulary are different. The latter is looking for a *modus vivendi*, seeing society as a group that needs organization and rules for the behaviour of its members, whereas the former is concerned with the definition of basic principles and the rationalization of the human activity. Moreover, Hart's primary concern goes to the individual, whereas Devlin's preoccupation is for society. Their theories, in the end, are not that far apart; Hart deals with the opposition between law and morality, while Devlin discusses the interplay of law and morality.

Lord Devlin's series of lectures on the enforcement of morals are based on a general concept of society; society exists as a series of facts, and enjoys the use of several means and weapons to maintain its existence and improve the standards of living of its members. It has been said that Lord Devlin does not actually define

⁴¹ See *infra*, and Devlin, *op. cit.*, p. 13, n. 1; Devlin, *loc. cit.*, (1962-1965), 1 Manit. L.S.J. 243, at p. 254.

⁴² In his most recent essay on the legal enforcement of morals ((1967), 35 U. of Chi. L. Rev. 1), Hart proposes a distinction between the 'classical thesis', the 'disintegration thesis' (attributed to Devlin — *cf* Devlin, pp. 94, 114) and the 'conservative thesis' (see Dworkin, *Lord Devlin and the Enforcement of Morals*, (1965-1966), 75 Yale L.J. 986). It does not appear, however, that this new classification sheds more light on the problems of legal enforcement of morals. It tends to hide the facts behind the men who discuss them and to oversimplify the issues by the uses of words.

“society”,⁴³ whereas others criticize him for having based his theory on a “confused definition of what society is”,⁴⁴ *id est*, the notion of “shared morality”. Both criticisms seem unjustified, because the very concept of “society” is a very difficult one to enclose within a formal definition.

There are as many notions of society as there are societies, and notwithstanding those critics, Devlin’s view that a society “is a community of ideas” is sufficient enough for the present purposes.⁴⁵ Beyond that, Lord Devlin is more inclined to enumerate what may be found in a society than to build up a final definition.⁴⁶ In the field of morality, there are some areas in which the law does not interfere, at least not in most western countries. The law leaves religion to the private judgment of individuals, and it is the same with morals.

What went wrong in the *Wolfenden Report*, as Lord Devlin puts it, is that as a result of an error of jurisprudence, the Committee was looking for a single principle to explain the division between crime and sin; as a consequence, it purported to ensure the protection of the individual instead of that of society. The Committee’s definition of the function of the law is therefore incomplete and misleading.

Although the law does not interfere with religion or morals, our society is a Christian one,⁴⁷ and as such, it cannot make its own rules without regard to Christian morals. Crimes may be classified into three categories: (a) regulatory offences, such as traffic violations; (b) criminal rules on moral precepts, such as the prohibition of theft or murder; (c) criminal rules which tend to regulate “immorality as such”, like the laws on prostitution or homosexuality, which have no other apparent justification but the regulation of immorality as such. On the other hand, criminal law has been based on traditional moral principles; for example, the victim’s consent to a crime never constitutes an excuse on behalf of the accused. But there are cases where there is more than a victim’s consent; there can be a victim’s request. A person who wants to commit suicide, for instance, could request the help of another to pull the trigger.

⁴³ *E.g.* Ison, T. G., *The Enforcement of Morals*, (1967), 3 U. B. C. L. Rev. 263, at 265.

⁴⁴ Hart, *op. cit.*, p. 82; Hart, *loc. cit.*, (1967), 35 U. of Chi. L. Rev. 1, at pp. 3-4; Devlin, *op. cit.*, pp. 9-10; see *infra*, nn. 45, 46 and the text.

⁴⁵ Devlin, *op. cit.*, pp. 9, 89.

⁴⁶ Devlin, *op. cit.*: “Every society has a moral structure as well as a political one . . .”, at p. 9; “Without shared ideas on politics, morals, and ethics no society can exist.”, at p. 10; see *infra*, and Devlin, p. 13, n. 1.

⁴⁷ Devlin, generally, chapters I, V and VI.

Similarly, euthanasia, suicide pacts, duelling, abortion, incest or homosexuality can be said to relate more directly to the individual's morality than to social order; but the law denies the existence of such "private morality" and makes it an offence against public order and common morality to commit any such deed.

Lord Devlin asks three questions, the answers to which will provide the proper rules for governing society and the individuals: (a) has society the right to judge morals? Or, is there such a thing as public morality, or are morals a matter of private judgment? (b) If public morality is found to exist, then has society a weapon to enforce its judgment? (c) If the answer to (b) is yes, then in which cases will the weapon be used?⁴⁸

In the examination of the first question, it is proposed that every society has both a political and a moral structure, which are not to be confused and which have to be protected. Political order calls for one set of rules, moral order for another; any attempt to weaken either should be punished with equal strength, because the very existence of society is at stake.

Moral order should not be taken for religion or other manifestations of human behaviour, but it may embody some patterns of behaviour that have been borrowed from religion. For example, marriage in our society is conceived on the very lines of the Christian marriage, not because our society as such is Christian, but because it so happened that the majority that formed our society was Christian, and that it was their thought to base the social order on the same ideals. Therefore, the concept of marriage that is part of our moral order is in essence monogamous, and society has undertaken to protect it as such, because an attack against marriage would constitute an attack against our social and moral order.⁴⁹ In that sense, sex offences such as bigamy, incest or homo-

⁴⁸ Devlin, *op. cit.*, pp. 7-8.

⁴⁹ "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." Devlin, *op. cit.*, p. 9. Note in Devlin's words the idea that it is the man who takes a wife, and not the reverse, though man and woman are supposedly equal in our society. But this also is part of the social order and morality, and it takes more than philosophical ideas to make a shift in the common belief.

sexuality, which amount to the rejection of the accepted notion of marriage, are considered as crimes against the moral order, just as treason is regarded as a crime against the political order. The internal structures of society have to be protected; if they are permitted to be undermined, then society might collapse. The idea of "collapse" must, however, be understood in a philosophical sense. Lord Devlin means that a society will cease to exist, but only to become another society, based on different ideas; it is essential, owing to human nature, that the notion of society include the sharing of ideas — political, moral and ethical. Substantial changes in the arrangement of shared ideas may result in the total transformation of such society.⁵⁰

One may be bothered by Lord Devlin's "natural law" approach to social morality, or by his somehow obscure approval of authoritarianism⁵¹ illustrated by references to traditional (*i.e.* religious) morality, or his approval of the decision in the *Shaw* case.⁵² On the other hand, closer analysis of his views allows the reader to distinguish between the writer's own feelings about which morality should prevail in the (English) law today, and how the process of acknowledging morality and enforcing morals should be defined.⁵³

As a result of its internal structures, society has thus a right to judge morals and protect its own existence. Morals are not a matter of private judgment; all morality is public. The next question is whether a given act of (public) immorality, done in private or not, may cause harm to the moral or political structure of society? Before he looks for an answer to his third question, Lord Devlin is careful to see if there is a weapon available to punish such acts in the first place. Indeed, what is the use of condemning a person or banning a deed if the order cannot be enforced? He thinks that the state not only has the proper weapons to protect society, but also that it has all the weapons it may need, for there is no theoretical limit on the power of the state to legislate against immorality; its legislation would always fall under the good government theory. Vice and treason are treated analogically, as actions directed against social order. Therefore, since there is no private

⁵⁰ See *infra*, and Devlin, *op. cit.*, pp. 13-14; on the right of society to protect itself, see also: Dworkin, *loc. cit.*, (1965-1966), 75 Yale L.J. 986, at pp. 989 ff.

⁵¹ Ison, *loc. cit.*, (1967), 3 U.B.C.L. Rev. 263, at p. 272.

⁵² See Devlin, *op. cit.*, pp. 13-14, 18, 86 ff., 100; Devlin claims that Mill would certainly have protested on Hart's comments on paternalism and the enforcement of morality; Devlin, *loc. cit.*, (1962-65), 1 Manit. L. S. J. 243, at p. 247.

⁵³ Devlin, *op. cit.*, pp. 13, n. 1, 115-117.

morality, a man's sin cannot only affect himself; there are some areas where society as a whole is less affected, such as drunkenness, but there are others where man's sin directly affects the moral structure, such as sexual offences. All areas of morality may, therefore, be the object of a special intervention of the state in order to ensure the protection of society.

Which specific areas will actually be regulated by the state? The answer to the third question rests upon a matter of policy. Each society, owing to its own concept of public order (*cf.*, the notion of shared ideas) will determine the areas in which it will allow the state to intervene at all times, and those where intervention will depend on particular circumstances. Lord Devlin proposes, as a rule of thumb, that the general rule should favor the toleration of a maximum freedom of every individual. Although there would be shifts in the limits of acceptable tolerance, the general rule would be sufficient to cover most cases. The real test would be that of "private behaviour", as against that of so-called "private morality".⁵⁴ If the private behaviour of the individual is considered harmful to society, then he should be punished as a criminal offender. The actual criterion by which the harmfulness would be gauged is that of the *reasonable man*, the man in the jury box or on the Clapham omnibus. This is not the "rational man", who is able to study the rules of morality and rationalize the existence of society, nor the intellectual or the expert, philosopher or lawyer, but the reasonable person, whose reasoning will be a reflection of the general principles of right minded persons on morality and immorality.⁵⁵

Not too much logic should be looked for in the legal process; individuals, and indeed society, have a natural abhorrence of commercialized vice and homosexuality. Since the existence of society depends on what ideas its members are prepared to share and tolerate, the ultimate judgment should normally be that of the average member, or the average group of members, of society. Notwithstanding the difficulties in ascertaining public opinion, the reasonable man's personal opinion seems more than sufficient for dealing in matters of moral order.

⁵⁴ As proposed by the Wolfenden Committee, *op. cit.*, para. 61.

⁵⁵ See Lord Devlin's comments on the role of the educated in a democratic society, *op. cit.*, pp. 94-99; see John Stuart Mill, on the "tyranny of the majority", John Stuart Mill, *On Liberty*, (London, 1859), cited in *The Six Great Humanistic Essays of John Stuart Mill*, Washington Square Press ed., p. 130; Rostow, E.V., *The Enforcement of Morals*, [1960] *Camb. L.J.* 174, at p. 185; *contra*: Dworkin, *loc. cit.*, (1965-66), 75 *Yale L.J.* 986, at pp. 1000-1001, on feelings and morality.

Criminal law should be used to set the *minimum* standards of conduct of the individuals, whereas moral laws will set the maximum standards of conduct. In some instances, the law will serve as deterrent, in others, as remedy; but the only acceptable criterion to be used in order to protect the moral structure of society is that of the "reasonable man".

Now that the function of the state has been determined, one would like to know what the relationship between law and morality will be? Society being defined as a community of shared ideas, the courts become the guardian of the community. John Stuart Mill's theories were not accepted in the nineteenth century⁵⁶ because England did not have a morality problem that needed such solutions. The separation between law and morals was not welcomed, because society had integrated its religious and moral principles into its own structure. The concept of "harm to others" was, therefore, superfluous, since society was protecting itself as a whole, not as a collection of individuals. This was also carried on in the *Shaw* case⁵⁷ when the moral welfare of the state was submitted as being the ultimate value of moral order.

Lord Devlin proposes a set of rules for the understanding of the relationship between law and morality. In the first place, there is a need for a sense of "right" and "wrong" in every society. Indeed, no human relationship could subsist permanently without this basic morality, or the ability to distinguish between right and wrong. While on the other hand, the basic morality is a subjective one, the general sense of right and wrong is universal; however, it may be said that there are no "true" beliefs, but rather a number of "common" beliefs, which form the core of common morality. Secondly, there are, in fact, bad laws, bad morals and bad societies, but it is not because a law or a society is a bad one that it is a non-law or a non-society. Besides, the idea of "bad" is a relative or a comparative one; a law might be a bad one because instead of serving society, it destroys it. It is, therefore, bad, although it is a valid law, and although many individuals may actually derive personal profit from its immediate application.⁵⁸ Finally, although

⁵⁶ See *infra*, on Hart.

⁵⁷ [1961] 2 All E.R. 446.

⁵⁸ "No one now is shocked by the idea that the lawyer is concerned simply with the law as it is and not as he thinks it ought to be. No one need be shocked by the idea that the law-maker is concerned with morality as it is. There are, have been, and will be bad laws, bad morals, and bad societies. Probably no law-maker believes that the morality he is enacting is false, but that does not make it true. Unfortunately bad societies can live on bad morals just as well as good societies on good ones." Devlin, *op. cit.*, p. 94.

one may theoretically conceive of morality and law as separate ideas, it is in practice impossible to isolate them. Reason cannot find truth by its own operation; the law will inevitably be what the judge or the jury think it is, or ought to be. The idea of toleration is, therefore, brought forward again in order to help both moralists and jurists; morality is a question of facts. Whether the judge, the jury or society as a whole (*e.g.* through the electoral voice) are prepared to tolerate a situation is a matter of fact. If they are to tolerate, then the weapons of the law will not reach the individuals; if they do not tolerate, then society's punishment will restore the moral order.

The matter of punishment is one of the most difficult to appreciate in the area of enforcement of morals, with respect to both the nature and the quantum of punishment. Devlin does not adopt Stephen's retributive theory of punishment, but he does not explain fully his opinion on the right of society to inflict pain or suffering on offenders, except as an expression of public disapproval. On the other hand, if one is to follow the author's general theory, once it is accepted that society has a right to protect its own moral and political structures, the right to punish finds an explanation. Forms and quanta of punishment will therefore be a matter of common morality and public order, coupled with the "toleration of the maximum individual freedom that is consistent with the integrity of society".⁵⁹

As opposed to Lord Devlin, who refers to the general sense of right and wrong in society, Professor Hart seeks to rationalize the human activity: the problem is "one of critical morality about the legal enforcement of positive morality".⁶⁰ Speaking of the interinfluence of law and morals, he discusses the existence or integration of morality in the definition of a legal system, and introduces the concept of critical morality. Throughout this analysis, however, Hart pursues one goal — the contemporary demonstration of the validity of John Stuart Mill's position on the legal enforcement of morality — although he expressly states that he does not approve of all of Mill's theories⁶¹ and even acknowledges that Stephen's⁶²

⁵⁹ Devlin, *op. cit.*, pp. 16 ff.; Hart, *op. cit.*, pp. 34 ff., 59-60 (see *infra*); Ginsberg, M., *Book Review*, [1964] *Brit. J. of Criminology* 283, at pp. 237-288; see *infra*, nn. 75, 107.

⁶⁰ Hart, *op. cit.*, p. 20.

⁶¹ "I shall consider this dispute mainly in relation to the special topic of sexual morality where it seems *prima facie* plausible that there are actions immoral by accepted standards and yet not harmful to others. But to prevent misunderstanding I wish to enter a *caveat*: I do not propose to defend all that

and Devlin's theories may be more popular than Mill's.⁶³ In short, Mill's stand was that immorality as such is not a crime; "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others".⁶⁴ In his own way, Professor Hart endeavours to justify this principle and rebuke Lord Devlin's (and others')⁶⁵ theory that morality should be envisaged in a positive way,⁶⁶ that is, to

Mill said; for I myself think that there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to be right." Hart, *op. cit.*, p. 5.

⁶² Stephen, J. F., *Liberty, Equality, Fraternity*, 2nd ed., (London, 1874).

⁶³ Hart, *op. cit.*, p. 17.

⁶⁴ Mill, *op. cit.*, p. 135; Mill continues as follows: "His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

⁶⁵ We shall not endeavour to review all opinions here; Hart has discussed the view of J. F. Stephen, who in his time opposed Mill's theory; see Hart, *op. cit.*, pp. 34 ff., 49, 55 ff.; Stephen, J. F., *op. cit.*, *supra*, n. 62 and especially the preface to the second edition.

⁶⁶ Here is how Devlin sees Mill's approach to the legal enforcement of morals: "While the political scientists and constitution-makers of the age were engaged in separating Church and State, the philosophers came near to separating law and morality. Austin taught that the only force behind the law was physical force. Mill declared that the only purpose for which that force could rightfully be used against any member of the community was to prevent harm to others; his own good, physical or moral, was not sufficient warrant.

But this sort of thinking made no impact at all upon the development or administration of the English criminal law. This was doubtless because no practical problems arose. If there had been a deep division in the country on matters of morals — if there had been, for example, a large minority who wished to practice polygamy — the theoretical basis for legislation on morals would have had to have been scrutinized. But the Englishman's hundred religions about which Voltaire made his jibe gave rise to no differences on morals grave enough to affect the criminal law. Parliament added incest and homosexual offences to the list of crimes without inquiring what harm they did to the community if they were committed in private; it was enough that they were morally wrong." Devlin, *op. cit.*, pp. 86-87;

"Now Professor Hart drafts his modifications so that he retains the two principles (as interpreted by himself) and two out of the eight specific crimes,

ensure the protection of society in its moral structure. "Harm to others" should be the test for the legal enforcement of morals, although the enforcement of morality as such may be admitted in some instances such as the punishment of cruelty against animals.

Hart summarizes Devlin's thoughts in two formulas: (a) that the law's function is to "enforce a moral principle and nothing else";⁶⁷ (b) "that he appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society 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 latter proposition is absurd."⁶⁸ . . . There is no evidence that the preservation of a society requires the enforcement of its morality 'as such'. His position only appears to escape this criticism by a confused definition of what a society is."⁶⁹ Such statements on the part of the two writers have only led to disagreement. It would appear, at first sight, that Professor Hart has not fully appreciated the fact that Lord Devlin is not concerned about the enforcement of morality as such, but that he is worrying about the protection of society as a "going concern".⁷⁰

namely bigamy and cruelty to animals. One of the crimes, homosexuality, he would abolish." Devlin, *loc. cit.*, (1962-1965), 1 Manit. L. S. J. 243, at p. 245. As indicated by Lord Devlin, Mill was, at the time of his writings, attracted more by the economic matters, and the prevailing *laissez faire* atmosphere than by morals as such. Nowadays, morality seems to be a major preoccupation. See *ibid.*, at pp. 248-249, on Mill's religion and common morality. Devlin concludes his remarks on Mill as follows: "... Mill's doctrine is just as dogmatic as any of those he repudiates. It is dogmatic to say that if only we were allowed to behave just as we liked so long as we did not injure each other the world would become a better place for all of us. There is more evidence for this sort of utopia than there is evidence of the existence of heaven . . .", *ibid.*, at p. 253. The other crimes referred to by Mill are abortion, buggery and bestiality, incest, obscenity (pornography) and offences relating to prostitution and the commercialization of vice. "Professor Hart is silent about all of them, although there are indications that he would grant neither to abortion nor to the commercialization of vice the full protection afforded by the private realm." *Ibid.*, at p. 245.

⁶⁷ Hart, *op. cit.*, p. 32.

⁶⁸ *Idem.* p. 51.

⁶⁹ *Idem.*, p. 82.

⁷⁰ Lord Devlin stated: "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 all a matter of words. I would venture to assert, for example, that you cannot have a game without rules and

Whereas Lord Devlin held that the legal enforcement of morality was necessary to protect the moral structure of society, and that the test of morality was the reasonable man's opinion, Professor Hart suggests that "harm to others" is the only purpose for which the law may be imposed on individual liberty. Strictly speaking, we need not go further in order to confront Hart with the underlying principles of his own theory; indeed, "harm to others" is meaningful only when one has been able to determine what sort of "harm" will hurt which "others." In other terms, "harm to others" presupposes a complete set of value judgments that will be found in each society's own structure and inner morality; the concepts of "harm" and "others" can only be appreciated through a set of relative values, which in turn must depend on a given notion of society as a whole and as composed of individuals. Therefore, even though this approach will not favorably approve of the enforcement of morality as such, it will nevertheless approve of the use of the law to compensate for harm done to others, on the assumption that this particular society or group, through its common morality, sees harm and evil in the consequences of a given deed. Instead of envisaging the broad consequences of the deed with respect to the moral structure of society, this type of valuation is limited to the more immediate effects upon the individuals, as victims of the immoral deed. But notwithstanding the number and depth of areas examined, the appreciation necessarily requires a system of values which cannot be but based on a given society's concept of morality and legal sanctions. One of the most obvious examples of the absence of "harm to others" (on purpose, homosexuality will not be included here) is that of suicide and of attempted suicide. Should only the interest and well being of the individuals be concerned in the definition of morality and of the legal enforcement of morals, unsuccessful attempts to commit suicide would not fall under the rule of morality since there would be no harm to others. Only in a broader concept

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." Devlin, *op. cit.*, p. 13, n. 1.

See Hart's reply to this reply: (1967), 35 U. of Chi. L. Rev. 1, at p. 9, n. 21; see *infra*, n. 79. "I think that the attempt by the (Wolfenden) Committee does break down and 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." Devlin, *op. cit.*, p. 11; see Hart, *op. cit.*, p. 52.

of society and morality will such deeds be punished, therefore affecting Hart's theory on two grounds: by an implication that the individual alone cannot form a proper and complete basis for the appreciation of morality, and by the necessity of having a particular and supple set of values by which morality and immorality can be defined and enforced.⁷¹

Many difficulties are encountered in this process, however; it has been said that such crimes as attempted suicide and abortion are the object and result of attempts to enforce morality "as such",⁷² or that the mere multiplication of so many examples of a species do not allow the observer to draw a strict rule as to the existence of a legal or moral rule. But, on the other hand, an unenforced or an unenforceable law is nevertheless a law, and the actual enforcement of some rules relating to morals (even mere fornication or adultery)⁷³ is a form of enforcement of morality. Which morality, though? It seems doubtful that the simple "harm to others" test can be applied here. Another objection is the "paternalism" argument,⁷⁴ where, for instance, criminal law never admits the consent of the victim as a defence on behalf of the accused. Hart suggests that far from being an instrument for enforcing moral principles, the rules of the criminal law in such cases are only pieces of paternalism, designed to protect individuals against themselves. Whether this interpretation is good or bad, however, it does not help the "harm to others" theory. Since it is unlikely that society will change such rules of criminal law, it means that the "harm to others" theory will have to be expanded to include harm to oneself; this situation also shows the necessity of having a system of moral values to define the idea of harm and, in this instance, elucidate the would be paternalistic attitude of society. It would, therefore, appear that harming others becomes the basis of "positive morality" not in the narrow interpretation of the idea of harm, but in the widest possible sense that society as a whole, and as composed

⁷¹ *Newsweek* magazine ran a cover story on morality on November 13, 1967, "Anything goes: Taboos in Twilight", and quoted a counsel of the U.S. Post Office as saying: "Sex is troubling for society, but government ought to stay out of it, unless there is widespread licentiousness which becomes harmful. The Government is not here to enforce the Ten Commandments, and the wants of society are generally twenty years ahead of government." (p. 77).

⁷² Hart, *op. cit.*, pp. 25-26.

⁷³ *Idem*, p. 27, citing Massachusetts statistics; many other states have such laws which are enforced from time to time, as a result of either public or private action. The Playboy Foundation has pledged its resources and services for helping those who are the victims of such laws.

⁷⁴ See *supra*, n. 52.

of individuals, is concerned both about its own structure and about the well being of its members. The notion of harm would definitely be linked to a system of moral and social values.

This becomes particularly evident in the area of punishment. Punishment, and the threat of punishment, are intended to prevent further occurrences of evil and suffering or harm. Criminal law, for example, is not principally directed to the prevention of evil; it may prevent evil by fear of punishment, but otherwise it is only a sanction. It is not only the suffering that must be considered here, nor the immorality of causing pain or suffering, but the whole process of cause and consequence, since one could not exist without the other. When society has to consider the quantum of punishment, it does so on the relative moral wickedness of the act done; it, therefore, follows that the theory of punishment is also based on a theory of values, that is to say, on a given concept of positive morality, supplemented by legal weapons to ensure its enforcement. The effectiveness of punishment results from the combination of the evil of suffering with the evil of immorality in order to produce a moral good. Once it is admitted that punishment should be related to the relative moral wickedness of the offender and of the act committed, the whole theory of "harm to others" collapses, or rather is absorbed by the broader concept of morality as a social value, based upon a society's positive morality. Hart states the following:

(T)hey can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of the *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.⁷⁵

This dual approach to morality is not convincing: it distinguishes theoretical values (*e.g.* the *system* of punishment) from practical ones (*e.g.* the *quantum* of punishment). If the intention or the means of the offender does not make the harm caused more harmful, then unequal punishments can only find some justification in the morality of the immoral, that is, in social values and the desire of enforcing positive morality. Hart's own terms would seem to allow such an interpretation, and thus weaken the "harm to others" theory:

(I)n the theory of punishment, what is in the end morally tolerable is apt to be more complex than our theories initially suggest. We cannot usually in social life pursue a single value or a single moral aim, untroubled by the need to compromise with others.⁷⁶

⁷⁵ Hart, *op. cit.*, p. 37, and (1967), 35 U. of Chi. L. Rev. 1, at p. 7; Hart cites Durkheim's *Division of Labor in Society*; see nn. 59 and 107.

⁷⁶ Hart, *op. cit.*, p. 38.

Professor Hart criticizes Lord Devlin's theory as being a seamless web; this is not much more than labelism; however, it is true that all social moralities possess universal values⁷⁷ that are deemed essential to society and common morality and "worth preserving even at the cost in terms of those same values which legal enforcement involves".⁷⁸ Devlin's idea of society as a community of shared ideas leaves much leeway for adaptation to social evolution, at least so far as the "reasonable man" (the jury) is made the arbiter of social evolution within the juridical sphere. Moreover, perhaps the seamless web concept would have helped Hart in the application of the "harm to others" theory, which is not as simple in real life as in the sayings of the writer.⁷⁹ At the outcome, however, Hart and Devlin do not stand very far apart, since both Hart's "harm to others" principle and Devlin's protection of society's moral structure rest on a very similar necessity, that is, a system of values particular to each society concerned. This debate on the legal enforcement of morality relates itself to the problem of the relationship between law

⁷⁷ Such as individual freedom, safety of life and protection from deliberately inflicted harm. See Hart, *op. cit.*, p. 70.

⁷⁸ Hart, *op. cit.*, p. 70.

⁷⁹ See Devlin, *op. cit.*, p. 13, n. 1, *supra*, note 70. "So, with permissiveness in the area formally covered by restrictive morality, there would come increase in violence and dishonesty and a general lapse of those restraints which are essential for any form of social life. This is the view that the morality of the individual constitutes a seamless web." Hart, *loc. cit.*, (1967), 35 U. of Chi. L. Rev. 1, at p. 13; see also pp. 9, n. 21, and 12-13; see Devlin, *op. cit.*, p. 115;

However, any permissiveness or relaxation would take place in due course, as society is able to bear the change, so that no real upset in social order would result. If the evolution is rapid or revolutionary, society will react in another way, trying to protect its security through a new social order. But to call the human feelings a seamless web, or a vicious circle, means nothing if it is not an acknowledgement of one's incapability of discerning the fundamental motives and pattern of human behaviour. See Hart, (1967), 35 U. of Chi. L. Rev. 1, at p. 13; Hart is right in saying that he sees no evidence of desintegration, for society rarely disintegrates, notwithstanding Devlin's use of that *word*. Evolution and transformation might have been more appropriate, as societies are under a constant process of evolution, as a result of the continuous movement of persons and ideas. Psychologists, sociologists and other scientific experts have yet to explain the common morality, and one may doubt whether the pattern of human and social behaviour will ever be explained and rationalized. We may be moving from religious morality to 'moral pluralism' or to permissiveness, but those very expressions already take us from the basic ideas of common morality and public order to the more subjective realm of value judgements and political or social systems. Any thesis chosen to explain the common morality will not do more than explain what its author sees through his own deficiencies, and names will not change the substance. One should be prepared to admit beforehand that his suggestion is only one of the possible theories.

and morality, a perennial source of controversies among legal philosophers; there is, however, in Professor Hart's own words an admission which could reconcile him with his opponents:

The influence of morality on law. — ...liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility. No 'positivist' could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connexion of law and morals, its existence should be conceded.⁸⁰

Common Morality and the Toleration of Immorality; Problems of guidance to the legislature and the judiciary

The Hart-Devlin debate has not been granted the same consideration and interest by critics and legal philosophers; Devlin himself refused to be carried further into what he called a battle of words.⁸¹ On the other hand, he did not refrain from restating his basic policy. Other critics have found themselves Devlinians or Hartians, and sometimes both at the same time on different aspects of the legal enforcement of morals.

On the subject matter of homosexuality, Professor Fuller found the "argument quite inconclusive on both sides, resting as it does on initial assumptions that are not made explicit in the argument itself".⁸² To him, this question is a far simpler one, and here he raises Lord Devlin's second question: there ought to be no law making it a crime for consenting adults to engage privately in homosexual acts, because such a law cannot be enforced. It would constitute an open invitation to blackmail, so that there would be a gaping discrepancy between the law as written and its enforcement in practice. This has, unfortunately, been the case, except in such far fetched instances as the *Klippert* case⁸³ where a single person has to pay for all the unattended cases. Fuller's conclusion is of the simplest kind: "I suggest that many related issues can be resolved

⁸⁰ Hart, H.L.A., *The Concept of Law*, (Oxford, 1961), pp. 199-200; also p. 207; "If, however, Professor Hart means that it 'would be wrong' for law-makers to act on the basis of disgust alone; that they should make a separate and independent judgment that a practice is injurious to society as well as odious; that they should consider the implications of the half dozen qualifying principles whose exposition requires almost one third of Sir Patrick's (Devlin) lecture, then I fail to understand how his (Hart's) position differs from that of the Justice (Devlin)." Rostow, *loc. cit.*, [1960] *Camb. L.J.* 174, at p. 189.

⁸¹ Devlin, *op. cit.*, p. 13, n. 1.

⁸² Fuller, L.L., *The Morality of Law*, (New Haven and London, 1965), pp. 132-133.

⁸³ See discussion, *supra*, at pp. 11 ff.

in similar terms without having to reach agreement on the substantive moral issues involved.”⁸⁴

To that the present writer would agree if the actual situations calling for the legal enforcement of morals were quite simple, and if society and its pressure groups could easily be convinced that the law will be unenforceable, or that some other technical difficulty rules out the necessity of finding agreement on, or of arriving at, a definition of certain substantive moral issues. However, such issues often arise at such times and under such circumstances when society faces an internal crisis, or when an unexpected event calls for urgent remedies where legislators or judges do not benefit from the calm and cool reasoning of legal philosophers. Every generation brings its own censors who claim that moral decay is ruining the foundation of society; what happens, though, is that society itself is under a constant evolution, through a purely natural and spontaneous process, and with it the concepts of public and moral order. True, in a society that is totalitarian, as where, for example, religion has been made one of the corner-stones of the political regime, the legal enforcement of morals appears as a necessity and an essential condition of this society's survival. Further examples may be found in some communist regimes, where one of the primary functions of the law is to enforce morality, that is, morality adopted for the time being by the “party”; regulations affecting hygiene and sexual morality in state residences and housing, or waste of public property are considered as essential to maintain the common morality. On the other hand, in a “democratic” state where religion as such is not the basis of the political order, but has been used as a model for, say, defining the goals of a Christian political society, public order will not be affected very seriously by the toleration of immoral acts.⁸⁵

The legal enforcement of morals raises the conflicts between individual ethics and social morality. The evolution of morality has not been, if at all, the sole factor of moral or social decay, whatever these concepts mean. It is too easy to reject changes in the name of “social decay” without due consideration for the underlying nature of each society.⁸⁶ Whether one adopts Devlin's approach and stands by the reasonable man's opinion or feelings as to when should the law be used to enforce morality, or Hart's rational view that law and morality should not be mistaken, with the exception that harm caused by immoral deeds will justify the use of legal weapons, the

⁸⁴ Fuller, *op. cit.*, p. 133.

⁸⁵ Devlin, *op. cit.*, p. 9.

⁸⁶ On society, see Hart, *loc. cit.*, (1967), 35 U. of Chi. L. Rev. 1, and the references cited.

ultimate outcome will depend not on the method used but on the system under examination. Since societies are constantly changing, so will the relationship between law and morality and the basis for the legal enforcement of morals. To a considerable extent, all laws are connected with the legal enforcement of morals: regulations concerning education, taxation, social welfare, old age, housing and municipal administration are necessary to ensure the proper conduct of society. The allocation of cost and other responsibilities reflect the common morality and need the action of the law to be properly executed.⁸⁷ Any society possesses such a common morality and has the power to enforce it according to its own legal system; but the legal enforcement of the common morality still leaves way for the individual's responsibility to make the necessary social and moral judgments. Society will only seek the enforcement of the rules when public order, as defined in each case, is endangered.

Legal philosophers have worried about the need for sufficient guidance to legislators in dealing with matters of morality, and especially when the public opinion is divided. Devlin has been criticized for leaving the matter to the judgment of the reasonable man, whereas Hart's "harm to others" criterion leaves the matter open to a further case of interpretation — what is harm, what is the relation between immoral deeds and the harm caused, and how to determine the quantum of punishment? Experience has shown, however, that guidance is not always an easy answer to this problem; depending on the type of society that has to be dealt with in the first place, one must also consider the system of values attached to the legislative and judiciary process, and then appreciate the immediate circumstances in which morality or immorality has to be valued. Democracy, free press and urbanization are factors which influence the legal enforcement of morals. Knowing that a case of homosexuality is to be tried in a small town with a highly religious or conservative jury, one might not be prepared to recommend that the man in the jury box be the final judge. On the other hand, one might well be!

One should remember that "society" is as vague a concept as "morality", "justice" or "equality", which are convenient abstractions to work with, but are quite difficult to define in practice; since both law and morality vary with the nature and structure of each society, absolute or definitive rules in this field can only belong to Utopia. Bias and prejudice are as much a part of our social values as religion or social order. For centuries, our societies have been

⁸⁷ Rostow, *loc. cit.*, [1960] Camb. L.J. 174, at pp. 196-197.

organized on the assumption that males are superior to females, and white people superior to colored people; this has resulted in a peculiar morality that affects individuals, spouses, families, social, economic and political activities and countless particular rules of behaviour, including the criminal law. Religious belief and natural law have also been prime factors in the determination of common morality.

But although most cases of immorality have some connexion with sexual matters, not all immorality is sexual; in the medieval ages, heresy used to be a classical example of immorality calling for the use of legal weapons. Although such crimes as heresy and blasphemy no longer exist in our society (at least for the time being), Lord Devlin's parallel between morals and treason is fully warranted. Granted that society has both a political and moral structure, though there might be other ways of classifying those aspects of social activity, attacks against the very nature of society may call for legal punishment. The notion of harm to others would be very difficult to appreciate, for example, in the case of Luther or Marx or other writers whose works have had deep and long lasting effects on social and moral structures. Legal philosophy, to some extent, must deal with problems *ex tempore*. The idea of harm must not necessarily be taken as bodily harm, and the changing of social structures as an instantaneous phenomenon. Homosexuality, for example, may or may not result in what is called social and moral decay; moreover, with the difficulties encountered in the prosecution of presumed guilty parties, the actual punishment of a convicted homosexual is more of an exemplary sanction than of an equitable punishment. But how is the damage or harm to society being valuated? Time is a fairly small factor in this process. The more critical one gets about the so-called criteria of morality, the more one realizes how dependent the law is on social values and common morality. After all, one may now very well question whether Galileo or Luther were the authors of immoral deeds. Morality, on the whole, would then be what each society, in its own time is prepared to accept as moral, and unless one is prepared to accept the existence of natural law, being outside the reach of human beings as individuals or as groups, then one must accept that morality, and, as a direct and necessary consequence, the legal enforcement of morality, is not susceptible of a fixed definition or valuation. Since each society determines its own legal system, the relationship between law and morals is thus the object of a constant renewal, notwithstanding some elements of continuity. But even if one went as far as to accept natural law as an imperative set of

rules, implied or not, social morality would, nevertheless, remain as a determinant factor in the legal enforcement of morals.⁸⁸

Problems of guidance to legislature and judiciary are not theoretical ones; that was the purpose of the *Wolfenden Report*. Just as the United Kingdom has given itself a new Act on homosexuality⁸⁹ and abortion,⁹⁰ the Parliament of Canada is studying a new bill dealing with those matters, and Governor Rockefeller, for the second consecutive year, is trying to have the legislature of the State of New York adopt a new law on abortion.⁹¹ The death penalty has been the subject of lengthy debates both in Canada and the United Kingdom,⁹² and such topics as divorce, drug addiction and many others are the constant subject of open debates at all levels of society and law making agencies. It may be necessary to remember, however, the exaggerated attention that has been devoted to sexual matters, in connexion with the enforcement of morals. Tax swindlers or traffic offenders, the most usual types of "upper class" wrongdoers, are as much guilty of immoral deeds in our society as sexual offenders. On the other hand, there have been cases of non sexual immorality that have raised wide interest and concern: members of the legislature or public servants accepting bribes or dissipating or using public or political funds for their private use, persons who could have rescued a child who was about to be drowned or hit by a vehicle, but who abstained from doing what they could, and the moral responsibility of cigarette manufacturers and their publicity agents. The recent introduction of the breathalyzer test in the United Kingdom for preventing and punishing dangerous driving as a result

⁸⁸ See *supra*, n. 70, ref. Devlin; Hart, *op. cit.*, pp. 51-52, 82; Ginsberg, *loc. cit.*, [1964] *Brit. J. Criminology* 283, at p. 289; Henkin, L., *Morals and the Constitution: the Sin of Obscenity*, (1963), 63 *Col. L. Rev.* 391; Schwartz, L. B.; *Moral Offences and the Model Penal Code*, (1963), 63 *Col. L. Rev.* 669.

⁸⁹ *Sexual Offences Act*, 1967, c. 60.

⁹⁰ *Abortion Act*, 1967, c. 87.

⁹¹ California has a new abortion law since November 8, 1967; see a review of the problem in the *New York Times*, January 8, 1968.

⁹² The law was voted in the House of Commons (Canada) on November 23, 1967, abolishing capital punishment for murder, except in the slaying of policemen and prison guards. The validity of the law extends to a period of five years only. Death penalty remains in force for rape and treason. The prime minister of Canada stated that capital punishment is not effective enough as a deterrent for murder to justify its retention. The real causes of crime were slums, ghettos and personality disorders. A former minister of justice, now in the opposition, said that the preservation of society required that anyone who deliberately takes a life has forfeited the right to live. — Party lines were raised for the voting. *New York Times*, November 24, 1967, pp. 1, 22; *House of Commons Debates*, November 23, 1967, V, pp. 4604-4606.

of drinking alcohol is yet another example; Sweden has had similar dispositions for many years. Those are increasingly becoming matters of public concern, thus forcing society to investigate its common morality and the legal enforcement of morals.⁹³

Modern society disposes of new instruments to take its own pulse; at one time, the man on the Clapham omnibus could be allowed to value the relative morality of a situation. Increased sophistication may not take from him this essential role, but society will now provide him with scientific apparatus and knowledge so that he can perform his tasks. Sociological, psychological or economic enquiries, research, the increasing use of medical or other experts, fact finding agencies, trends and tendencies analysts will enable the man in the jury box, whose personal knowledge is by definition insignificant, and whose once reliable common sense is vanishing, to evaluate the moral pulse of society. It may well be that Bentham's censorial jurisprudence, Hart's critical morality or Devlin's equity and reason have all been absorbed by a society that is changing at an increasingly rapid pace and that has to adjust its own rules to its new existence.

If, however, we are struck by the "medieval rhetoric" of Viscount Simonds in the *Shaw* case⁹⁴ or the "I would rather stick to the law" attitude of Fauteux, J., in the Canadian *Klippert* case,⁹⁵ we must take into consideration some other factors, such as the personality of those two men, the traditionally assumed rule that in England and Canada the courts will not act as law making agencies when Parliament could properly do so, and the prevailing social atmosphere of the time. The *Shaw* case followed a recent amendment of the *Sexual Offences Act*, and it may have been feared, as is evidenced by the prosecution's brief, that an over-liberal test case might result in abuses.⁹⁶ The Canadian case, on the other hand, was dealt with by the Supreme Court of Canada just after the homosexual amendment in the United Kingdom, and just as the Minister of Justice had announced oncoming legislative reforms in this area. This may help to explain the decision.

But if the reasonable man's view of morality can be acceptable on the judicial level, who is going to fulfil his task in the legislature? This question would seem even easier to answer, because

⁹³ See *Newsweek*, November 13, 1967, *supra*, n. 71.

⁹⁴ [1961] 2 All E. R. 446 (H. L.).

⁹⁵ [1967] S.C.R. 822.

⁹⁶ On the other hand, the logic of the House of Lord's majority reasoning and of its traditional conception might have led it to take a more modest view of its own role, on account of the recent activities of the legislator. See the debate in the *Columbia Law School Centennial* (1953).

judicial cases have to be dealt with as they arise, whereas legislative bills are usually introduced when the government is good and ready to do so. In such regimes as totalitarian politics, the party's ideology or the internal bureaucratic structure normally provide answers to moral problems. Immoral deeds exist in greater number because those societies have a greater need to protect themselves, and legal enforcement is hardly a problem as a result of a variety of efficient weapons and remedies.

Democratic societies, on the other hand, often have to depend on individual action for raising moral issues. Morality and the legal enforcement of morals often have to be attacked by way of resistance or civil disobedience before being the object of adapted legislation. In some instances, a government or political party will pledge itself to the enactment of reforms affecting common morality and public order, or, such reforms will be proposed in the form of a private member's bill. When reforms are long overdue, and there is evidence that the legal rule is now beyond the common morality, governments and parliaments will simply act upon the bill as a matter of routine. If the issue is not all clear, a private member's bill is more likely, since no government will assume such responsibility, for fear of being told by the electorate that it had moved ahead of the common morality. Less doubtful subject matters are likely to provoke endless debates or filibuster in Parliament, and when the time comes for voting, party lines will be raised so that each member will be allowed to act as a man in the jury box, using both his common and political sense to vote upon the measure; the common morality is well served by such a procedure, and so is the government, whose party does not bear the responsibility for the vote. American legislatures do not follow this pattern, but generally attain similar results; bills are introduced by the government but have to go through a complex pattern of committee and legislative sessions where the common wisdom and morality is evaluated, and congressmen do not necessarily follow their party lines in voting on any bill, thus perpetuating the reasonable man's common sense.⁹⁷

⁹⁷ "The democratic system of government goes some way — not all the way, for no representative can be the mirror of the voters' thoughts — to ensure that the decision of the law-maker will be acceptable to the majority, but the majority is not the whole...

But under the second theory the law-maker is not required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about right and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity. He has not to argue with himself about the merits of monogamy and polygamy; he has merely to observe that monogamy is an essential part of the structure

Politics would, therefore, appear as inseparable from morality. However, one has to query whether, in the process of social and moral evolution, there can be changes in morality. Natural lawyers, and many legal philosophers would think that moral standards do not shift:⁹⁸ they do not, so far as one is prepared to admit that they come from a superior divine source, or are simply built into human nature. Some aspects of morality, on the other hand, are more easily questioned, and would seem to rest on a purely consensual, or merely social, basis. Monogamy, for instance, although practiced by most societies nowadays, is not, and has not been, universal, as it has yielded to polygamy in areas where living conditions made it useful or necessary. Although most societies are more or less religious and have in some cases been greatly influenced by their religious practices, it is obvious that religious morals are not all alike, and that there tends to be an increasing division between the common morality of a given society and the religious morals that have influenced its formation. Although adultery, fornication and usury ranked equally as both sins and immoral crimes in the medieval Christian society, the same are not always regarded as sins by most contemporary societies.⁹⁹

Whether morality and moral standards shift, or should be regarded as shifting, or not, is a matter which will very likely not be solved, as long as human beings have limited means of knowledge. In fact, this is more a matter of religious belief, and the churches themselves have had to revise their concepts of morality; Galileo's case is perhaps the easiest to understand nowadays. What worries us in a democratic society is how to assess the shift in the social toleration of departures from moral standards. In the first place, although there is a general feeling that there is a shift in

of the society to which he belongs. Naturally he will assume that the morals of his society are good and true; if he does not, he should not be playing an active part in government. But he has not to vouch for their goodness and truth. His mandate is to preserve the essentials of his society, not to reconstruct them according to his own ideas." Devlin, *op. cit.*, pp. 89-90; see also Ison's rather humoristic comment on how a bill on homosexual behaviour was voted in 'Ruritania'; *loc. cit.*, (1967), 3 U. B. C. L. Rev. 263, at pp. 270-271; Dworkin, *loc. cit.*, (1965-66), 75 Yale L.J. 986, at pp. 994-999, and 1002.

⁹⁸ Devlin, *op. cit.*, pp. 18, 5-7.

⁹⁹ Henkin, *loc. cit.*, (1963), 63 Col. L. Rev. 391, at p. 407. "No doubt a critical morality based on the theory that all social morality had the status of divine commands or of eternal truth discovered by reason would not for obvious reasons now seem plausible. It is perhaps least plausible in relation to sexual morals, determined as these so obviously are by variable tastes and conventions." Hart, *op. cit.*, p. 73, and see pp. 73-74.

tolerance, it is not all that easy to determine the swing and intensity of such shifts. It is true that moral standards, that is the individual's attitude towards morality, change with each generation, but there is no sure method of evaluating this phenomenon, since modern communication media often tend to distort the available information.

Surely, there is a tolerance shift; contraception, abortion, drug addiction or homosexuality have all been at least accepted as topics for open discussion, whereas earlier moral standards banned them from "honest" circles. Yet, the traditional divisions remain between (a) common morality, (b) social tolerance to some form of immorality and the changing of common morality, (c) the legal enforcement of morality, or the use of legal weapons to punish immorality. Devlin's preliminary question concerning the right of society to judge morals and the existence of proper weapons to deal with immorality now seem to have found answers. Common morality is perhaps the most difficult to define, but also the least interesting as regards the matter of legal enforcement. The lawyer and the legal philosopher will want to know which immoral deeds society is not prepared to tolerate, and which among those it is prepared to punish expressly. It is almost impossible to assume any regular or phased evolution; social tolerance cannot be predicted, and it is not always easy to introduce or repeal a law dealing with morality or immorality; it often takes a number of years before the two are permitted to coincide, if ever.

Most critics of the *Wolfenden Report* agree in rejecting the Committee's test of "private morality"; Devlin suggests that a test of "private behaviour" should be substituted,¹⁰⁰ and Hart suggests that the "harm to others" idea should be retained. But is this the proper approach to the enforcement of morals? Of course, this query takes place in a democratic context where society does not require a special moral behaviour from its members, although some writers seem to take for granted that there is some inherent rule of private morality or behaviour that citizens should obey. This is much more evident in the area of sexual morality, and tends to disappear almost entirely in other areas of morality, such as economic or social behaviour (*e.g.* tax dodging), where the common morality serves as the only criterion. In sexual matters, however, the individual is given a particular duty to contribute to the common good by his own private behaviour, and it is this conduct that will or will not be tolerated by the community.

¹⁰⁰ Devlin, *op. cit.*, p. 19.

Apart from natural law or religious morality, so called private morality has no bearing on common morality in a democratic society. Indeed, all morality is social and serves social goals: there being no such thing as private morality. Common morality will find its manifestations through the members of the society, but whether a deed is good or bad for one individual or for the society is not a matter of private concern; it may be wrong in terms of religious morality, but not necessarily in terms of social morality. The behaviour of individuals and the use of legal weapons to punish such behaviour as it is judged socially immoral have to be considered through society's morality and agencies. For example, societies have, at other times, regarded homosexuality as socially immoral; modern societies are, however, faced with such a rule that has proven very difficult to universally and equitably enforce. Certain countries have now come to questioning whether homosexuality is after all a danger for the public order and should be treated as socially immoral.

This is but one example of the shift in social tolerance towards morality. There were some periods where homosexuality was regarded as a normal manifestation of sexuality and even as a military advantage.¹⁰¹ Canada is now considering whether it should adjust its criminal law to the common morality and adopt legislation similar to the recent United Kingdom *Act*. On the other hand, the American society has shown little sign that homosexuality would cease to be regarded as a social evil, notwithstanding the action of pressure groups and the social discrimination that results from the prevailing social morality.¹⁰²

There is, however, no strict rule that enables the legal philosopher to advise his government on how to handle common morality and the legal punishment of immorality. Laws are by no means perfect instruments to deal with morality, and generally are either too strict or too lenient; for example, laws prohibiting homosexuality have never been efficient. One is always surprised to see that although prostitution as such is not a criminal offence, the fact of being a common prostitute is, but habitual male partners of female common prostitutes are not prosecuted. The consent of a victim cannot be raised as a defence by the accused. Those examples show how imperfect the rules are, and yet, it is not very easy to make better ones, that is, rules that would be adapted to the common morality, and at the same time equitable and enforceable. The government has a right and a duty to protect society and its moral

¹⁰¹ See Bertrand Russell, *Human Society in Ethics and Politics*, p. 99, on the Spartan's theory that homosexuality promoted courage in battle.

¹⁰² See the *New York Times*, November 26, 1967.

values; in many instances it has been protecting groups and individuals against themselves. But it is not usually efficient to tell a government that the laws it has enacted are *ultra vires* or that its rules do not fit the common morality. It is far easier to show it that its legislation, or its silence, is doing more harm than good, or at least is doing it more political harm than good, and to convince it that the rules for the enforcement of morals should be changed.¹⁰³

Social gain or common morality should be the real test for the regulation of morality and immorality. But here again, it is difficult to assess in advance the limits of change and of tolerance. Society needs no law to make a father love his child, because it would in any case be unenforceable; but on the other hand, there are laws to force a father to support his children, although our society, through its common morality, fails in this respect by not forcing a father to support all his children, legitimate or not. Other areas are still more difficult to appreciate. Why should attempts to commit suicide be punished? Is it because it is an implied rejection of society as such or because of the harm to others, though indirect? How can such a crime be explained in terms of social goal, common morality and social tolerance?¹⁰⁴ Deeds, moral or immoral, will be punished by the law if the common morality and the limits of tolerance require that they be punished.¹⁰⁵ The pattern is definitely unpredictable, because social evolution takes place without uniform phasing, and always on the basis of a given society's common morality. One example will summarize this process. Birth control methods were traditionally banned as a result of the adoption by our society of religious morality. Modern medicine has shown, however,

¹⁰³ Devlin, *op. cit.*, p. 117.

¹⁰⁴ "No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them... If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow-creatures generally; perhaps becomes a burden on their affection or benevolence; and if such conduct were very frequent, hardly any offence that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead." Mill, *op. cit.*, pp. 204-205.

¹⁰⁵ Devlin comments: whether a man, on being accused of bigamy, pleads that (a) he believed his wife was dead or (b) he believed bigamy is a good thing, society will reject his defence, on moral grounds: "We can't be certain, we may be mistaken, but we must act upon our belief". Such belief will determine the limits of tolerance. See (1962-65), 1 *Manit. L. S. J.* 243, at p. 252.

that such methods can be harmless, and indeed useful. Overpopulated countries may even reach a new social morality where it will become immoral not to control births, whereas the very capitalistic countries who need substantial increases in population in order to keep up with their economic structures will perhaps make it socially immoral to over restrain births and endanger the community.

Should homosexuality, or abortion, or the use of contraception be legally punished? One can build up an answer according to philosophical or religious belief, but if one is to stand by sheer social reasoning, there is no answer to be given, or at least no answer that would be universally acceptable without due reference to social structures and common morality. Although one may recommend that the toleration of a maximum freedom be acknowledged to individuals, and that the law represent the minimum intervention in the affairs of the citizens, the real limits of tolerance, and the actual shifts in legal restrictions, will reflect what each society, through its own agencies, common morality and legal system, is prepared to tolerate or punish.¹⁰⁶

To that extent, the Hart-Devlin debate has been helpful, but not as much as one would have expected. Any assumption of private or religious morality will only divert the analyst's attention from social to individual problems of behaviour. Individual and social morality may result in a vicious circle if the basis for argumentation is too firm or narrow; otherwise, it may also become a matter of words and definitions where the same terms do not correspond to the same ideas. The problem here is not only philosophical; it also involves the actual enforcement of common morality and the underlying relationship between law and morality. Hart and Devlin have gone a long way towards the explanation of the legal enforcement of morals, but their debate is in fact a non-debate, for they hardly speak from the same standpoint. Strong principles will succeed in maintaining social order only if such principles have their roots in society as a "going concern" and not as an abstract idea. The implantation of strong moral rules in a society that advocates individual freedom and open democracy will not yield expected results. Any actions that are suspected of undermining society will have to be assessed and weighted by such society, owing to particular circumstances. In the interpretation of the structure of society, Devlin chose a group-oriented solution, whereas Hart remained closer to

¹⁰⁶ Devlin, *op. cit.*, pp. 14 and also 115: "But when considering the degree of injury to a public morality, what has to be considered is how the morality is in fact made up and not how in the opinion of rational philosophers it ought to be made up." Mewett, *loc. cit.*, (1961-62), 14 U. of T.L.J. 213, at p. 223.

the individual. Moreover, experience teaches us that solutions to particular problems often are the result of compromises on the part of individuals and groups, thus making it still more difficult to rationalize the rules of common morality.

It is not so certain that the evil of punishment, or even the threat of punishment, is actually producing the desired social good, so that in those cases where legal enforcement of morals is not even effectively possible, the law should not be allowed to intervene in the field of morality.¹⁰⁷ Moreover, punishment has never, as suggested by Hart, resulted in "freezing" morality;¹⁰⁸ society has, in many instances, been able to resist punishment and create pressures so that the law would be changed. In some cases, the very fact of punishment or the severity of sanctions has constituted a factor that influenced the amendment or repeal of certain laws. Abuses flowing as a result of undue or unjustified punishment are quite numerous; the most famous are those which followed prohibition laws in the United States, where disorder, violence, defiance of the law and health hazards accompanied bootlegging and other practices by the underworld. The laws on abortion have rendered still more dangerous the extremely numerous cases of illegal abortions, because they are performed by the unskilled under unsafe conditions; here again, the law did not reach its original purpose.¹⁰⁹ Of course, punishment is understood in the widest sense possible, but it traditionally refers

¹⁰⁷ "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 judgment and the question of whether the arm of the law should be used to enforce the judgment. 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." Devlin, *op. cit.*, p. 20;

"The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime..." Lord Denning, before the Royal Commission on Capital Punishment, cited and criticised by Hart, *op. cit.*, p. 65. See *supra*, nn. 59 and 75, and the text.

¹⁰⁸ See Hart, *op. cit.*, p. 72; also Devlin, *op. cit.*, p. 115: "There is no phased programme, no planners to say that if free love is let in in the 60's, the homosexualist must wait until the 70's."

¹⁰⁹ Facts on homosexuality, prostitution, drug addiction prove it; yet, our society insists that every person who has been convicted once must have a criminal record that will stain its reputation for life. Universities go farther by asking their applicants if they have ever been arrested, although they may have never been convicted. See Mewett, *loc. cit.*, (1961-62), 14 U. of T. L.J. 213, at p. 227.

to methods of individual coercion. Prisons, for example, have been used to a greater extent in the very last centuries, and are under close study as a result of doubts arising out of their usefulness. Modern psychology and medicine have opened the way to better and more positive ways of punishment and rehabilitation, although the preventive sentence imposed to Klippert is perhaps one of the worst examples of modern therapy. Punishment should be seen as the best available instrument to ensure the security of society, the prevention of further offences, and the well being and rehabilitation of those who have gone morally astray. Here again, however, the ideas of justice and equality would have to be examined in order to provide some satisfactory conclusion.

There seems to always be those who will claim that where there is evil, there should be punishment, enforceable or not;¹¹⁰ the idea of evil also has to be defined, as has been seen. Kings and bishops have had their mistresses and *mignons* at times when sexual morality was not in the least relaxed and when theft was punishable by death. There still is a long way to go before morals, society and law can be reconciled into a fully rational and yet equitable system.

Judges and legislators do not really need guidance or philosophical guidelines; circumstances and social groups will evidence the common morality and the shift in tolerance. The rest can only be classified as theories. All are as good or bad as the others, that is, insofar as it is impossible to appreciate their relative moral value. However, their internal consistency and their relationship to human behaviour enable the student to illuminate his choice between alternative ideals of life. On the other hand, precedents show us some good and bad uses of social and legal powers, and some good and bad uses of legal theories. The main difference between insurrection and revolution is success, showing how social order and morality can easily and dangerously become a matter of timing and expert valuation of anticipated shifts in toleration, and reflecting the fundamental concern of man for freedom and security.¹¹¹ "What the law maker has to ascertain is not the true belief but the common belief."¹¹²

¹¹⁰ See *supra*, Stephen and Hart, *op cit.*, pp. 48 ff.

¹¹¹ "Freedom, equality, security of life and possessions, and security against certain hazards of human existence must be harmonized in such a way as to bring about a maximum of individual self-realization within the framework of the common goals of humanity." Bodenheimer, E., *Treatise on Justice*, (New York, 1967), pp. 103-104.

¹¹² Devlin, *op. cit.*, p. 94. The author would not be caught saying that there is no true belief. It may, however, be right to say that the common belief is that there is no true belief.