THE LEGAL ENFORCEMENT OF NON-UTILITARIAN MORALITY

F. W. M. McElrea, M.A., LL.B.

I

Section 391 of the Municipal Corporations Act 1954 and s.406 of the Counties Act 1956 provide that:

> The powers of making and enforcing bylaws shall be subject to the following limitations and provisions. . .
> (b) No bylaw shall be valid if a breach thereof would involve a breach only of some religious or moral rule.

The corresponding section in the Municipal Corporations Act of 1908 provides the clue to the rationale of the above sections, for it reads:

> Inasmuch as it is inexpedient that questions of religion or morals should be regulated by bylaw, no bylaw shall be valid if a breach thereof would involve a breach only of some religious or moral rule.

The concern of the legislature has therefore been to prevent *local bodies* regulating religious or moral questions, and *Doyle* v. *Whitehead*[1] shows the application of this restriction to a bylaw prohibiting the playing of golf on the Wellington City Council golf links on Sundays. The Supreme Court held the bylaw invalid on the basis that a breach thereof involved only a breach of the religious rule relating to the Sabbath.

In the past seven years there has been a great deal of ink[2] and effort expended in debating an issue of a similar nature, but at the legislative rather than the local body level. The background to the controversy is the Wolfenden Report on Homosexual Offences and Prostitution. In recommending that homosexual behaviour between consenting adults in private should no longer be a criminal offence, the committee put forward the "decisive" argument that unless society, through the agency of the law, is "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.*"[3] To say this, the Report continued, is not "to condone or encourage private immorality". It is rather a recognition of "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality".[4] And in respect of prostitution it is stated[5] "It is not the duty of the law to concern itself with immorality as such . . . it should confine itself to those activities which offend against public order and decency, or expose the ordinary citizen to what is offensive or injurious."

The immediate problem raised by the report was of course that of the relationship between the criminal law and morality, between crime and sin. At the outset, however, it is important to identify the question a little more exactly than this, for as Professor Hart points out,[6] there are at least four distinct questions about law and morality, only one of which (the fourth) concerns us here. These are:

1. What part has morality played in the historical development of law? (a causal question).

2. In defining, stating the essence or nature of, law, or a legal system, or *a* law, need any reference be made to morality? (a conceptual, definitional question).
3. Is law beyond moral criticism? (a question of relative status and critical propriety).
4. Has society the right to enforce the contents of a code of morality *merely because* it is the predominantly accepted code of morality in that society? Is it *sufficient* that given conduct is immoral by the common standard, or does one have to show that the conduct causes harm to society before society is entitled to make that conduct punishable by law? If we understand "utilitarianism" to mean the assessment of the moral value of an act — its rightness or otherwise — by the consequences the act has, as against the moral nature of the act "in itself", we might say that the fourth question concerns the legal enforcement of non-utilitarian morality.

Is the legal enforcement of non-utilitarian morality a proper or desirable act of a legislature? Lord Devlin replies "yes", Professor Hart answers "no", but the debate by now involves over a dozen participants, and for the interested reader the resulting diversity and complexity of argument is rather bewildering.

II

In his Maccabaean lecture in Jurisprudence (1959),[7] Lord Devlin presents an argument in favour of his affirmative answer to the fourth question, which I now summarise. (It must be borne in mind of course, that a précis such as I give is necessarily selective. The bases of this selection are the following three requirements:—first, the need to provide a summary brief enough to be worthy of that name but full enough to do some justice to Lord Devlin's argument; secondly, I have attempted to reproduce the argument so that its statement is not coloured by the controversy which followed; thirdly, I have tried to state the argument in such a manner that the separate issues involved can be sifted out and examined in the light of that controversy.)

The "strict logician" can put up a good case for the complete separation of crime and sin, which, if sound, requires that one bases criminal law on something other than morality — for example, the preservation of order in society. However, such a separation of crime and sin cannot be maintained in any explanation of law as it is, as many criminal acts (euthanasia, attempted suicide, abortion, etc.) can only be brought within the law because they are matters of moral principle. Further, the use of the criminal law to protect the individual from injury by others cannot account for the fact that the consent of the injured party is not a defence to the majority of criminal acts. So the criminal law *as we know it* is clearly based upon moral principle. How is this to be justified? At this point there are three questions to be asked:

1. Are morals always a matter for private judgment?
2. If not, has society the right to enforce its public judgment by means of the law?
3. If so, in what cases and on what principles should it so act?

1. A negative answer to the first question, follows from two considerations. First, it would be inappropriate to talk of "corrupting" youths or of living on "immoral" earnings if society has no right to pass judgment on matters of morality. Secondly, a society has a moral structure, the framework of which comprises the common moral beliefs which bind society together and without which no society can exist. Being gregarious, mankind cannot avoid the bondage which is entailed in living in a society; if he wants to live in the house he must accept it built as it is. Because it weakens the structure of society, immorality is no less a legitimate concern of society than is treason.

2. This being established, it follows that one must allow that society prima facie has the right to use the law to preserve morality as something essential to its existence. The Wolfenden Report is wrong in principle in requiring special circumstances to be shown before the law may intervene. Because *any* immorality is capable of affecting society injuriously, one cannot set theoretical limits to society's right to intervene. Any exceptions must be exceptions to the right of the law to intervene in matters of morality, and not to a prohibition against such intervention, as the Wolfenden Report would have it. One cannot define a sphere of private morality into which the law must not enter; "the suppression of vice is as much the law's business as the suppression of subversive activities."[8]

Before proceeding further Lord Devlin poses the question of the criterion for immorality and answers it in terms of the "reasonable man", the "right-minded man", or (even better) the man in the jury box. "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral".[9]

3. The third question brings us to the age-old problem of striking a balance between the interests of society and those of the individual. Immorality affects society and this gives society its *locus standi.* But the individual has a *locus standi* too, for he cannot be expected to surrender the whole conduct of his life to the judgment of society. How does one reconcile these two interests, public and private, in morality? No rigid rules can be laid down, Lord Devlin says. But while each decision is necessarily *ad hoc,* while one cannot circumscribe the operation of the law, elastic principles which should guide the legislature can be enumerated. Chief among these are the following general statements:

(a) "There must be toleration of the maximum individual freedom that is consistent with the integrity of society".[10] But there are limits to what may be tolerated. If the right-minded man makes a deliberate judgment that the practice in question is injurious to society, if the conduct arouses in him a real feeling of approbation, of "intolerance, indignation and disgust", then society cannot be denied the right to eradicate that activity.

(b) The limits of tolerance shift. Hence the legislature must be sure that the backing of public feeling is not going to quickly subside leaving the law high and dry when the tide turns.

(c) As far as possible privacy should be respected.

(d) The law should not attempt to provide a complete statement of how people ought to behave; its concern is with the minimum, not the maximum.

And finally, one should always remember that where the juryman is concerned it will not in the long run work to make laws about morality that are not acceptable to him. His reaction is the practical test, and there are no clear-cut rules which can provide a predetermined answer. There must be a separate judgment in each case, but that judgment must be guided by the principles already detailed. "The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain that division between crime and sin."[11]

Lord Devlin concludes with a summary which I shall not attempt to summarise, but in which the whole debate is recast in terms of the interdependence of Church and Law, the ceiling and the floor respectively of the house which is our society.

III

I shall call Lord Devlin's short answer to the fourth question[12] *legal moralism,* where it is understood by this term the view that society *does* have the right to use the law to enforce the contents of its common moral code merely because it is the moral code predominantly accepted in that society. Defined in this manner, legal moralism is an affirmation of the propriety of the legal enforcement of non-utilitarian morality. It is submitted that more than a dozen distinct, though of course interrelated, questions are raised by Lord Devlin's Maccabaean Lecture, and it is a principal contention of this article that one of the major causes of the complex, confusing and inconclusive nature of the ensuing literature has been that these questions are not always recognised and treated as distinct and separate. Far too often the tendency has been to slide from one to another, blurring the issues involved. Perhaps this tendency has its roots in the temptation to give a simple yes-or-no answer to the (apparently) simple question. This temptation, attractive though it may be, should be resisted with passion and zeal until it is first established that the question *is* simple.

Any satisfactory treatment of legal moralism must incorporate a discussion of at least the following questions:

1. Does it make sense to speak of a common morality, and if so how is it to be ascertained?
2. How much reason does the reasonable man have to have?
3. How far should a legislature listen to an "enlightened" minority in the face of a contrary answer from the common morality?
4. To what extent is a common morality necessary to society?
5. Has every society a right to be preserved at all costs?
6. Is it desirable to have a legally enforced morality?
7. Is the basic principle of legislative action in morality a licence or a prohibition? Can one define a sphere of private morality?

In the remainder of this article I shall deal with each of these in turn. Of equal relevance though perhaps of less importance are a number of other questions which I do not directly consider here, for example:

8. Does the existing state of the criminal law support legal moralism?
9. Does Lord Devlin confuse the law as it is with the law as it ought to be?
10. Has Lord Devlin a satisfactory view of the nature of moral rules?
11. How relevant to the argument is the role of Christianity in law?

1. DOES IT MAKE SENSE TO SPEAK OF A COMMON MORALITY, AND IF SO HOW IS IT TO BE ASCERTAINED?

Nobody has disputed that there is in any society a "common" morality in this sense, that the members of that society will share a common attitude to much of the conduct which is considered immoral.[13] Probably the greater part of the provision of the Crimes Act 1961 would be accepted by the majority of New Zealand citizens as prohibiting conduct which is morally wrong, although a wide variety of reasons would be given in support of such a judgment. This is the sense in which Lord Devlin requires us to think of a common morality, and about this there can be little dispute. But I see one complication, and it arises in the following manner. The common morality comprises in the main rules about and attitudes toward certain types of behaviour — homicide, theft, homosexuality, abortion, and so on. Now if this was all that the common morality consisted of, all would be well; when we want to know what to do about a given type of conduct, we look and see what the common morality says about it.[14] These rules about behaviour I shall call *principal rules*. But coexistent with the principal rules are rules which are not about behaviour but about the principal rules themselves. I submit, for example, that the common morality contains a rule to the effect that not all principal rules should form part of our criminal code, together with a number of rules defining the application of this maxim. These rules about rules shall be labelled *subsidiary rules*.[15] The result is that while society may by a principal rule of its common morality condemn a particular type of conduct (e.g. adultery)[16] it might by a subsidiary rule deny the criminal law the right to enforce that judgment. Lord Devlin recognises the existence of subsidiary rules, as can be seen from his list of "elastic principles" which a legislature should bear in mind in considering the enactment of laws enforcing morals.[17] What he does not appear to recognise is that the subsidiary rules, though less precise and fewer in number, are as much a part of the common morality as are the principal rules. And if we are going to listen to the common morality on one count there would seem to be no reason why we should not heed its attitude on the other.

When it comes to ascertaining whether society approves or disapproves of a given type of conduct, one is faced with a question of fact — *does* society by and large agree on this issue? Lord Devlin avoids the counting of heads by means of the concept already shaped for him by the law of negligence, that of the "reasonable man".

> For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.[18]

Dean Rostow objects that a jury is "exposed in advance to many conditioning voices", including that of the trial judge, and is by no means the only medium through which the common morality is expressed.[19] But Lord Devlin can agree with this, for nobody is unexposed to "conditioning voices", and as long as the jury is representative of society it is irrelevant that there are other equally representative media. Glanville Williams rebukes Lord Devlin for drawing an inadmissible parallel between the function of the jury in cases of negligence and its role as the criterion for morality. In the former case, he says, the end aimed

at (the prevention of injury or damage) is agreed by all to be a proper end, but in the latter case the end itself is in dispute.[20] This is true enough, but the force of this objection, and that of Dean Rostow, is somewhat dissipated when it is realised that Lord Devlin does not here propose to ascertain the view of an actual jury on some proposed legislation: "Immorality then, for the purpose of the law, is what every right-minded person is *presumed* to consider to be immoral".[21] However, the question then is: *when* is it to be presumed that the right-minded man considers the conduct immoral? If there is no need for the legislature to actually ask society — and Lord Devlin never suggests that it should, for it is entitled to presume — then the test of the right-minded man amounts in practice to little more than the legislature deciding what it feels is proper, unless it is prepared to concede that it is not a body of right-minded men and women; and so we come dangerously close to the possibility of the rule of an "enlightened" minority which Lord Devlin eschews.

These difficulties aside, one can agree with Lord Devlin that a legislature should keep in touch, though not necessarily in step, with views widely held within society; this is at least part of what is meant by his reference to the jury. It can also be agreed that where an accused elects trial by jury there may be a divergence between the law as explained by the trial judge and the law as applied by the jury if the law so stated does not accord with the jury's sense of what is just. But it is more difficult to side-step the remark in The Times Literary Supplement:[22]

> the right-minded man's feelings, particularly in such disputed areas as capital punishment and homosexuality, are often based on his beliefs as to matters of fact; and about these he is often ignorant or misinformed.

For Lord Devlin it should be said that this problem is one for any democratic society: witness the reluctance of New Zealand governments to alter our liquor laws from six o'clock closing, or of some local bodies to introduce fluoridation, because of the possible results in later elections. Wherever the ideal is government of the people *by* the people, the people's ignorance, as well as their wisdom, will be one of the brute facts of political life. A government is certainly elected to govern, but there are politico-moral as well as practical considerations which limit its freedom to reconstruct society in term of its own ideals.[23]

2. HOW MUCH REASON DOES THE REASONABLE MAN HAVE TO HAVE?

Lord Devlin has been charged with repudiating a "rationalist morality"[24] and no doubt it is easy to gain this impression from such comments on the reasonable man as: "He is not to be confused with the rational man. He is not expected to reason about any thing, and his judgment may be largely a matter of feeling."[25] But elsewhere one gains a different impression. Consider for example this passage:[26]

> Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong. . .

And in the same paragraph we are told that[27]

> . . . before a society can put a practice beyond the limits of tolerance there must be a *deliberate judgment* that the practice is injurious to society.

It is difficult to see how a man who is not expected to reason about anything can make a deliberate judgment that a practice is injurious. One would have thought that such a judgment required the assessing of evidence and the evaluation of argument, both of which activities involve man's powers of reason. Clearly Lord Devlin is not consistent here, and in the preface to *The Enforcement of Morals* he admits,[28] "It may be that the language I used [in the Maccabaean Lecture] put too much emphasis on feeling and too little on reason". He then explains his position in this manner:[29]

> What I want is a word that would clarify the distinction between "rational" and "reasonable". The reasonable man is to be expected not to hold an irrational belief. . .
> But when the irrational is excluded there is, as any judge and juryman knows, a number of conclusions left for all of which some good reasons can be urged. The exclusion of the irrational is usually an easy and comparatively unimportant process. For the difficult choice between a number of rational conclusions the ordinary man has to rely upon a "feeling" for the right answer. Reasoning will get him nowhere.

My reaction to this explanation is two-sided. On the one hand I see the last three sentences quoted as misleading to the point of being simply wrong. The suggestion that the exclusion of irrational beliefs is usually an easy and comparatively unimportant process implies that this is the first stage in moral argument and one which is quickly and easily dispensed with. If irrational beliefs were always as patently irrational as Lord Devlin's example (the belief that homosexuality causes earthquakes), this would be true; but unfortunately they are not. Look carefully as some of the letters to the editor of a daily newspaper on moral or religious issues — apartheid, immortality, the Resurrection, Vietnam, etc. How many, by some easy and comparatively unimportant process, can be labelled "irrational"? Very few, I would say. In most cases one has to take an argument step by step, questioning the relevance of this evidence, disagreeing on the logic of that move, disputing the interpretation of this quotation or the authority of that "expert". And this sort of process is neither easy nor unimportant. If it be objected that these are therefore not examples of irrational belief, one is left with the conclusion that by and large moral and religious discussion is at an end; all we can and need do is consult our "feelings" and state our creed. The very fact that Lord Devlin has produced a work of some 139 pages on what is certainly a moral issue should suggest that he would not accept this conclusion.

Lord Devlin creates further difficulties for himself by his use of a strict separation of logic and experience. For example he adverts to "the standpoint of the strict logician",[30] and elsewhere tells us that "there is no logic to be found" in the law's treatment of sexual offences.[31] This dichotomy between logic and experience is one which lawyers have almost traditionally supported. It is implicit, for example, in Lord Wright's dictum in *Liesboch Dredger* v. *Edison Steamship*[32] that:

> In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.

It is explicit in Judge O. W. Holmes' statement: "The life of the law has not been logic: it has been experience."[33]

Against this traditional view it must be argued[34] that there is no incompatibility between logic and experience. Logic's concern is to formulate and examine the *form* of thought, as against the content, the skeleton as against the flesh. Logic endeavours to elucidate the rules of valid argument, by means of which one can determine whether or not, *given* the premises, the conclusion follows. The flaw in the traditional legal view, here espoused by Lord Devlin, is that it regards logical thinking as an alternative way of thinking, which it is not. Any use of argument whatsoever involves the use of logic, be it good or bad logic. Rather than viewing logic and experience as mutually exclusive alternatives, they should be thought of as two ingredients in argument; the skeleton or framework (logic) is always clothed with the substance of the argument, and there is no reason whatever why this substance should not be practical considerations. To choose a certain course of action because experience has taught us that this is more satisfactory than a given alternative is a perfectly reasonable and logical thing to do, and one should be immediately suspicious of the logic of the proposed alternative. The mere fact that it has a "logical" flavour does not mean that it *is* logical.[35]

So when Lord Devlin tells us that the application of his elastic principles is not to be settled by the "clear and simple lines of logic", Dean Rostow most properly comments[36]

> I should prefer to phrase the matter differently. The law-maker's conclusion in each instance, I should say, is a logical one, but it is the logical function of several variables, not of one. The boundary line is therefore fixed by judgments as to the relative strength of the several variables. . .

So much by way of criticism. On the other hand I read parts of Lord Devlin's text as an attempt to express a difficult and important idea, one which has occupied philosophers in endless literature — the limits of reason. Aristotle may have defined man as a rational animal, but he is not always rational. I do not mean that he sometimes acts irrationally, though this is true enough, but rather that the rational-irrational dichotomy is not always applicable to his activities; which is to say that on those occasions it would be inappropriate to use either of the adjectives "rational" or "irrational". The term *non-rational* is a good one for my purposes, and if difficulty is experienced in seeing how this term would function one should think of the way the word "amoral" is used to mean that which is neither moral nor immoral. The non-rational is, I think, what Lord Devlin means by "feeling". It is most obvious in spheres which are substantially a matter of taste, e.g. preferences in music or art, or fashions in clothing; it is non-existent in mathematics and the pure sciences, which one might say are pure rationality. But in between these extremes man's activities involve varying proportions of the rational and the non-rational, and wherever the non-rational is involved this means that to some degree at some stage a personal *choice* is involved, a choice which exhibits the person's values, his priorities in life.[37] Of course there are good and bad choices, just as there are sound and unhealthy values; but there are limits to the extent to which choices and values can be displaced by reason. This is well expressed by Ludwig Wittgenstein:[38]

> If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say 'This is simply what I do'.

This then is the light in which I think one can most profitably read Lord Devlin's references to "feeling", *viz.* as a reminder that morality

is not a completely rational matter in the way that mathematics is, that when argument has been exhausted, be it criticism or justification, rock-bottom is reached and at this point one can only say: this is what I believe.[39] Professor Hart's "critical principles" can take one so far, but in the end they are supplementary to rather than a substitute for assertions of choice.

To recapitulate, I do not go the whole way with Lord Devlin in his treatment of the reasonable man. By assigning a larger role to the non-rational than is necessary for his purposes, he fails to give a consistent or plausible account of moral argument. Furthermore he endorses and uses the traditional but unsupportable dichotomy between logic and experience. But I do suggest that his text can be read so as to make sense and tell something important, a sense and an importance which are admittedly obscured by the language of the Maccabaean Lecture.

3. HOW FAR SHOULD A LEGISLATURE LISTEN TO AN "ENLIGHTENED" MINORITY IN THE FACE OF A CONTRARY ANSWER FROM THE COMMON MORALITY?

Suppose that a legislature is contemplating passing legislation which is advocated by a select committee or other "enlightened" group[40] to remedy patent injustice and to constitute a substantial advance in terms of society's general welfare. Should the fact that the proposed legislation does not accord with the moral views of the man on the Clapham omnibus then be a bar to proceeding with the reform?

A number of considerations can be urged in support of an affirmative answer:—

(a) If the ordinary man's attitude really is one of "intolerance, indignation and disgust", if public feeling on the subject is up to "concert pitch", then a legislature that disregards the public's attitude runs the risk of a bloody revolution and social chaos. How great this risk would be must depend on the stability of the government, the patience and temperament of the public, the extent of the proposed reform, and other such variables. But if the risk was a real one, then it might be the legislature's duty to accept the lesser of two evils and drop the proposed reform.[41]

(b) As has already been shown, Lord Devlin's reference to the juryman is intended as a reminder that where law is out of touch with the common morality it is liable to become quietly inefficacious.

> The man in the jury box is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him.[42]

The truth of this maxim is borne out by reference to the days when that ancient and curious privilege "benefit of clergy" was available to a person accused of common theft if *inter alia* the value of the article stolen did not exceed a certain sum, say one penny. It was the jury's task to ascertain guilt or innocence and to fix the value of the goods allegedly stolen, and without his "clergy" the miserable offender was liable to some monstrous penalty in the hands of the royal courts. A list of actual jury findings would run something like this:

> Cecil Smith. Guilty of stealing one loaf of bread. Value: one farthing.

John Trog. Guilty of stealing one sow, the property of Ethel Trog. Value: one penny.

William Black. Guilty of stealing one sovereign. Value: one penny.

(c) A law which is at variance with the common morality may also end up producing greater evils than it is designed to prevent; racketeering, bribery and corruption are commonly found in the wake of unpopular law, as was the case in the prohibition era in the United States of America.

(d) As a corollary to (b) and (c), an unpopular law may have an effect of a more general nature in that public respect for law generally and for those involved in the administration of law is diminished, with the consequence that law becomes ineffective as a tool of social control. The implications of such a state of affairs are obvious.

But these factors must not blind us to the fact that a government's job is to govern. The fact that we live in a democracy does not mean that the government must call a referendum on every important issue, which is what legal moralism carried to its extreme would require. Apart from the impracticality of such a procedure we would no longer need or have a legislative body — government would mean administration. If the role of a government is to govern, this means that while being guided by public opinion it should also guide public opinion in that direction which after full and careful consideration it considers proper.

Faced with a remark reported by Professor Hart,[43] "we once burnt old women because, without giving our reasons, we felt in our hearts that witchcraft was intolerable", Lord Devlin takes refuge in the reply:[44]

> Naturally he [the law-maker] will assume that the morals of his society are good and true. . .[45] [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.

As might be expected this answer is viewed by his critics as a resort to misguided conservatism and a negation of the possibility of a progressive society.[46]

Lord Devlin, then, sees certain dangers in the idea of a legislature leading public opinion. I have outlined four such dangers and given an opposing viewpoint. Are the two points of view beyond reconciliation? If legislation alone was the sole means by which a government could "educate" the public to its point of view, then perhaps the answer would be "yes". But a government usually has another string to its bow; before legislating it can undertake a fairly extensive "softening up" process. The legislature's intention is made public, officially or unofficially, and through the various news media the public is educated in the virtues of the proposed legislation until such time as it can safely be made law. So one can agree that the lawmaker does not have a mandate to reconstruct the essentials of his society *without society's consent* and still acknowledge the truth of the proposition "the job of a government is to govern." The reconciliation is effected by means of this wider concept of public education. By concentrating on the short-term effects of unpopular legislation Lord Devlin neglects the long-term answer that can satisfy both points of view.

4. TO WHAT EXTENT IS A COMMON MORALITY NECESSARY TO SOCIETY?

> If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[47]

Here is a succinct statement of one of the foundations of Lord Devlin's legal moralism, the idea that a common morality is necessary for the continued existence of society. Although this part of his argument has come in for heavy critcism, a certain amount of agreement has been reached. Professor Hart speaks of "the acceptable proposition that *some* shared morality is essential to the existence of any society",[48] and Glanville Williams concedes that there is "a minimum of common behaviour required for social cohesion."[49] The contentious point is *how much* shared morality is essential. Where does one draw the line that says "this is essential and that is not?" How absolute is the bondage? Lord Devlin offers a number of analogies, but none of them is very much help. In one of the later lectures he states[50]

> A common moral faith means that there is common agreement about the way he [man] should go. A band of travellers can go forward together without knowing what they will find at the end of the journey but they cannot keep in company if they do not journey in the same direction.

But what one needs to know is whether they "keep in company" if, though journeying in the same direction, some of the band take a short cut through the woods, or make a detour to see the view. Do they remain "a band of travellers"? It has fairly been said that Lord Devlin gives little guidance on this question. Minor excursions would not require one to say that the band had dispersed, but in terms of the analogy this means that minor deviations from the common morality do not undermine the foundations of society.

Lord Devlin's reply is a curious one. He does not want to say that every minor deviation *does* undermine the foundations of society (this indeed would be absurd), but only that it is *capable* of doing this; thus he maintains the generality of his thesis. But this is surely not sufficient. I am capable of doing many things that I can be certain I will never even attempt to do. And if it can be certain that the structure of society will not collapse, then the "common bond" argument does not apply and it is irrelevant that it *might* have collapsed, whatever this may mean. One cannot have it both ways.[51]

The truth is that certain parts of the common morality are indispensable beams in the framework of our society; if we abandoned all ten commandments overnight there would be sheer chaos. But other parts could be altered, added to or abandoned (some of them admittedly not overnight) without disaster or anything like it. Would we have the "same" society? Would I cease to be the same person or have the same body if all the tissues in my body were replaced every seven years? Here the dispute really is a verbal one — the answer does not matter. What does matter is that a society with no moral flexibility is not a viable society. Moral relaxation may be one path to decay, but moral torpor is another.

5. HAS EVERY SOCIETY A RIGHT TO BE PRESERVED AT ALL COSTS?

Lord Devlin says in several places that it is the lawmaker's mandate and duty to preserve his society by maintaining and if necessary strengthening its dominant morality. Looking with hindsight on the spectre of Nazi Germany, few would be happy with this proposition without making substantial qualifications. By the middle years of World War II the "essentials" of the Nazi society had crystallised sufficiently for Lord Devlin's proposition to require one to say that Hitler's associates were justified in acting as they did, for they were reinforcing the common moral bonds and so preserving their society in its essentials.

> What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference.[52]

Is this not reminiscent of another German visionary, Nietzsche, and his "superman" philosophy?

Even if one thinks of societies as existing in sound-proof air-tight boxes it can be acknowledged, as I think with Lord Devlin's critics it must, that error can be as great an enemy of society as indifference. But societies cannot be thought of in this manner all the time. As the world's population and the strain on nature's resources increase, so does the possibility of maintaining this insular view decrease. Without society the individual would have an unlimited "right" to do whatever he thought necessary for his self-preservation; which is to say that neither rights nor duties would exist at all. But within society the individual is both limited in what he may do by the demands made by society and assisted in what he may do by the demands which society recognises he may make upon others. He may not steal to provide himself with food, or rob a man for his clothing; but he does not have to resort to force if his neighbour will not pay him the price of his pig. His rights, including his right to exist, are meaningful only in the context of a whole system of rights and duties, a system which simultaneously creates and limits freedom of action.

Where is all this leading? Simply to this point, that what holds true for the individual in society in this respect holds true for the individual nation in international society; neither has an unlimited right to self-preservation at the expense of others. Unless the efforts of all who have concerned themselves with international organisation and co-operation this century are to be branded as foolish and misguided, we are committed to the conclusion that no society can concern itself with strengthening and consolidating what its lawmakers see as its common morality unfettered by any consideration of the rights of other societies. In the international scene the short-comings of Lord Devlin's position are best illuminated and most distressing.

6. IS IT DESIRABLE TO HAVE A LEGALLY ENFORCED MORALITY?

In one sense I have been discussing this question all along, so I should clarify the sense in which I intend it to be understood here. Let it be supposed that Plato was right in teaching that the good life could be the object of knowledge, and not of mere belief; and suppose further that one is able to produce Plato's ideal state, in which the rulers are

those who have this knowledge of the good life. On moral matters the rulers are infallible. Would it then be desirable for the law-makers to use the law to enforce conformity in all respects to this ideal pattern of morality revealed through the insight of the philosopher-kings?

It is sometimes said by those who would deny the rulers this power that legislation may make a man do better things but it cannot make him a better man. There is a certain obvious truth in this, for insofar as motive is relevant to moral judgment it is obvious that one cannot ascribe the same value to an act done out of fear of punishment as to an act done from a sense of duty or in the belief that it is the right action.[53] Does this mean that legislation is impotent to produce better citizens? Not entirely; once again I think that the long-term effects must be looked at before a fair appraisal can be given. Legislation introduced today may perhaps be complied with merely because of the prospect of punishment, which may be considered an unworthy motive. But the next generation will probably grow up with this legislation as part of the settled normative background from which they imbibe their sense of values. That which shocks this generation will be taken for granted by the next as normal and proper simply because they have known no different. To this extent I think the objection that legislation cannot produce the moral motive should be qualified.

Secondly, those who would give the rulers this power must face the objection that making everything which is a sin also a crime may actually weaken the moral motive. The more the criminal and moral orders are co-extensive, the greater the difficulty the ordinary citizen will have in distinguishing between them, and the greater the tendency to substitute the one for the other.[54] It is therefore not merely a concession to the dissenter but something of positive value that at some points morality should be a matter for individual choice.

If this presupposition of legislative infallibility is now removed and the argument transposed from Plato's ideal state to our own society, the considerations telling against a legally enforced morality are reinforced, for a divergence in moral attitudes is one check upon the values of the orthodox morality. In answering the criticism of the dissenter the supporters of the established morality are continually forced to rethink and restate the value which they find in their moral code. Thus society as a whole is better equipped to recognise error when it appears, and to present its beliefs in terms which are relevant and meaningful to the younger members of society. The present controversy within the Presbyterian Church in New Zealand exemplifies this point.[55] Professor Geering's views have, I think, been welcomed not so much for their veracity as for the refreshing breeze which they have brought to religious thought in this country, a breeze which has dispelled the inertia which saps the vitality of Christianity. On the other hand his critics allege that the difference is not one as to detailed content of religious belief but a difference as to the whole structure of that belief, so that Professor Geering can no longer call himself a Presbyterian or a Christian. At this point my analogy breaks down, for while the religious dissenter can break away and form a new (religious) society, no such course is open in the secular sphere as a practical possibility for the moral dissenter.

While warning against attaching too great a significance to our fallibility (for "to admit that we are not infallible is not to admit that we are always wrong"),[56] Lord Devlin apparently recognises some truth

in these arguments for he affirms the proposition that "the law is concerned with the minimum and not with the maximum".[57]

> The criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave; good citizens are not expected to come within reach of it, and every enactment should be framed accordingly.[58]

But the passage devoted to this principle appears strangely out of context with the theme of the lecture, that the law cannot be restricted in its right of entry into matters moral. It is to this question that I now turn.

7. IS THE BASIC PRINCIPLE OF LEGISLATIVE ACTIVITY IN MORALITY A LICENCE OR A PROHIBITION? CAN ONE DEFINE A SPHERE OF PRIVATE MORALITY?

I have stated the theme of the Maccabaean Lecture in the proposition that the law cannot be restricted in its right of entry into matters moral. In that lecture Lord Devlin asserts that "it is not possible to set theoretical limits to the power of the state to legislate against immorality"[59]; and later the question is posed[60]

> Can then the judgment of society sanction every invasion of a man's privacy, however extreme? Theoretically that must be so; there is no theoretical limitation.

The basic difficulty confronting Lord Devlin's readers is in understanding exactly what he means by "theoretical". At times this word is used as an antonym to "practical", but elsewhere as an antonym to "flexible". The difficulty is one for Lord Devlin too, as it involves him in a large amount of argument which when analysed leaves one with the impression that on this count there is very little difference between his position and that of the Wolfenden Report. Lord Devlin wants to give the legislature an unrestricted right of entry into morality, but he qualifies this right by enunciating four (perhaps five) "general statements of principle" all of which would be accepted *in toto* by his critics. (It should be noted in passing that the much-criticised reference to "intolerance, indignation and disgust" is not used as a simple justification of the action of the law but as a qualification on *one* of these "elastic principles" which restrict the action of the law. Professor Hart at times[61] and possibly D. L. Mathieson[62] tend to neglect this point, possibly because they read Lord Devlin as using a simple double-negative; a careful reading does not support this construction.) The Wolfenden Report, on the other hand, denies the legislature the right to intervene except in certain cases which, broadly speaking, can all be justified on utilitarian grounds. As, in the vast majority of cases, the rules of our common morality can be justified on utilitarian grounds, one is left wondering how often the protagonists would differ in their solutions to concrete problems.[63] In any case it would certainly be rare that public feeling on a moral issue could be described in terms of "intolerance, indignation and disgust" at concert pitch. D. L. Mathieson[64] suggests on the basis of a survey conducted in the 1961 Jurisprudence class at Victoria University of Wellington that no such "abhorrence" exists in our society in relation to homosexuality.

To repeat, Lord Devlin wants to start from a licence issued to the legislature, while his opponents commence from a prohibition on

the law's intervention. Both parties then proceed to qualify the licence or prohibition until there is little more than an architectural difference between them. Personally, if I had to choose between the two I would opt in favour of the prohibition; yet if asked my reasons I do not think I could improve on a splendid passage from *The Enforcement of Morals*:[65]

> We who belong to the societies of the United States or of the British Commonwealth or of the other like-minded peoples say that we belong to a free society. By this I think we mean no more than that we strike a balance in favour of individual freedom. . . What I mean by striking it in favour of freedom is that the question to be asked in each case is: 'How much authority is necessary?' and not: 'How much liberty is to be conceded?' That the question should be put in that form, that authority should be a grant and liberty not a privilege, is, I think, the true mark of a free society.

Given Lord Devlin's answer on the licence-prohibition issue one can only conclude that he does not see in British law the true mark of a free society.[66]

Lord Devlin's attitude follows from his assertion that one cannot define a sphere of private morality (into which the law may not enter). Why not?

> I do not think that one can talk sensibly of a public and private morality any more than one can talk of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the law-making power but to guide those who have to apply it. While every decision which a court of law makes when it balances the public against the private interest is an *ad hoc* decision, the cases contain statements of principle to which the court should have regard when it reaches its decision. In the same way it is possible to make general statements of principle which it may be thought the legislature should bear in mind when it is considering the enactment of laws enforcing morals.[67]

Why can it not be said that these "general statements of principle" delimit or define a sphere of private morality? The answer apparently is: because they are flexible, because they produce *ad hoc* decisions. This may be so, but flexible though they may be these statements are *some* help; the legislature does not merely toss a coin, or draw the answer from a hat. I feel that Lord Devlin is preoccupied with the fact that one cannot by means of some politico-moral slide-rule predict with mathematical certainty how given behaviour will be viewed in the future. But surely nobody *expects* mathematical certainty in the theatre of human affairs; one need only be able to say that if, in Lord Devlin's own terms, the private interest out-weighs the public interest then it is a matter of "private" morality which is not within the law's ambit. If it be replied that there is no one factor which controls the weighing process,[68] this can be admitted without necessitating the conclusion that no definition whatever is possible. Lawyers of all people should be familiar with definitions in which there is no one essential factor common to all applications of the word.

IV

I cannot offer a summary of this essay, but I would like to make one remark in conclusion. Paradoxical though it may seem I have tried to simplify the controversy by showing its complexity. It is not

possible to give a simple yes-or-no answer to legal moralism because there are too many issues involved, the honours (if honours there must be) being distributed differently on different issues. Is it merely a matter of words? Most certainly not — it is one of profound consequence. To one who replies: "Well then, legal moralism is either right or it is wrong" I can only say: you are expecting the impossible.

1 (1917) 36 N.Z.L.R.308
2 Selected and useful bibliographies are given by Professor H. L. A. Hart in *Law Liberty and Morality* (1963) and Lord Devlin in *The Enforcement of Morals* (1965).
3 Para. 61, (emphasis added)
4 *ibid*
5 Para. 257
6 *Law Liberty and Morality, supra,* 1
7 Reprinted as chapter one in *The Enforcement of Morals, supra*
8 *ibid,* 13-14
9 *ibid,* 15
10 *ibid,* 16
11 *ibid,* 22
12 Part I, *supra*
13 This might even be considered a defining feature of a society.
14 I over-simplify legal moralism here to emphasise my point.
15 The distinction between principal and subsidiary rules is similar to Professor Hart's distinction between primary and secondary rules in *The Concept of Law,* (1961). I have not adopted his terminology because the parallel is not exact.
16 The principal rule in this case might read simply: adultery is wrong. I think such a rule would feature in an inventory of the common morality of western society.
17 *op. cit.* 16-21
18 *ibid,* 15
19 "The Enforcement of Morals" (1960) C.L.J. 174, at 178.
20 "Authoritarian Morals and the Criminal Law", (1966) Crim.L.R. 132 at 146, 147
21 *op.* cit. 15 (emphasis added)
22 Quoted by Glanville Williams, *op. cit.* 146
23 I return to this topic under question 3, *infra*
24 See e.g. Hart "Immorality and Treason" reprinted in *The Law as Literature* (1961), 200 at 225
25 *The Enforcement of Morals,* 15
26 *ibid,* 17
27 *idem,* (emphasis added)
28 *ibid,* viii
29 *idem*
30 *ibid,* 5
31 *ibid,* 22
32 [1933] A.C. 449 at 460
33 *The Common Law,* p.1
34 See by this writer *Law and Philosophy* (1965) 1 Otago L.R. 48 at 53-54
35 See Professor A. G. Guest's essay "Logic in the Law", *Oxford Essays in Jurisprudence* (1961) Chapter VII for a more detailed treatment of the unpopularity of logic in legal reasoning.
36 *op. cit.* 182
37 It is the non-rational elements in judicial behaviour that the school of jurists known as the American Realists have made the basis of their jurisprudence.
38 *Philosophical Investigations* para. 216. Wittgenstein, an Austrian philosopher of this century, would probably rank with Plato, Aristotle and Kant among the 'top ten' of Western philosophers. Perhaps the greatest all-out assault on this subject is Immanuel Kant's *Critique of Pure Reason* (1781).

39 In a later lecture, reprinted as chapter six in *The Enforcement of Morals,* Lord Devlin returns to this idea, substituting "faith" for "feeling". He states: "the removal of religion from the structure of society does not mean that a society can exist without faith. There is faith in moral belief as well as in religious belief. Though it is less precise and less demanding, it is not necessarily less intense". (pp. 119-120). See also p. 123

40 Such as the Committee on Homosexual Offences and Prostitution, which produced the Wolfenden Report.

41 Elements of this theory (known to jurisprudence students at the University of Otago as the "blood and guts" theory) can be traced in Professor Hart's "minimum content of natural law" in *The Concept of Law* Chapter IX, and even in Austin's definition of law as the command of a sovereign supported by a sanction, where the sovereign is said to be one who receives "habitual obedience" from the bulk of a given society.

42 *op. cit.* 21. And see p.24 and p.116

43 "Immorality and Treason", *op. cit.* at 226

44 *op. cit.* 90

45 He adds: "if he does not, he should not be playing an active part in government". I omit this because it is, with the greatest of respect for the learned author, highly questionable and only likely to confuse the issue.

46 See e.g. Glanville Williams, *op. cit.* 136

47 Devlin, *op. cit.* 10

48 *Law Liberty and Morality,* 51

49 *op. cit.* 135

50 *op. cit.* 120

51 For Professor Hart's analysis here, see *Law Liberty and Morality,* 51-52. Lord Devlin's reply (*The Enforcement of Morals,* 13, fn.1) constitutes a substantial retreat from the text of the Maccabaean Lecture.

It is interesting to note in this connection that in basing his case on the proposition that "any immorality is capable of affecting society injuriously" (p.15) Lord Devlin is adopting a utilitarian justification — i.e. because the consequences of immorality are harmful society has the right to intervene.

52 Devlin, *op. cit.* 114

53 T. S. Eliot's Becket sees it as the greatest treason "to do the right deed for the wrong reason": "Murder in the Cathedral".

54 Admittedly this will not be true of the citizen with religious beliefs, for these should provide him with an independent criterion of right and wrong. But it is difficult to know what proportion of our society comes within this category; if church attendance is an indication the proportion is a small one.

55 Substituting, of course, religious views for moral views.

56 *op. cit.* 123

57 *ibid,* 19

58 *ibid,* 20. I suggest the word "complete" should be inserted before "statement" where it first appears.

59 *ibid,* 12

60 *ibid,* 118

61 e.g. in "Immorality and Treason", *op. cit.*

62 "Intolerance, Indignation and Disgust", (1961) N.Z.L.J.359

63 Dean Rostow (*op. cit.* 190) takes the example of polygamy to show that their analyses of such a problem would hardly differ at all.

64 *op. cit.* 361

65 p.102

66 One cannot without contradiction or verbal acrobatics maintain both (1) that in our society authority is a grant *and* (2) that the basic principle in the legal enforcement of morality is the proposition that one cannot limit the power of the state to legislate against immorality.

67 *op. cit.* 16

68 "The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin". Devlin, *ibid,* 22