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Volume 28, numéro 3, 1972

URI : <https://id.erudit.org/iderudit/1020314ar>

DOI : <https://doi.org/10.7202/1020314ar>

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Éditeur(s)

Laval théologique et philosophique, Université Laval

ISSN

0023-9054 (imprimé)

1703-8804 (numérique)

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Citer cet article

Micallef, P. J. (1972). Abortion and the Principles of Legislation. *Laval théologique et philosophique*, 28(3), 267–303. <https://doi.org/10.7202/1020314ar>

ABORTION AND THE PRINCIPLES OF LEGISLATION

Paul J. MICALLEF

THE controversy surrounding the legalization of abortion has provoked the age-old problem of the relationship between law and morality. In season and out, it has been recalled to this effect that there is a realm of morality which is not the law's business, a realm which quickly, often gratuitously, has been extended to include abortion.

That there is a realm of morality which *de facto* is of no concern to the law is not in dispute. Even a cursory glance at any criminal code should reveal that : a) while some acts are both criminal and immoral (e.g., murder, rape, perjury, theft); b) other acts are immoral but not criminal (e.g., lying, cohabitation, fornication); c) others still are criminal but not immoral (e.g., highway traffic offences, fiscal laws and in general any crime which does not involve *mens rea*)¹.

What in our day and age is in dispute is whether abortion should fall within or outside that realm of morality which is the law's concern. Indeed it is as much a fact that law and morality are not co-extensive, much less identical, as it is that their relationship, specifically in what they approve and disapprove, is so close that all or most serious crimes are equally serious moral offences. However, their respective approach with regard to the acts they approve and disapprove is different, so that "if the moral law and criminal law do coincide, it is not purely because the immoral act has a criminal sanction attached but because some other element is present which renders that act a fit subject for the criminal law"².

Precisely what that element is and the principle or principles that must be used to establish the basis on which society selects its criminal offences is a question which has provoked no inconsiderable controversy in the social and political history of western society. On the one hand is the positive contention that the state, as a natural institution, is the 'noble city'; on the other, the negative contention that

¹ Cf. Alan W. MEWETT, "Morality and the Criminal Law", *University of Toronto Law Journal*, 1962, 14:223.

² *Ibid.*

the state is a 'necessary evil', brought about and conditioned by man's fall. To the former belongs the Greek tradition of Plato, Aristotle, eventually St. Thomas and in general the philosophers of the scholastic tradition; to the latter belongs the Augustinian school of thought, eventually Luther, Calvin and in general the philosophers of the positivist or liberal tradition. Both theories offer criteria to determine the function of the criminal law, for both profess obedience to the state: to the former, this is virtue there finding its proper object; to the latter, it is virtue there encountering its occasion³. However, both theories can be disastrously applied setting might and right in profound opposition to each other unless certain safeguards are met. For while the former might in effect invest the state with power of determination between good and evil, destroying in the process the individual's freedom of conscience, the latter tends to narrow the ambit of legislation, increasing in the process the individual's freedom of activity. Indeed men cannot be driven to the noble life any more than they should be left alone to pursue their own interests in a life which is essentially social and political. For too much or too little authority, as too much or too little freedom, might well mark the end of both and the beginning of tyranny.

Like most of the important philosophical and political controversies, the dispute over the role of the state and the functions that its law should serve started in ancient Greece. Little is known of the early Greek liberal tradition which received one of its most eloquent formulations in the funeral oration of Pericles⁴. But in its original form, the liberal theory appears to have been advocated by Democritus, Protagoras and Lycophron. Aristotle quotes Lycophron as saying that "law is only a convention, 'a surety to one another of justice' . . . and has no real power to make citizens good and just . . . The state a mere society, having a common place, established for the prevention of mutual crime and for the sake of exchange"⁵.

In reaction to such a proposal for a liberal society, Plato urged, as did Aristotle, the regulation of every important phase of the citizen's personal and social life as an absolute condition of his just society. However, though for Aristotle the state is essentially directed towards the full development of man, consequently entrusted with the promotion of virtue, Aristotle started distinguishing between the virtue of the good man and the virtue of the good citizen, acknowledging that there is wisdom (and virtue) in a certain amount of freedom of action⁶.

The Aristotelian theory was taken over with modifications by St. Thomas

³ Thomas GILBY, "The Crimination of Sin", *Blackfriars*, 1960, 41:53-61.

⁴ Cf. THUCYDIDES, *The Peloponnesian War* (New York: Random House Classics, 1951), p. 104; Robert M. HURT, "Sin and the Criminal Law", *New Individualist Review*, 1962, II:30.

⁵ *Politics*, VII:1280a7 et seq.

⁶ *Ibid.* See also Plato, *Laws*, VI:780: "He who imagines that he can give laws for the public conduct of states, while he leaves the private lives of citizens wholly to take care of itself . . . who gives up the control of their private lives and supposes that they will conform to law in their common and public life, is making a great mistake".

whose "synthesis of law and morals is unrivalled and may fairly lay claim to be the only fully comprehensive philosophy of law"⁷. For St. Thomas, as for Aristotle, the state is in its own right a natural and perfect institution. Though he also saw virtue as the principal end of the 'polis', St. Thomas outdistanced Aristotle in that he emphasized the importance of leaving a basis of right for individual liberty and conscience as well as for divine law.

The Platonic-Aristotleian tradition, but largely the Aristotleian compromise, triumphed over the early liberal theory until St. Augustine made his bow on the social and political stage of western society. Proceeding from the premise that, due to man's fall, the state is completely unable to improve the moral condition of its already corrupt people, St. Augustine advocated severe limitations on state intervention. Beyond its essential task of checking criminal vice, the Augustinian state is hardly capable or competent to do anything else. Within this framework, the state is no more than a useful convenience and its rule, though providentially ordained to prevent anarchy, is devoid of moral value within itself. Consequently, the promotion of virtue becomes the sole responsibility of the individual who only uselessly expects the state to provide him with a directing hand⁸.

For the most part today the original points of departure have been lost sight of and the original premises obscured. That, however, does not make it any less urgent to go back to those fundamental positivist and thomistic principles of legislation to see how these principles, advanced over the centuries, have been carried forward into present-day society's trial of human fetal life and have been used, often beyond recognition, to direct the law in its attitude towards abortion and in general towards those 'private' acts as may seem of no concern to it and around which the present controversy will long be centred.

I. THE POSITIVIST APPROACH

Unlike the aristotelico-thomistic theory, the positivist liberal theory concerning the role of the state and its criminal law is a multifaceted one⁹. Though it allows extreme polarities, it has nonetheless preserved an amazing basic unity in that all viewpoints are traceable to and converge on St. Augustine's fundamental premise that man is utterly corrupt by sin as are all the institutions he sets up and into which he penetrates.

Following St. Augustine's line of thought are Luther and Calvin, whose re-

⁷ Norman St. JOHN-STEVAS, *Life, Death and the Law* (New York: World Publishing Co., 1964), pp. 19-20.

⁸ *The City of God*, II:21; GILBY, *op. cit.*, in *Blackfriars*, 41:53; see also Ernest BARKER, "St. Augustine's Theory of Society", *Essays on Government* (Oxford: University Press, 1951).

⁹ For what could well be an eyewitness account of the contemporary democratic liberal state, see PLATO, *The Republic*, VIII:557b-557c.

spective positions stand in direct opposition to each other but at the same time represent the Augustinian polarities as the two bases of a triangle with St. Augustine's at the peak. Translated into religious and socio-political movements, Lutheranism and Calvinism resulted in the Reformation and Counter-Reformation, in revolts and counter-revolts which devastated the length and breadth of western Europe. The religious and political upheavals that followed represented for western society at once "the best of times and the worst of times" that Dickens speaks of, producing in the sphere of political thought on the one hand the sovereign absolutism of Hobbes, on the other the utter distrust in government of Locke and the 'social contract' of Rousseau which with its ringing declaration that "man is born free and everywhere he is in chains" immediately heralded the formation of the French and American republics and the birth of political freedom through government of, by and for the people, henceforth making it utterly impossible for any monarch to claim : *l'état, c'est moi*.

But it was in Jeremy Bentham and John Stuart Mill that the liberal movement found its staunch allies and its fullest expression. Standing in a complementary relationship to each other and repudiating the idea that society has any right to enforce morality as such on any of its members, both Bentham and Mill sought to determine, with scientific objectivity and accuracy, the basis on which human acts should be the subject of legislation.

In recent years, the positivist approach has been highlighted, among others, by the Wolfenden Report (1957) which provoked considerable controversy, producing in the process many and varied criteria by which the function of the criminal law, particularly in matters of morality, should be ascertained.

In one way or another, all theories affirm the hypothesis that somewhere deep down in man's conscience there is an area that can by no means be subdued from the outside but must be won from within by free assent. That area is man's private and personal life which like the proverbial Englishman's home is his castle into which no pope or king may trespass with impunity.

Bentham "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we should do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne"¹⁰. With these words, Bentham fires the opening shots of his major work, *An Introduction to the Principles of Morals and Legislation*, which at once provide the basic norm both for morality as such and for the law to determine which actions should or should not be brought within its jurisdiction. He called it the 'principle of utility', expressed in terms of "the greatest happiness of

¹⁰ Jeremy BENTHAM, *An Introduction to the Principles of Morals and Legislation* (1789 ; revised edition, 1823), (Oxford : Blackwell's, 1948), Chapter 1.

the greatest number of people"¹¹. Bentham explains how this principle is that quality in any act or object that : a) *positively*, produces or tends to produce pleasure, benefit, advantage, or happiness ; b) *negatively*, prevents pain, mischief or unhappiness to that party whose interest is considered : if that party is a particular individual, then the happiness (or unhappiness) of that individual ; if the community at large, then the happiness (or unhappiness) of the community. Legislation must assist the happiness of the individual in ways which support and promote the happiness of the whole community. In the long as well as in the short run, the end of moral action is none other than the happiness of the community, a principle and an objective valid, in Bentham's words, "at all times and upon all occasions". In the hands of the skilful legislator such a principle could well become the liberating and energizing force of any liberal state.

Bentham's problem was how the legislator can best harmonize the happiness of the individual with the happiness of the group. For he was very much aware that the happiness of the part is not always identical with the happiness of the whole. On the contrary, there may be instances when the pleasures of the few may well be found or be believed to overbalance quantitatively the pains of the many. Bentham thus led himself into establishing standards by which individuals and legislators could agree on what constitutes personal happiness and what constitutes the happiness of the community and how to balance one against the other. To this end, he thought that the conflicts could be minimized by reducing differences of metaphysical and *a priori* principles into differences of a simpler and more measurable order. Problems of utility can more easily be reduced to issues of fact, he thought, than can problems involving fundamental beliefs and principles. On this basis, the promotion of social harmony in general largely depends on the legislator's ability to reduce questions of principle to questions of fact. So whatever the issues may be, they should be capable of being measured and balanced against each other in some quantitative or even mathematical manner. Pleasures and pains thus become at once the *ends* to seek and the *means* by which the ends themselves could be achieved.

Bentham goes on to work out a fascinating "hedonic calculus" by which the differences between one pleasure and another and between one pain and another may best be narrowed. He uses the following dimensions : a) intensity ; b) duration ; c) certainty, or uncertainty ; d) propinquity, or remoteness ; e) fecundity, in giving rise to sensations of the same kind ; f) purity, in not being followed by sensations of the opposite kind ; and g) extent, involving the number of persons

¹¹ In developing his ethico-legal theory, Bentham acknowledged that he had derived the idea of 'utility' from David Hume, *A Treatise of Human Nature* (1740), cf. Bentham's *A Fragment of Government* (1776) ; and the idea of 'the greatest happiness of the greatest number' from Joseph Priestley, *Essay on Government* (1768) and from Cesare Bonasena, Marquis of Beccaria, *Treatise on Crimes and Punishments* (1764). In actual fact, the principle of utility was well known to the Sophists in 5th Century Greece. However, the form that Bentham gave it was no less than the hedonism of Epicurus.

affected. The first six concern the individual person considered by himself whereas the last one places the individual person vis-à-vis a number of persons to whom the act extends or who are affected by it¹².

These dimensions should help the legislator to weigh in the balance individual liberties against society's well-being. Adequate regard for each of them, taken singly and collectively, should provide moral man and moral society as much with a system of morals as with a positive scientific guide to action in the public interest. Furthermore, in calculating the amount of pleasure an action will produce, Bentham assumed that : a) each individual person including the legislator himself will count equally ; and b) there are no qualitative differences between pleasures but only quantitative ones.

Applying Bentham's suggested method of reducing questions of principle to questions of fact to the present-day abortion debate, if abortion is debated in terms of fundamental issues, for instance the rights and happiness of the fetus, etc., agreement is highly improbable, even within the tenets of utilitarian ethics¹³. However, if the abortion issue is debated in terms of fact and of quantitative pleasures and pains — the safety of a professionally performed abortion and the pressing demands of present-day society on the one hand, balanced against the dangers and hazards of criminal abortion and the cost in human effort in terms of all forms of exploitation on the other hand, etc. — then the original gap is narrowed and reform is much likelier on this basis than on the basis of practically irreconcilable ultimate values.

Mill Mill, the intellectual heir of Bentham and nominally also his follower, accepted the main tenets of Bentham's principle of utility as a theory of morals but he rejected it as a principle of legislation. He further disagreed with Bentham's assumption that calculation of pleasures involved only quantitative factors. He considered this aspect of Bentham's theory as being too materialistic and as not providing enough opportunity for complete individual self-determination nor as providing the community with a basis in support of the complete welfare of its members. Accordingly, he distinguished between various kinds of pleasures, arguing that inasmuch as there are the higher human faculties, there are correspondingly higher tastes and pleasures of the cultivated mind and, consequently, some pleasures are more valuable than others. Mill is satisfied that through a sufficient amount of "mental culture", everyone can reach the level of cultivated

¹² BENTHAM, *op. cit.*, Chap. 4.

¹³ Glanville WILLIAMS, *The Sanctity of Life and the Criminal Law* (London : Faber & Faber, 1958), p. 30, says to this effect that the utilitarian premise may be given any one of a number of interpretations : "For example, the premise may assert that every child, once born, is entitled to its portion of happiness ; or the premise may even accord moral rights to unborn children. On the other hand, it may take a restrictive view and make the moral question depend on the prospect of happiness enjoyed by the particular infant. According to the latter interpretation, severely, handicapped infants may rightfully be put to death".

existence, unless hindered by the denial of liberty through an encroachment on a man's individuality and private interests by obstructive legislation.

So Mill embarked on what has since been called "a hymn in praise of liberty": his essay *On Liberty*¹⁴, regarded as "the finest and most moving essay on liberty in English, perhaps in any language"¹⁵.

Defining liberty as "consisting in doing what one desires" and "pursuing our own good in our own way"¹⁶, Mill sets out to establish once and for all "the nature and limits of the power which can be legitimately exercised by society over the individual", a question, he continues in a prophetic tone that "is likely soon to make itself recognized as the vital question of the future"¹⁷. The unimpeded exercise of one's individuality, one's originality, one's own desires and impulses, briefly one's own liberty, was for Mill a value in itself with which it is *prima facie* wrong to interfere and without which the pursuit of happiness is meaningless. For Mill, the full development of the human being through liberty is the supreme good, while every tendency toward conformity and regimentation is a step in the wrong direction. Mill insistently reminds those who are willing to repress individual liberty for the sake of a strong state that the worth of a state is no more than the worth of the individuals composing it. He writes :

A state which dwarfs its men in order that they be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work smoothly, it has preferred to banish¹⁸.

Where, then, does the authority of society over the individual begin and end? On what basis should actions become a fit subject for legislative interference? In

¹⁴ John Stuart MILL, *On Liberty* (1859). The citations are from Max Lerner (Ed.), *Essential Works of John Stuart Mill* (New York: Bantam Books, 1961).

¹⁵ William EBENSTEIN, *Great Political Thinkers* (New York: Holt, Rinehart & Winston, 1965), p. 531.

¹⁶ MILL, *op. cit.*, Chap. 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, Chap. 5. Strikingly similar to Mill's underlying philosophy on liberty is the following paragraph from the House of Commons (Canada) Speech from the Throne, 1970: "With foresight and stamina and enterprise, ours may be, if we wish it: a society in which human differences are regarded as assets, not liabilities; a society in which individual freedom and equality of opportunity remain as our most cherished possessions; a society in which the enjoyment of life is measured in qualitative, not quantitative terms; a society which encourages imagination and daring, ingenuity and initiative, not coldly and impersonally for the sake of efficiency, but with warmth and from the heart as between friends. The Canada of the seventies must continue to be a land for the people; a country in which freedom and individualism are cherished and nurtured; a society in which the Government lends its strength to withstand, rather than support, the pressures for conformity", *Debates of the House of Commons*, (Ottawa: Queen's Printer, 1970), October 8, 1970, pp. 1-2.

reply, Mill asserts that he has but "one very simple principle" to express the nature and limits of society's powers over the individual :

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is *self-protection*. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is *to prevent harm to others*. 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 some one else. The only part of the conduct of any one, 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 sovereign¹⁹.

Thus while Mill endows men with as much liberty as they are entitled to and as much as they can safely handle to follow their own bent and lead their own individual lives as they see fit, in the same breath, however, he subordinates this liberty to the interests of others and the community, only in the event that some individual action is likely to cause harm to others or is prejudicial to the public interest. For instance, he says, drunkenness as such is not a fit subject for legislative interference. But immediately he adds : "I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself . . . The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others"²⁰. Or again, while every man's opinions, whether right or wrong, ought to be permitted free expression, they become subject to legislation if their expression leads to actions which are detrimental to society at large : "Opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute by their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard"²¹.

Mill was not one to clamour for relief from political oppression or for a change in political organization. His appeal was for that kind of tolerance which values differences in points of view, limits the amount of agreement it demands

¹⁹ MILL, *op. cit.*, Chap. 1. Emphasis, showing Mill's key-words, is mine.

²⁰ *Ibid.*, Chap. 5.

²¹ *Ibid.*, Chap. 3.

and welcomes new ideas as sources of discovery. What Mill recognized was that behind the government that professed to uphold liberty, there must be a liberal way of life. With his essay, *On Liberty*, Mill sought to inaugurate a new society in which men would be left free to realize the rich potentialities with which they are endowed. The result, as envisaged by Mill, is a society enriched by the widest variety of individuals and which, in Mill's view, is at once the free and the just society.

Wolfenden In its formulation of the function of the criminal law, the Wolfenden Report²² echoes Mill's principle of legislation : the fact that an act is immoral ought not to be involved in a decision regarding its criminality nor must the law protect people from themselves. It must rather protect them from others — and that only by confining itself to preserving public order and decency. It is not to intervene in the private lives of citizens, nor to seek to enforce any particular pattern of behaviour further than is necessary.

It is important to note at the outset that Wolfenden was essentially interested in developing a working formula to reach practical conclusions concerning only those matters which his committee reviewed : homosexuality and prostitution. It is equally important to note that even in these matters the Wolfenden Committee was charged to deal with them only "in so far as they directly affect the public good"²³. It was not charged with providing a blanket-principle to cover other areas of sexual behaviour, much less all areas of man's moral and social behaviour. As the Report itself puts it : "Our primary duty has been to consider the extent to which homosexual behaviour and female prostitution should come under the condemnation of the criminal law"²⁴.

At the time, in England, the criminal law provisions concerning homosexuality and prostitution were these : homosexuality was a criminal offence ; prostitution was not. The committee's task, then, was not so much to make both offences criminally liable, but rather to establish a consistent policy of law on these two specific types of behaviour and in so doing to determine their degree of criminality. To this end, Wolfenden stated that the function of the criminal law, as it affects these two areas of sexual behaviour, is :

- a) to preserve public order and decency ;

²² *Report of the Committee on Homosexual Offences and Prostitution*, Chairman : Sir John Wolfenden (London : CMD 247, 1957). Cited as Wolfenden. For background information on the Committee's approach and deliberations, see Sir John Wolfenden, "Evolution of British Attitudes Toward Homosexuality", *American Journal of Psychiatry*, 1958, 125:792 ; Charles Berg, *Fear, Punishment, Anxiety and the Wolfenden Report* (London : Allen & Unwin, 1959).

²³ WOLFENDEN, §12. Unless otherwise indicated, references are to paragraphs.

²⁴ *Ibid.*, §13. Patrick DEVLIN, *The Enforcement of Morals* (Oxford : University Press, 1968), p. 3 : "These statements of principle are naturally restricted to the subject-matter of the Report".

- b) to protect the citizen from what is offensive or injurious ; and
- c) to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence ²⁵.

Guided by this threefold scope of the criminal law, Wolfenden goes on to lay down three categories of offences as falling within the law's jurisdiction : a) offences committed by adults with juveniles ; b) offences committed in public ; and c) homosexual offences committed between adults in private. With regard to the first two offences, the Report makes it clear that the Committee does not wish to see any change whatever in the law that would weaken this protection ²⁶.

The third category, the subject-matter of the Report, is precisely the category that resuscitated the problem and provoked the controversy whether or not immorality as such should be a crime, whether certain acts should be crimes because they are sins or because some other element is involved which makes them a fit subject for the criminal law. Wolfenden's conclusion with regard to this category — *and this category alone* — has since become classic : homosexual behaviour between consenting males in private should not be the concern of the criminal law : "Legislation which covers acts in the third category . . . goes beyond the proper sphere of the law's concern . . . unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good" ²⁷.

The immediate application of this principle involves prostitution. Wolfenden did not attempt to make prostitution in itself criminal ; he attempted to make it less visible : "What the law can and should do is to ensure that the streets of London and our big provincial cities should be freed from what is offensive or injurious and made tolerable for the ordinary citizen who lives in them or passes through them" ²⁸. Consequently, solicitation by prostitutes in public places should henceforth become illegal.

Thus Wolfenden 'decriminalizes' homosexuality and prostitution performed in private but 'criminalizes' their public manifestation. Wolfenden's operative term is "the private act" against "its public manifestation". Without attempting to

²⁵ *Ibid.*, § 13. Mill, *op. cit.*, Chap. 1, puts this point as follows : "It is perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury".

²⁶ *Ibid.*, §§ 48-50.

²⁷ *Ibid.*, § 52.

²⁸ *Ibid.*, § 285. Cf. also *Report of the Committee on Street Offences* (London : CMD 3231, 1928) : "The law is plainly concerned with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens . . . It is within this category of offences, if anywhere, that public solicitation for immoral purposes finds an appropriate place".

provide a legal definition, he defined the term "in private" as being immorality performed in the strictest privacy and not accompanied by some other feature such as indecency, corruption, exploitation, etc.

On the basis of these considerations, Wolfenden then raises this principle — again, directly to homosexual acts committed in private, indirectly to prostitution — to the compendious sphere of the relationship between law and morality, marking out — erroneously — the distinction between crime and sin. It is the best known passage, because it is the most quoted one, in the Report :

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 personal and private 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 ²⁰.

For Wolfenden, as it was for Mill, the promotion of the moral virtues is a matter for individual conscience and largely "a matter for agencies different in their operation from the forms of legal punishment" ²⁰. In other words, whatever the criminal law may or may not say, homosexual acts are sins ; the life of a prostitute is a life of sin ; as moral offences, they are a transgression of the law of God. But as social offences, the law should take note of them only "in so far as they directly affect the public good". Wolfenden's position is a bold acceptance of the fact that the community should not in general pry into a citizen's private deeds, even when they are misdeeds — or as David Frost might put it : "The Englishman is in favour of sin but opposed to the open enjoyment of it".

Notwithstanding its limited terms of reference, its limited premise and its limited applications, the Wolfenden principle has been applied to other areas of moral and social behaviour, not excluding abortion. In fact, since the Report's publication, hardly any other principle has been used to mark out the function of the criminal law in general as has Wolfenden's ²¹.

²⁰ *Ibid.*, §61.

²⁰ H. L. A. HART, *The Morality of the Criminal Law* (Jerusalem : The Hebrew University, 1964), p. 46.

²¹ Cf. American Law Institute, *Model Penal Code* (Philadelphia : American Law Institute, 1962), pp. 277-278 : "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners... Such matters are best left to religious, educational and other influences". See also, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* (Ottawa : Queen's Printer, 1969), March 25, 1969, p. 659 ; *Debates of the House of Commons* (Ottawa :

As far as abortion is concerned, the application of the principle is not immediately obvious. On the strength of the Wolfenden principle, abortion is relegated to the private realm not in so far as the actual operation itself is privately performed, becoming a criminal offence only if it is publicly manifested. Its application is achieved through a series of rigidly exclusive steps which appear to have found nebulous recognition in the history-making U.S. Supreme Court decision *Griswold v. Connecticut* (1965), striking down Connecticut's anti-contraception law³². That this law was a gross invasion of privacy is obvious: the Connecticut law, which had made sexual intercourse with contraceptives a statutory offence, required for its enforcement evidence of the actual marital act³³. But that the abortion law provides a similar invasion of privacy is not so obvious. The steps connecting contraception and abortion with the claim of privacy are briefly the following: though no law penalizing abortion interferes with sexual relations as such, nor does enforcement of the abortion law constitute an invasion of the nation's bedrooms by the state, as did the Connecticut anticontraception law, it is argued that pregnancy does to an extent, albeit a limited one, hinder sexual relations, so that if the hard-won rights to privacy and to the use of contraceptive measures had given married couples the right to control their reproductive functions as they see fit — to have the number of children they want, and conversely not to have any child they do not want to have — these rights are meaningless without the ultimate guarantee of the right to abortion in the event that pregnancy should follow intercourse.

The abortion and homosexuality sections in Canada's *Bill C-150 (1969)*, the whole bill in fact — seeing it lumps together a number of unrelated matters — was precisely an attempt: a) to consider as fit subjects for legislation matters regarded from a purely (or nearly) social standpoint; b) to accept the legality of certain practices, moral or immoral though they be; and c) to prevent socially detrimental excesses and socially detrimental side-effects³⁴.

For the time being, so much on Wolfenden's principle on the basis of which certain acts, which at the same time are held to be sins, might be written off the Criminal Code.

Queen's Printer, 1969), May 12, 1969, pp. 8576-8577; Edwin M. SCHUR, *Crimes Without Victims* (New Jersey: Prentice-Hall, 1965), *passim*, and in particular pp. 169-177: the law should have no business interfering in those "crimes" which are said to be "without victims" as are homosexuality, drugs, abortion, prostitution, since consent precludes the existence of a victim. Legislating such acts is an attempt to legislate morality.

³² 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

³³ David W. LOUISELL and John T. NOONAN, Jr., "Constitutional Balance", in John T. NOONAN Jr., (Ed.), *The Morality of Abortion* (Cambridge, Mass.: Harvard University Press, 1970), pp. 233-234: "The Connecticut law challenged was more stringent and sweeping than any statute, civil or ecclesiastical, in the history of social efforts to control contraception".

³⁴ *Bill C-150: Criminal Law Amendment Act, 1968-69*: "An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act." Popularly known as 'Omnibus Bill'.

The English Bench The Wolfenden Report touched off one of the liveliest and most heated debates on the relationship between law and morals and the criteria that the law should use to determine its criminal offences. But it was a pornography case, *Shaw v. Director of Public Prosecutions*, four years later, that tested the validity of Wolfenden's principle³⁵.

Following the enactment of *The Street Offences Act (1959)*³⁶ which, in accordance with Wolfenden's suggestion had driven prostitutes out of sight, a *Ladies' Directory* was published listing names and addresses of prostitutes with a coded indication of their practices and fees.

Now English judges, both in their judicial as well as in their extrajudicial capacity and equipped among other things with Lord Mansfield's history-making dictum of 1774

— Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish³⁷ —

had repeatedly proclaimed themselves as "the keepers of the nation's morals", in view of which the enforcement of certain actions which are immoral was in their view a proper function of the criminal law — as much its function, in fact, as the suppression of treason.

The great Victorian judge and historian of the criminal law, Sir James Fitzjames Stephen, was such a champion and defender of the contention that "the suppression of vice is as much the law's business as the suppression of subversive activities"³⁸. In a sombre and impressive book, *Liberty, Equality and Fraternity*, written in direct reply to Mill's *On Liberty*, Stephen insisted that it was perfectly legitimate for society to use the criminal law outside the limits prescribed by Mill and in particular to use it to enforce morality as such and quite independently of whether or not the immorality punished caused any harm or suffering to others. If the conduct punished was something that violated the generally accepted standards of society's morality that, for Stephen, was enough: "Criminal law in this country actually is applied to the suppression of vice and so to the promotion of virtue to a very considerable extent; and this I say is right"³⁹, an approach requiring of the criminal an awareness that he has committed not only a crime but also a sin. "As a judge who administers the criminal law and who has often to pass sentence in a criminal court", Lord Devlin would write later, "I should feel handicapped in my task if I thought that I was addressing an audience which had no sense of sin or which thought of crime as something quite different . . . I must

³⁵ *Shaw v. Director of Public Prosecutions (1961)*, 2 A.E.R. (1961), p. 446 et seq.

³⁶ 7 & 8 Elizabeth II, c. 57 (1959).

³⁷ *Jones v. Rendall (1774)*; H. L. A. HART, *Law, Liberty and Morality* (New York: Random House, 1966), p. 7.

³⁸ James Fitzjames STEPHEN, *Liberty, Equality, Fraternity*, 2nd ed. (London: Smith, Elder & Co., 1873), p. 162.

³⁹ *Ibid.*, p. 178.

admit that I begin with a feeling that a complete separation of crime and sin would not be good for the moral law and might be disastrous for the criminal law" ⁴⁰. There are some fundamental laws, Father Gilby points out on reviewing Devlin's position, "which need the backing of a sense of sin, so much so that if it did not exist it would be necessary to invent it for the health both of the individual and the group . . ." ⁴¹.

As a result of this judicial climate, Shaw, the appellant in the pornography case, was charged with : a) publishing an obscene publication ; b) living on the earnings of the prostitutes who paid for the insertion of their advertisements in the *Directory* ; and c) conspiring to corrupt public morals by means of the publication, or as phrased in the criminal charge : ". . . to debauch and corrupt the morals as well of youth as of divers other liege subjects of our Lady the Queen and to raise and create in their minds inordinate and lustful desires" ⁴².

Rejecting Wolfenden's and by implication the liberal principles, the judges in the House of Lords, Professor Hart of Oxford points out, not only raised no objection to the inclusion of the charge of conspiracy to corrupt public morals (as opposed to the morals of a particular individual), but with only one dissident they confirmed the prosecution's contention that this was an offence still known to English law and insisted that it was a salutary thing that this should be so ⁴³. On that occasion, Lord Simonds, one of the judges and a former Lord Chancellor, made the following statement which should provide guidance to the English Bench for many more years to come :

When Lord Mansfield . . . 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. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society . . . Must we wait till Parliament finds time to deal with such conduct ? I say, My Lords, that if the common law is powerless in such an event then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's Judges to play the part which Lord Mansfield pointed out to them ⁴⁴.

Shaw was found guilty as charged — but not without being offered the consolation that the charge was one of "the unravished remnants of the common law"

⁴⁰ DEVLIN, *op. cit.*, p. 4.

⁴¹ GILBY, *op. cit.*, in *Blackfriars*, 41:54.

⁴² *Shaw v. D.P.P.*, *op. cit.*, pp. 446.

⁴³ HART, *Law, Liberty and Morality*, *op. cit.*, p. 8.

⁴⁴ *Shaw v. D.P.P.*, *op. cit.*, pp. 452-453. For 'conspiracy to corrupt public morals', see DEVLIN, *op. cit.*, pp. 97-101 ; Glanville WILLIAMS, "Conspiring to Corrupt", *The Listener*, August 24, 1961, p. 275.

and that he had been convicted only after the earnest deliberations of twelve members of the jury⁴⁵.

Devlin and Hart In the academic sphere, the debate on Wolfenden's principle, eventually on the verdict of the Shaw case, was liveliest between Lord Devlin, a noted English judge⁴⁶, and Professor Hart of Oxford⁴⁷. Behind him, Hart had the philosophy of Bentham and Mill and in general the support of the liberal point of view. Devlin could count on the implicit support of the English Bench who in their approach towards the judicial cases brought before them and inspired by "the powerful hand of the common law" largely followed their own independent and traditional line.

Professor Hart's and Lord Devlin's respective positions are briefly the following: Hart broadly accepts Mill's and Wolfenden's line of thought "on the narrower issue relevant to the enforcement of morality", but he disagrees with Mill in that he recognizes "there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others"⁴⁸. Lord Devlin endorses the latter view and also accepts both Wolfenden's distinction between crime and sin — though he admits he "had never before thought about this distinction otherwise than superficially"⁴⁹ — and the principle that there is a realm of morality which is not the law's business. However, he disputes the reasoning behind them. For, in Devlin's view, "the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corrup-

⁴⁵ For criticism of the Shaw verdict, see: J. E. Hall WILLIAMS, "The Ladies' Directory and Criminal Conspiracy", *Modern Law Review*, 1961, 24:631: "judicial folly"; D. Seaborne DAVIES, "The House of Lords and the Criminal Law", *Journal of the Society of Public Teachers of Law*, 1961, p. 105: "an egregious performance"; A. L. GOODHART, "The Shaw Case", *Law Quarterly Review*, 1961, 77:567: "an important contribution to the development of the criminal law".

⁴⁶ Patrick DEVLIN, *The Enforcement of Morals*, *op. cit.* For an endorsement of Devlin, see in particular: Eugene ROSTOW, "The Enforcement of Morals", *Cambridge Law Journal*, November 1960 [Reprinted in Eugene Rostow, *The Sovereign Prerogative* (Yale: University Press, 1962)].

⁴⁷ H. L. A. HART, *Law, Liberty and Morality*, *op. cit.*; *The Morality of the Criminal Law*, *op. cit.*; *The Concept of Law* (Oxford: Clarendon Press, 1967); "The Use and Abuse of the Criminal Law", *Oxford Lawyer*, 1961, 4:7; "Immorality and Treason", *The Listener*, July 30, 1962; "Positivism and the Separation of Law and Morals", *Harvard Law Review*, February 1958, 71:593-629.

⁴⁸ HART, *Law, Liberty and Morality*, *op. cit.*, pp. 5-6; Hurt, *op. cit.*, in *New Individualist Review*, II:38-39, is also of the same view arguing that if Mill's principles were strictly adhered to, another extreme position would arise defeating Mill's appeal for freedom. Hurt says that Mill's maxims can be stretched to sanction almost any conceivable state intervention, since it is difficult to conceive of any act which could not adversely affect no one except the individual who performs it.

⁴⁹ DEVLIN, *The Enforcement of Morals*, *op. cit.*, p. vi.

tion, and exploitation ; the law must also protect the institutions and the community of ideas, political and moral, without which people cannot live together" ⁵⁰.

Devlin reaches that position on the basis of affirmative answers he gives to two intimately related questions which at once provide him both with his point of departure as well as with his point of arrival : a) has society the right to pass judgment at all on matters of morals ? b) if society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it ?

Steeped as he is in the unremitting traditions of the English Bench as "the preserver of the moral welfare of the State" — to Hart all this is "legal moralism" ⁵¹ — Devlin strongly defends the position that morality must be the basis of the criminal law and its enforcement as much its function as the suppression of treason : for society is a community of shared ideas of which moral principles are an essential part : they are "built into the house in which we live and could not be removed without bringing it down" ⁵². Consequently, just as there is no justification in providing society with an *a priori*, theoretical, limit as to how far the law may go in legislating against sedition to safeguard whatever is essential to its existence, so also one may not put an *a priori*, theoretical, limit as to how far the law may go in legislating against immorality. What, for Devlin, is even more important is that one may not put a theoretical limit as to how far the law may go in enforcing what brings about a healthy moral climate in society, even if this should constitute an extreme invasion of a man's privacy ⁵³. "Even where it constructs a citadel", he writes, "the law may build outposts as well so as to be an added protection" ⁵⁴. So it is not enough that the law condemn only the public manifestation of the 'private vice' ; it must as well condemn the vice itself and whatever brings it about simply because like subversive activity it threatens or is capable of threatening the moral integrity of the community or some great moral principle on which society is based.

Devlin charges that Wolfenden's special circumstances that justify the law's intervention in matters of homosexuality and prostitution are such that "they can be supported only if it is accepted that the law *is* concerned with immorality as such" ⁵⁵. For instance, if society is not prepared to say that homosexuality is morally wrong, then there is no basis for a law protecting youth from "corruption" or punishing a man for living on the "immoral" earnings of prostitution as the Report recommends ⁵⁶.

⁵⁰ *Ibid.*, p. 22.

⁵¹ HART, *Law, Liberty and Morality*, *op. cit.*, p. 6.

⁵² DEVLIN, *op. cit.*, pp. 9, 11, 24-25.

⁵³ *Ibid.*, p. 118 : "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".

⁵⁴ *Ibid.*, pp. 29-30.

⁵⁵ *Ibid.*, p. 11. Emphasis is author's.

⁵⁶ *Ibid.*, p. 8. Cf. WOLFENDEN, §§ 48-49, 76.

For Devlin, the protection of individual liberty is not achieved by making of the law what Battifol calls "*un bastion inexpugnable de droits individuels*"⁵⁷, nor is the protection of society achieved only by crushing seditious activities, by preventing harm to others, or by ensuring the non-manifestation of a privately-performed immoral act. The protection of political and individual liberties is ensured by widening the ambit of the law making it capable of securing all these vital aspects of social life and something more besides: namely, of enforcing those moral standards or principles which are as necessary to the welfare of society as good government and without which society is affected injuriously⁵⁸.

Underlying Devlin's approach is his conviction that there is no such thing as a private and public morality any more than there is a private and public highway:

Morality is a sphere in which there is a public interest and a private interest . . . It is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the state to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality⁵⁹.

While Mill and Wolfenden understand morality as an exclusively private matter and the responsibility of agencies other than the law, Devlin understands it in terms of 'personal' and 'social', representing not quite two distinct spheres of activity — and never, or hardly ever, the twain shall meet — but rather as different phases in and different abstractions from one single course of activity⁶⁰. Within this framework, human conduct is not viewed in isolation from its effect on society; nor are private immoral acts necessarily of concern only to the individual who performs them: they could well have very serious social (or public) repercussions and, in Devlin's view, to a greater or lesser extent they usually do affect society adversely⁶¹. Put differently, Mill and Wolfenden recognize the necessity of legal intervention whenever harm to others is caused or whenever the private immoral act is accompanied by some such feature as indecency, corruption, exploitation, etc.; Devlin recognizes such necessity even before these situations arise. To this end, the line that divides the criminal law from the moral law is not determinable by the application of any rigid and exclusive principle. There simply is, in Devlin's view, no theoretical limit one may put to the law in enforcing morality as such in the same way that one may not put a theoretical limit to the law to suppress seditious activities.

⁵⁷ Henri BATTIFOL, *La Philosophie du Droit* (Paris: P.U.F., 1960), p. 115.

⁵⁸ DEVLIN, *op. cit.*, pp. 10, 13, 15.

⁵⁹ *Ibid.*, pp. 14-16; see also, HART, *Law, Liberty and Morality*, *op. cit.*, p. 45.

⁶⁰ Cf. GILBY, *op. cit.*, in *Blackfriars*, 41:55-56.

⁶¹ DEVLIN, *op. cit.*, p. 15.

Later in the day, however, in the face of severe criticism, Devlin re-stated his position as follows : "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"⁶².

If not *all* deviation from a society's shared morality threatens society's existence, it remains to be seen *what* deviation should fall within the purview of the criminal law. This brings Devlin to a third question : if society has the right to pass judgment on moral matters and the right to use the weapon of the law to enforce this judgment, ought it to use that weapon in all cases or only in some ; and if only in some, on what basis should it distinguish ?

Here Devlin wrestles with the basic issue of how the rights and interests of society can be balanced against those of the individual. For though Devlin admits that in theory the law may go all the way to enforce morality as such, he does concede that in any highly secularized and pluralistic society, it is practically impossible to enforce any law for purely religious or moral principles. In the present state of affairs, what the law should seek to enforce is what in the judgment of "the right-minded person" is enforceable, provided further "the forces behind the moral law", namely, "intolerance, indignation and disgust" are present⁶³. For Devlin, the right-minded person is personified in "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"⁶⁴. For the purposes of the law, then, immorality is "what every right-minded person is presumed to consider to be immoral" and if the three forces behind this moral judgment are present, then, says Devlin, their presence is "a good indication" that "society's feelings" concerning any given act are "weighty enough to deprive the individual of freedom of choice" and the act concerned should be legislated against⁶⁵. The right-minded person, sitting dispassionately in the jury box, provides Devlin with the 'yardstick' the law requires to determine which actions should be legally liable, for "it will not in the long run work to make laws about morality that are not acceptable to him"⁶⁶. However, Devlin thinks and he has every reason

⁶² *Ibid.*, p. 13, note 1. Emphasis is author's.

⁶³ *Ibid.*, pp. 16-17 ; also pp. viii-ix. Stephen, *op. cit.*, p. 174, had also posited a similar proviso, namely, that the law should not be used unless what it seeks to enforce is supported by "an overwhelming moral majority".

⁶⁴ *Ibid.*, p. 15.

⁶⁵ *Ibid.*, p. 17.

⁶⁶ *Ibid.*, pp. 15, 21, 90-91. The faith of the English Bench in the jury is classic. On the occasion of the Shaw trial, Lord Morris stated : "Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved" ; Lord Hodson said that the

to believe that the right-minded person also so thinks that immorality as such, even that which is usually classified as private sexual immorality, should, like treason, be considered as something which *de facto* jeopardizes or is capable in its nature of jeopardizing society's moral integrity and existence and, like treason, should be a fit subject for the criminal law.

Though Devlin does not advocate any specific ethics as being society's shared or common morality, to all intents and purposes he envisages Christian ethics : in the last analysis, the right-minded person is for Devlin the man of Western society, in the main a Christian society⁶⁷.

Because of their attitude towards the whole question of law and morals in general and the Shaw case in particular, Professor Hart, the leading writer on jurisprudence in the English-speaking world, takes the judiciary (and Devlin) to task charging that they made an excursion into the area of policy, a very rare occurrence for English judges : the revival of the idea that the courts should function as the *custos morum* was plainly a deliberate act of policy which, in Hart's view, fashioned a very formidable weapon for punishing immorality as such⁶⁸. Even under the rigorous English doctrine of precedent, Hart argues, the old cases relied upon as precedents plainly permitted, in Shaw's case, a decision either way. But the judges seemed willing to pay a high price in terms of the sacrifice of other values for the establishment, or re-establishment, of the courts as "the general censor and guardian of the public manners". The particular value which they sacrificed is the principle of legality which required criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand which acts are criminal and which are not⁶⁹. As for Devlin's "right-minded person" and the faith of their Lordships in the man in the jury box, Hart dismisses this standard as probably being "merely a projection of the judge's own morality or that of the social class to which he belongs"⁷⁰.

With Bentham and particularly with Mill, Hart argues that

... the use of the criminal law is an evil requiring justification and that it is not justified by the mere fact that the conduct which the criminal law is used to punish is an offence against the accepted code of the community. For the justification of punishment something more than this is required : it must be shown that the conduct punished is either directly harmful either to individuals or their liberty or jeopardizes the collective interest which members of society have in the maintenance of its organization or defence. The maintenance of

function of *custos morum* would ultimately be performed by the jury : "In the field of public morals, it will thus be the morality of the man in the jury box that will determine the fate of the accused". Cf. *Shaw v. D.P.P.*, *op. cit.*, pp. 290-292.

⁶⁷ DEVLIN, *op. cit.*, pp. 24-25.

⁶⁸ HART, *Law, Liberty and Morality*, *op. cit.*, pp. 8, 10.

⁶⁹ *Ibid.*, pp. 11-12.

⁷⁰ HART, *The Morality of the Criminal Law*, *op. cit.*, p. 41.

a given code of morals 'as such' is not, according to this outlook, the business of the criminal law or of any coercive institution. It is something which should be left to other agencies : to education or to religion or to the outcome of free discussion among adults ⁷¹.

Hart is as fiercely critical of Devlin, his peers and his predecessors as Bentham and Mill were of the English judges of their day. He recalls to this effect how Bentham "fired the first shot with his invective against those whom he often termed 'Judge and Co' . . . and whom with some good reason he accused of blocking urgent reforms and offering only a blind conservatism or indeed a blind eye as a remedy for urgent social evils" ; and how Mill accused the English judges with misleading juries, displaying "that extraordinary want of knowledge of human nature and life, which continually astonishes us in English lawyers" ⁷².

As understood by the liberal philosophers and jurists, the function of the criminal law is, or should be, unconcerned with morality as such but merely with those fringes of it which affect the protection of the community and its individual members. Within the framework of this approach, 'private vice' does not injuriously affect the community and its members. But Devlin and what Hart calls "the English judicial philosophy *par excellence*" think that it does and should be as criminally liable as its public manifestation. To put it in another way : the Hart approach wishes to have, in the words of Professor Merrills of Toronto, the minimum of rules necessary for the playing of the game leaving the spirit of the game to be developed by the players. The Devlin approach sees the function of games as the inculcation of a particular code of sporting behaviour which he therefore wants to see incorporated in the rules of the game ⁷³.

Devlin would not have anything to do with yardsticks : in matters of morality, as in matters of subversive activities, the law should have a *carte blanche*. Hart provides a yardstick or rather endorses one : it is that which, in sexual matters, generally divides the punishment of immorality (the private vice) from the punishment of indecency (the public manifestation of the private vice). In support of this demarcation line, Hart draws one's attention to the Romans' studious and careful distinction between the province of the 'Censor', concerned with morals, and the province of the 'Aedile', concerned with public decency. Perhaps little attention is paid to this distinction, says Hart, and one of the judges in the Shaw case went out of his way, in Hart's words, "to profess indifference to it" :

⁷¹ *Ibid.*, pp. 31-32.

⁷² *Ibid.*, p. 32. On p. 36, Hart observes : "It is natural to wonder what it is that makes for such continuities which do not seem to depend on one generation of judges reading what an earlier generation wrote". And he goes on to ask rhetorically : "Is this persistence explicable in terms of social origin, education, or the conditions and status of an English judge's office ?". Cf. MILL, *op. cit.*, Chap. 3 (footnote).

⁷³ J. G. MERRILLS, "Law, Morals and Psychological Nexus", *University of Toronto Law Journal*, 1969, 21:58.

It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires it will seem a corruption of morality⁷⁴.

But, Hart goes on, the distinction is in fact both clear and important :

Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse between consenting adults in private is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public. But the fact that the same act, if done in public, could be regarded both as immoral and as an affront to public decency must not blind us to the difference between these two aspects of conduct and to the different principles on which the justification of their punishment must rest. The recent English law relating to prostitution [*The Street Offences Act, 1959*] attends to this difference. It has not made prostitution a crime but punishes its public manifestation in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive⁷⁵.

Devlin insistently and repeatedly retorts by saying that the law cannot be told "so much is the law's business but more is not" and that it cannot intervene whenever a practice is regarded "as a vice so abominable that its mere presence is an offence", even if the law's intervention might be construed as an invasion of privacy. At this stage of his discussion, Devlin softens this point considerably by introducing a principle that, he says, "must be advanced more tentatively" : while whatever is done or said "in public or private" is all brought within the criminal law's scope "without distinction in principle", Devlin is quite prepared to set what appears to be a practical limit to the law: as far as the detection of crime and the enforcement of the law are concerned, privacy, says Devlin, should be respected: "When the help of the law is invoked by an injured citizen, privacy must be irrelevant . . . but when all who are involved in the deed are consenting parties and the injury is done to morals, the public interest in the moral order can be balanced against the claims of privacy"⁷⁶. Following the implications of this "tentative principle", which Devlin does not pursue to any extent, and shifting it to the level of the educative force of the law, it might be said that having a law against any immoral action — without invading the nation's bedrooms to enforce it — is a means of upholding a code that does not approve of such actions. Perhaps it could also be said to be a way, on the one hand, of accommodating divergent points of view

⁷⁴ *Shaw v. D.P.P.*, *op. cit.*, p. 452 ; HART, *Law, Liberty and Morality*, *op. cit.*, p. 44. For an incisive discussion of this point, see : "The Censor as Aedile", *Times Literary Supplement*, August 4, 1961, p. 1 ; Ronald DWORKIN, "Lord Devlin and the Enforcement of Morals", in Judith J. Thomson and Gerald Dworkin (Eds.), *Ethics* (New York : Harper & Row, 1968), pp. 468-491.

⁷⁵ HART, *Law, Liberty and Morality*, *op. cit.*, p. 45.

⁷⁶ DEVLIN, *op. cit.*, pp. 17-19, 113.

manifesting "society's continuing commitment to its preferred values" ⁷⁷ and, on the other, of educating "the well-intentioned average man seeking society's judgment" ⁷⁸.

What is significant and at the same time crucial in the contemporary dispute over the proper scope and use of the criminal law is not merely the kind of 'moral' or 'immoral' acts to be enforced but rather the principles that the law should use to determine which acts, with or without moral overtones, should be criminally liable.

Devlin's and the English judiciary's approach on the wider issue of the enforcement of morals is probably 'ideal'. But in the irreducibly pluralistic society that is ours, human, social and political life is regrettably neither inspired nor governed by the high ideals that Devlin can set up for it.

Devlin considers the distinction between private and public as illusory. Professor Mewett of Toronto is quite prepared to accept Devlin's explanation but he adds that, as a principle of legislation, "this is of no assistance in determining whether and to what extent the law should enforce moral ideals by criminal sanctions. To assert that all immoral acts are detrimental to society is not the same as asserting that all acts that are detrimental to society are immoral, nor can one slide from that proposition into stating that therefore all immoral acts are a fit subject for the criminal law" ⁷⁹. Norman St. John-Stevás also notes this gap in Devlin's argument: the conclusion that society has the right to enforce moral judgments does not necessarily flow from the premises that it has the right to pass them. While the law operates within a framework of moral concepts, it does not necessarily follow that it has every right to enforce all moral principles ⁸⁰. Furthermore, to determine whether and to what extent the law should enforce moral ideals, Devlin uses the standards of the right-minded person. The right-minded person may be correct in his judgments (and one sincerely hopes that he is always correct) but to use him as a device by which the law may ascertain the 'common belief' that Devlin speaks of is open to severe criticism. "Jury decisions are one indication of society's moral opinions", writes Stevas, "but they are not its sole source as he suggests. Lawmakers can look to other institutions, groups and individuals, to help them reach conclusions. Furthermore, in practice, juries may not afford explicit guidance where it is most needed. Controversial moral issues are precisely those on which society, and therefore the jury, has ceased to have a unanimous opinion" ⁸¹.

⁷⁷ John M. FINNIS, "Three Schemes of Regulation", in NOONAN, *op. cit.*, p. 179; also pp. 204-205 for what Finnis thinks are insubstantial differences between the positions advocated respectively by Devlin, *op. cit.*, p. 113, and Hart, *The Morality of the Criminal Law*, *op. cit.*, p. 47.

⁷⁸ Robert E. COOKE *et al.*, (Eds.), *The Terrible Choice: The Abortion Dilemma* (New York: Bantam Books, 1968), pp. 63, 97.

⁷⁹ MEWETT, *op. cit.*, in *University of Toronto Law Journal*, 14:223.

⁸⁰ STEVAS, *op. cit.*, p. 36; *Law and Morals* (New York: Hawthorn Books, 1964), p. 25.

⁸¹ STEVAS, *Life, Death and the Law*, *op. cit.*, p. 42.

Finally, the three forces behind the moral law which Devlin posits — intolerance, indignation and disgust — ground ethico-legal judgments on something most arbitrary: the subjective and emotional reaction of the people. Applied to abortion, the dispute is soonest ended: there does not appear to be general intolerance, indignation and disgust today against permitting abortion. On the contrary, these three forces will be all the more evident if abortion law reform is suppressed. While he goes to great lengths to uphold the Christian basis of society, all of a sudden he tries to uphold that basis without Christianity and without morality.

Wolfenden's principle of legislation concerning the private act is not exempt from criticism either.

Wolfenden equates the sphere of sin with private immorality, thereby limiting the scope of sin and of morality. Sin, as a transgression of the divine or moral law, is indeed of no concern to the law but the law may well be concerned with that "course of conduct which is contrary to the best interests of the community", conduct which may at the same time be sinful and which "it has always been thought right to bring within the scope of the criminal law on account of the injury which they occasion to the public in general"⁸². By equating sin with the private and crime with the public realm, Wolfenden confuses the distinction: while the law may well punish conduct which happens to be sinful, it is not thereby committed, as Wolfenden suggests "to a deliberate attempt through the agency of the law 'to equate the sphere of crime with that of sin'"⁸³. Granted that there is an area of morality which is not the law's business, the line that separates the two is by no means the same line that separates the private from the public. Perhaps Wolfenden could have anticipated this objection by saying that a private act is one that does not affect the community at large or its welfare, etc., without mentioning sin at all.

In his criticism of Wolfenden, Devlin makes a valid point when he says that if Wolfenden's principle is meant only as a slogan to draw attention in a dramatic way to the fact that homosexual offences are usually committed in private and without direct injury except to the participants, it is not worth further comment, but if it is really meant as a statement of principle which could possibly include other immoralities, every practical reformer before he makes use of it will want to be told what else it embraces. For instance, artificial insemination by a donor is undoubtedly an act performed in the strictest privacy of one's bedroom but not, for that matter, without some profound effect on society as a whole and specifically on the status of the family as "built into the house in which we live". If the principle is conceded in one area, what other areas of the existing criminal law will be carried away as well? "These are not questions", writes Devlin, "that can be shirked indefinitely by anyone who regards the principle as relevant to contemporary social reality" and which to all intents and purposes is being used to decriminalize all private acts⁸⁴.

⁸² Cf. WOLFENDEN, pp. 117-118, for Mr. Adair's reservations.

⁸³ STEVAS, *Life, Death and the Law*, *op. cit.*, p. 35; WOLFENDEN, §61.

⁸⁴ DEVLIN, *op. cit.*, pp. 138-139.

For all his genuine efforts to safeguard society's shared or common morality and the law's ethical basis, Devlin takes only "tentative" care to safeguard to some extent individual choices and hardly leaves any basis for religion, the church, etc. Then while Bentham, Mill, Wolfenden and Hart go to great lengths to respect individual freedom, they merely demand of the law to do 'policing work' to oversee that what is done does not actually cause harm to others. Within this so-called non-paternalistic view, most if not all private sexual offences, when corruption of youth is not involved and when not performed in a public place, do not cause harm to others or the public interest in general.

The source of their respective major deficiency appears to lie : for the liberal tradition, in its point of departure ; for Devlin, in his point of arrival. On the one hand, behind Bentham's and Mill's principle of legislation lies a moral theory of utilitarian expediency which, while making abortion practically mandatory, does not pass the test against several immoralities, not excluding such vital matters as infanticide, euthanasia, suicide, etc. On the other hand, Devlin's considerations lead him to solve an ethico-legal problem exclusively (or almost exclusively) by moral principles based on something most arbitrary. Both approaches cut across a number of values held sacred and untouchable both by the abortion law reform movement as well as by its opponents. For one, the legalization of abortion violates a number of moral principles which are "the cement of society" ; for the other, the legal proscription of abortion violates the individual's right to self-determination and is little short of legalizing 'paternalism' and 'morality' and now even of invading a woman's constitutionally protected right of privacy. But, then, as Devlin puts it, "in passing sentence upon a female abortionist, ought one to treat her simply as if she were an unlicensed midwife ? If not, why not ? But if so, is all the panoply of the law erected over a set of social regulations ?" ⁸⁵ That is precisely what the liberal philosophers and by extension the abortion law reform movement are arguing about.

Notwithstanding their theoretically irreconcilable approach, both make a practical concession which unites rather than separates them. Devlin puts it as follows :

When we are constitution-making — whether what is being formulated is a clause in writing or a principle supported by tacit consent — it is *the nature of the subject-matter that is the determinant*. Whether society should have the power to restrain any activity depends on the nature of the activity. Whether it should exercise the power at any given time in its history depends on the situation at that time and requires *a balance to be struck between the foreseeable danger to society and the foreseeable damage to the freedom and happiness of the individual* ⁸⁶.

Speaking specifically of the abortion issue, Hart advances the same principle : "In the circumstances such as these it seems most desirable to many critics of the law

⁸⁵ *Ibid.*, p. 4.

⁸⁶ *Ibid.*, pp. 112-113. Emphasis is mine.

that the issue should be calmly viewed as one to be decided by consideration of *the balance of harm done by the practice, and the harm done by the existing law*"⁸⁷.

In the light of these practical conclusions, it is yet possible to search for an ethico-legal principle possibly acceptable as much to the liberal trend as to the traditional philosophers. If that is possible, then one would disagree in theory with Devlin and in practice with Wolfenden and Hart "that a theoretical principle limiting enforcement of morals by the law can be erected, a principle derived deductively from considering the nature of both, and inductively from the experience of the common law, namely that those moral offences which affect the common good are fit subjects for legislation"⁸⁸.

II. THE THOMISTIC APPROACH

St. Thomas discusses his principle of legislation largely in his *Treatise on Law* (1269-72), a miniature *magna charta*, in which he establishes inch by inch the function of law and its relationship with the moral sphere⁸⁹. Its chief merit lies in the fact that St. Thomas housed it within the larger scope of ethics, placing law in the realm of value. By so doing, he sought to avoid the very imminent danger of setting up the individual good and the common good in direct opposition to each other, a situation which would inevitably lead to a false identification of the part with the whole, either by reducing the whole to its parts or by denying the parts all individuality within the social order.

Perhaps it is not too clear that Aristotle himself avoided this danger, even after Plato had demanded of the organized community the same moral virtues as were demanded of the citizens. To St. Thomas it appeared that Aristotle intended to treat of virtues as directed to civic life. The subordination of ethics to politics was probably what Aristotle intended to do. But such an approach appeared to St. Thomas to be conducive to dangerous assumptions, not least to making the state the final arbiter of right and wrong⁹⁰.

Law Defining law as "an ordinance of reason for the common good promulgated by him who has the care of the community"⁹¹, St. Thomas argues that all law originates in God's own eternal law and is accessible to man in two ways : a) through direct revelation, the divine law ; b) through human reason, the natural law. Being alternative ways of apprehending the eternal law of God, neither divine

⁸⁷ HART, *The Morality of the Criminal Law*, *op. cit.*, p. 47. Emphasis is mine.

⁸⁸ STEVAS, *Life, Death and the Law*, *op. cit.*, pp. 37-38.

⁸⁹ I-II, qq. 90-97, trans. by English Dominican Fathers (New York : Benziger Brothers, 1911-29) ; cf. also, Walter FARRELL, *A Companion to the Summa* (New York : Sheed & Ward, 1938-42), 4 vols.

⁹⁰ Cf. Vincent McNABB, *St. Thomas Aquinas and Law* (London : Aquinas Society of London, Paper No. 24, 1929), pp. 5-6.

⁹¹ I-II, q. 90, a. 4 ; also aa. 1-3 ; q. 96, a. 1.

law nor natural law can ever be in conflict with it or with each other. Nor can human law — derived as it is from natural law and being, as it were, its verbal expression — be subject to irreconcilable conflict with natural law ; if it were, it would possess no validity. What gives human law a rightful claim to call itself law, in the thomistic sense of the word, is not the simple fact that it is enacted by a law-maker but that it implements divine and natural law. Hence like the natural law itself, the true function of human law is ultimately to lead men to virtue⁹².

It might be objected here that if human law is an instrument to promote virtue, then St. Thomas' moral purposive interpretation of the law might well lead to precisely what he sought to avoid and what positivism strongly denounces : a tyrannical supervision of the moral life of the individual, "not that it may lead to anarchy but that it may push us too far in the opposite direction" posing "a threat to human freedom and human dignity"⁹³ It is at this junction that St. Thomas' practical wisdom concerning the function of human law and its limited powers can be seen, for, unlike natural law embodying as it does general principles universally applicable to men, human law, as the articulate decree of a human agent, consists of relatively detailed decrees applicable to very specific and particular communities. "Wherefore", as he would say, "laws should take account of many things, as to persons, as to matters, and as to times"⁹⁴. Briefly, law is meaningless without reference to the concrete situation in which particular communities exist and develop. Of its very nature, then, unlike morality, law is a limited agency. While it seeks the good of the community which it serves and by so doing ensures the community's continued existence, morality goes beyond this to seek the good of the person as person : morality is ultimately concerned with the individual judgment of one's conscience and calls for conformity of that judgment with the ideal. The law has no such concern. Its scope is more pragmatic in that it looks to the outward conformity of man's actions in relation to what it approves or disapproves, meaning in effect that the law is not designed, nor is it competent, for the work of preparing men for salvation in the world to come⁹⁵. While it can make sure that we do justice to our fellow-men, it cannot make of us just men. Its immediate task is fulfilled when certain preliminaries or what St. Thomas calls "*prima initia*" are observed⁹⁶. Designed as it is for the better enjoyment of the goods available in a particular society, it does not disapprove of certain actions because they are exclusively morally objectionable but rather because they threaten or in their nature are capable of threatening the sort of community in which we want to live. Legislators

⁹² *Ibid.*, q. 96, a. 4 ; q. 92, a. 1 ; II-II, q. 64, a. 6, ad 3.

⁹³ Lon L. FULLER, "Positivism and Fidelity to Law — A Reply to Professor Hart", *Harvard Law Review*, 1958, 71:670-671 ; cf. H. L. A. HART, "Positivism and the Separation of Law and Morals", *Harvard Law Review*, 71:593-629.

⁹⁴ I-II, q. 96, a. 1.

⁹⁵ *Quodl.* 12, 25, c ; I-II, q. 92, a. 1.

⁹⁶ GILBY, *op. cit.*, in *Blackfriars*, 41:57 ; I-II, q. 100, a. 9.

are not, in Gilby's phrase, "spiritual directors"; they are rather "guardians of the peace"⁹⁷. Furthermore, law is not a science with rigid, cut and dried rules, but a 'fluid art' to be practised in the realm of the contingent, the relative, the practical, the particular⁹⁸. Even the logic used in its philosophical striving for justice is not irrefutable. For the law, as society's instrument to promote peace and ensure its stability, envisages human actions and hence is at grips with the individual, the variable and contingent element, who though he might be said to be capable of achieving perfection is not here and now perfect.

One can then proceed by saying that though the law is intended to lead men to virtue and though theoretically "there is no virtue whose acts cannot be prescribed by the law"⁹⁹, it does not seek to prescribe all the acts of every virtue nor all the acts of some virtues; it does not seek to proscribe all the acts of every vice nor all the acts of some vices¹⁰⁰. What, then, is the law's function with respect to virtue and vice? On what basis does it determine which acts of which virtues it should promote and which acts of which vices it should forbid?

With a few deft strokes, St. Thomas answers as follows, providing us at once with his principle of legislation:

Human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike¹⁰¹.

Prima facie, St. Thomas uses the same principle that Mill uses: "chiefly those that are to the hurt of others". However, he as quickly adds: "without the prohibition of which human society could not be maintained". Legislation of any given act is at once seen chiefly in terms of both the good of the individual as well as the good of society, comprising all those basic values without which "the common good of all the citizens"¹⁰² would be exposed to great risks of self-destruction. What essentially determines law, then, is its final end: the good possessed or worthy of being possessed by all the citizens alike, for the sake of which St. Thomas is quite prepared to leave certain actions, vicious though they be, out of the law's jurisdiction. Hence the law should be "proportionate to the common good"¹⁰³, framed in such a way as to be within the reach of every man, virtuous and vicious alike, "just, possible to nature, according to the customs of the country, adapted

⁹⁷ — *Principality and Polity* (London: Blackfriars Publications, 1958), p. 30.

⁹⁸ I-II, q. 91, a. 3, ad 3; q. 96, a. 1, ad 3; q. 105, a. 2, ad 8.

⁹⁹ *Ibid.*, q. 96, a. 3

¹⁰⁰ *Ibid.*, aa. 2-3.

¹⁰¹ *Ibid.*, a. 2.

¹⁰² *Ibid.*, a. 1.

¹⁰³ *Ibid.*, a. 2; q. 95, a. 3.

to place and time . . . necessary, useful, helpful to discipline . . . capable of furthering the common weal . . ." ¹⁰⁴. To this end, even as he speaks of the prescription of some acts of some of the virtues and the proscription of some acts of some of the vices as being the purpose of the law, this purpose is not unqualified : out of consideration of individual freedoms and of the common good he further limits this purpose by saying that though "the purpose of the law is to lead men to virtue", it should not do so "suddenly but gradually" — essentially meaning that the law operates in an imperfect world but it dare not relax the effort to make men better. Hence those actions, moral or immoral though they be, which *prima facie* should be crimes and are in fact crimes are not crimes because they are immoral but because demonstrable social harm results from them as in the case of murder, etc. Conversely, the law accepts the legality of certain actions, moral or immoral though they be, because it is capable of reducing them, in Professor Mewett's words "to a level where society can absorb the harmful effects of crimes without danger to its stability" ¹⁰⁵. St. Thomas puts it as follows :

The purpose of the law is to lead men to virtue, not suddenly but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils . . . ¹⁰⁶.

Put differently : the very starting point of investigation must be the situations in which human nature lives and acts ; consequently, the legislator must take into account the widely different states and conditions and times of men, meaning that laws must be as diversified as are the ways of various communities. At the heart of this approach lies the one criterion that probably sums up the thomistic principle of legislation : *feasibility* — that quality whereby a proposed course of action is not merely possible but practicable, adaptable, depending on the circumstances, cultural ways, attitudes, traditions of a people, etc., involving not so much ends and objectives as such, as the selection of means to reach these ends and objectives that the communities set themselves. Given a right objective, the people work out for themselves and within the framework of their culture, the manner in which they can achieve that objective. Any proposal of social legislation which is not feasible in terms of the people who are to adopt it is simply not a plan that fits man's nature as concretely experienced. For "law does not exist in isolation but is an institution reflecting the life and views of society. When it ceases to correspond with the underlying beliefs and habits of a people it ceases to be enforceable" ¹⁰⁷.

¹⁰⁴ *Ibid.*, q. 96, a. 1.

¹⁰⁵ Alan W. MEWETT, "The Proper Scope and Function of the Criminal Law", *Criminal Law Quarterly*, 1960, 3:391.

¹⁰⁶ I-II, q. 96, a. 2, ad 2.

¹⁰⁷ Norman St. JOHN-STEVAS, *Law and Morals* (New York : Hawthorn Books, 1964), p. 19 ; *Life, Death and the Law* (New York : World Publishing Co., 1964), pp. 17-23 ; A. D. LINDSAY, *The Modern Democratic State* (Oxford : Universtiy Press, 1947), pp. 274-275.

It is therefore up to the legislator to scrutinize and analyze constantly the data provided by the social sciences, history, psychology, etc., to see whether or not and how those actions which affect or are likely to affect the common good should become fit subjects for legislation.

What the common good is, for the sake of which St. Thomas is not prepared to push us in either direction — whether to let the state make us virtuous or to let us become vicious — may at best be described rather than defined¹⁰⁸. And the first thing that should be said is that the common good is by no means the abstract concept that Lord Devlin makes it out to be: “a useful and compendious, if vague, description of all the things law-makers should have in mind when they legislate”¹⁰⁹, as might be the heritage of the great historical remembrances of the community, its symbols and its glories, its living traditions and cultural treasures, the maintenance of public order and civil peace, the protection of the young, the weak, the inexperienced, the promotion of common beliefs, common ideals, the sum or sociological integration of all the civic conscience, political virtues and sense of right and liberty, of all the activities, material prosperity and spiritual riches, of unconsciously operative hereditary wisdom, of moral rectitude, justice, friendship, happiness, virtue and heroism in the individual lives of its members . . .¹¹⁰ All of these are included in the concept of the common good, constituting as they do the good life of the multitude and being as they are communicable to each member to help him perfect his life and liberty of person. But neither singly nor collectively do they by any means exhaust it. For beyond these practical manifestation of “what law-makers should have in mind when they legislate”, the common good is, in Maritain’s words, “the human common good” which “includes within its essence the service of the human person. The adage of the superiority of the common good is understood in its true sense only in the measure that the common good itself implies a reference to the human person”¹¹¹.

Understood in terms of the welfare of the community and its members, singly and collectively, the common good may then be said to consist, in the comprehensive words of Pius XI, “in the peace and security which families and individual citizens need for the exercise of their rights, in the maximum of prosperity, spiritual and material, which can be attained in this life through the combined and co-ordinated

¹⁰⁸ Speaking of the origin of the concept, Henri Battifol, *La Philosophie du Droit* (Paris: P.U.F., 1960) pp. 110-111, says: “L’expression se trouve chez Aristote, elle répond à la notion fondamentale de sa philosophie morale suivant laquelle un acte humain, en tant qu’humain, se propose toujours une fin, et emprunte sa valeur à celle de la fin poursuivie: il sera donc bon dans la mesure où il recherche un bien. La notion est reprise par Saint Thomas d’Aquin et mise au centre de sa philosophie de la loi sans autre élucidation”. Emphasis is author’s. Cf. *Politics*, 1252a1-1253a38; *In Pol.*, I,1,i.

¹⁰⁹ DEVLIN, *op. cit.*, p. 117.

¹¹⁰ Cf. Jacques MARITAIN, *The Person and the Common Good*, trans. J. J. Fitzgerald (Indiana: University of Notre Dame, 1966), pp. 28-30, 49-54. Also SUAREZ, *De Legibus*, I, 7.

¹¹¹ *Ibid.*, pp. 29-30.

efforts of all. The function of the civil authority is therefore twofold : to protect and to promote ; but not to absorb the family or the individual nor to take their place" ¹¹².

On the basis of the common good of all the citizens, which underlies St. Thomas' theory of law, all acts — whatever their nature, private or public, moral or immoral — with ascertainable public consequences on the maintenance and stability of society are a legitimate matter of concern to society ; consequently, fit subjects for the criminal law. The law is thus left with at once a narrow and a wide scope provided that what it takes under its jurisdiction does not impose certain obligations on the community or sections of it which are directly contrary to morality.

Law and Morals To say that the thomistic principle of legislation would take note of immoral actions or of morality in general in so far as the common good is affected detrimentally is not to say that St. Thomas so considers the common good as to divorce it from, or to leave no basis for, morality — as though law and morals were things absolutely apart. Granted that the law differs from morality in scope in that it is "an order of society, liable to enforcement, defining powers of control held by individuals and communities" ¹¹³, it has nonetheless a moral character about it in that it is rooted in the human existential ends : as the ordering of social relations in accordance with these human ends, law is none other than "the natural law applied to social life and the order of ends projected on to the social existence of man" ¹¹⁴, so that while the law can, say, exact from us the payment of a bill, morality can turn on what lies deep in our minds to flow into our external behaviour and move us to contribute the "widow's mite" to a charitable fund ¹¹⁵.

To accept the thomistic principle of legislation then is to say : a) that human law and moral ideals, or better the acts of the good citizen and the acts of the good man, are but different aspects of or different phases in what is in fact a continuous progression from initial to perfect virtue ¹¹⁶ ; b) that law should not impose too severe a moral burden on weak men ; c) that it is our external behaviour that directly enters into the content of the law ; and d) that therefore crime need not

¹¹² *Divini Illius Magistri*, December 31, 1929, AAS (1930), 22:2.

¹¹³ J. MESSNER, *Social Ethics* (London : Herder, 1952), p. 151.

¹¹⁴ *Ibid.*, p. 156.

¹¹⁵ Cf. GILBY, *op. cit.*, in *Blackfriars*, 41:57, Messner, *op. cit.*, p. 151, observes that the fact that St. Thomas was able to trace back the fundamental social function of law so clearly to the ends inherent in the nature of man and society prompted Jhering (himself a Protestant) to remark in his famous work on the end as constituent of law, *Der Zweck im Recht* (1916, 2nd ed.), p. 126, that had his attention been drawn earlier to the fundamental position of ends in the theory of St. Thomas, he might have hesitated to write his book at all : "In amazement I ask myself how it was possible that such truths, once expressed with perfect clarity and conciseness, could have been so completely forgotten by our Protestant scholars".

¹¹⁶ I-II, q. 63, a. 1 ; q. 66, aa. 1-2.

be coterminous with vice. The thrust of the thomistic principle is that beyond the morality of the particular act concerned, St. Thomas recognizes other moral values : civil peace, individual freedoms and choices, tolerance ; furthermore there is every reason to say that he was as keen on protecting the morally weak as Mill, Wolfenden, etc., are keen on protecting the physically weak. So while safeguarding personal decisions in matters of morality and tolerating people to sin if they want to sin, he does not equate the realm of sin with that of the private¹¹⁷. St. Thomas simply means that human law is not equipped to deal with sin as such either at the personal level or at the social level unless it is of such a nature that it is at the same time detrimental to society. So if legislation covers areas which are also immoral, it is not because the act itself is immoral but rather because some element or elements, detrimental to society, are present necessitating the legalization of that immoral act.

Which aspects of virtue should be promoted and which aspects of vice should be checked on the basis of the common good are political decisions which can only be taken after those contingent social conditions as prevail in the particular community the law is intended to serve have been adequately and fully considered. To this end, every discipline capable of throwing light on these conditions should be allowed to speak for itself. The extent to which virtue and vice may yield to social legislation in particular communities and in particular circumstances will always be a matter of sharp disagreement and conflict. But as long as what is done, whether it is moral or immoral, whether it is performed in private or in public, is not detrimental to society, then morality as such need not be externalized and enforced by law. For besides entailing what might well be a serious invasion of privacy, enforcement might also require, as Dean Bayless Manning of the Stanford University Law School puts it, "an enormous input of both manpower and funds in the administration of criminal justice"¹¹⁸. Not that such an expenditure might not be worth society's time, money and effort, but it is a question whether society's measures will obtain the desired result and whether the common good might not be affected adversely in another way, particularly with the vicious breaking out "into evils worse still"¹¹⁹. Even Aristotle had warned that in dealing with the practical and social order, caution must be exercised¹²⁰.

Both John Courtney Murray and Norman St. John-Stevias essentially draw on St. Thomas in their discussion on the relationship between law and morality. Murray writes :

¹¹⁷ *Ibid.*, q. 18, aa. 5-6, 9 ; q. 19, aa. 5-6 ; q. 20, aa. 1-4, 6 ; q. 95, a. 2 ; II-II, q. 47, aa. 1, 10-12 ; q. 58, aa. 5-6.

¹¹⁸ Robert E. COOKE, et al., (Eds.), *The Terrible Choice : The Abortion Dilemma* (New York : Bantam Books, 1968), p. 95.

¹¹⁹ I-II, q. 96, a. 2

¹²⁰ *Nic. Eth.*, I:3

The moral aspirations of law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order. It does not look to what is morally desirable, or attempt to remove every moral taint from the atmosphere of society. It enforces only what is minimally acceptable, and in this sense socially necessary . . . Therefore the law, mindful of its nature, is required to be tolerant of many evils that morality condemns. A moral condemnation regards only the evil itself, in itself. A legal ban on an evil must consider what St. Thomas calls its own 'possibility'. That is, will the ban be obeyed, at least by the generality? Is it enforceable against the disobedient? Is it prudent to undertake the enforcement of this or that ban, in view of the possibility of harmful effects in other areas of social life? Is the instrumentality of coercive law a good means for the eradication of this or that social vice? And, since a means is not a good means if it fails to work in most cases, what are the lessons of experience in the matter? . . . *There are the questions that jurisprudence must answer, in order that legislation may be drawn with requisite craftsmanship* ¹²¹.

Stevas puts it as follows :

Whether behaviour, private or public, strikes at the common good so gravely that it endangers the fabric of society and so should be suppressed by law is a question of fact, which can only be answered after full consideration of the conditions prevailing in a given society, including the rights enjoyed by the individual . . . Even when conduct has been so classified, it does not follow that the law should necessarily be invoked. It may not be enforceable, or not enforceable equitably or may give rise to greater evils than those it is intended to eradicate. *Political prudence, not jurisprudential theory, must, at this stage, be the guide* ¹²².

These considerations on the relationship between law and morality in the light of St. Thomas raise an important question : if "human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain ; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained" ¹²³, what, in St. Thomas' view, is the law's attitude towards : a) those virtuous acts which it does not forbid? By not promoting the former, is the law betraying its own function? By not condemning the latter, is the law condoning immorality?

St. Thomas takes up this matter early in his *Treatise on Law* when he discusses "whether there was any need for a divine law", possibly one of the least known passages in St. Thomas' philosophy of law. Proceeding from David's prayer to God to set His law before him (Ps. 108:33), St. Thomas argues that since "it is by law that man is directed how to perform his proper acts in view of his last end"

¹²¹ JOHN COURTNEY MURRAY, *We Hold These Truths* (New York : Sheed & Ward, 1960), pp. 166-167. Emphasis is mine.

¹²² STEVAS, *Life, Death and the Law*, *op. cit.*, p. 39 ; *Law and Morals*, *op. cit.*, p. 27. Emphasis is mine ; Daniel Callahan, *Abortion : Law, Choice and Morality* (New York : MacMillan, 1970), pp. 475-476, 483, invokes this principle as formulated by Murray and Stevas to supply to abortion

¹²³ I-II, q. 96, a. 2 ; also ad 2.

and since this end of eternal happiness is "inproportionate to man's natural faculty", it was necessary that, besides the natural and the human law, man should be directed to his ultimate end by a law given by God¹²⁴. He goes on to say that :

On account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts ; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.

Man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear ; and yet for the perfection of virtue it is necessary for man to conduct himself aright in both kinds of acts. Consequently human law could not sufficiently curb and direct interior acts ; and it was necessary for this purpose that a Divine law should supervene.

Human law cannot punish or forbid all evil deeds : since while aiming at doing away with all evils, it would do away with many good things, and would hinder the advance of the common good, which is necessary for human intercourse. In order, therefore, that no evil might remain unforbidden and unpunished, it was necessary for the Divine law to supervene, whereby all sins are forbidden¹²⁵

In other words, the divine law supplements, as it were, for the incompetence and inability of human law in moral matters : i.e., while human law is not competent to enjoin everything that the moral law enjoins, it is equally incompetent to forbid everything that the moral law forbids. Competent and capable of enforcing only what is socially necessary, human law must therefore allow and look to other institutions for the elevation and maintenance of society's moral standards, i.e., the church, the home, the school, and the whole network of voluntary associations that concern themselves with one or other aspect of the 'noble life'¹²⁶.

Addressing the Fifth National Convention of the Union of Italian Catholic Jurists in 1953, Pius XII spoke within the terms of this broad outline when he

¹²⁴ *Ibid.*, q. 91, a. 4.

¹²⁵ *Ibid.* Cf. also *Suppl. S. Th.*, q. 67, a. 3 ; also ad 1 ; SUAREZ, *op. cit.*, I, 9 ; I, 15 ; II, 12.

¹²⁶ MURRAY, *op. cit.*, p. 166 ; for Murray's thought on the matter, see among others : "Freedom, Responsibility and the Law", *Catholic Lawyer*, 1956, 2:214 ; "The Making of a Pluralist Society", *Religious Education*, 1958, 53:521 ; "Governmental Repression of Heresy", *Proceedings of the Catholic Theological Society of America (1948)*, (Washington, 1949), pp. 26-98 ; Vatican II's "Declaration on Religious Freedom" (*Dignitatis Humanae*) and Murray's introduction to the Document in Walter M. Abbott, (Ed.), *The Documents of Vatican II* (New York : America Press, 1966), p. 672. These references are primarily concerned with Church-State relations. However, much of the principles discussed and the conclusions reached are relevant to the problem of the legal enforcement or non-enforcement of morals. Bernard Häring, "A Theological Evaluation", in John T. NOONAN, Jr., *The Morality of Abortion* (Cambridge, Mass. : Harvard University Press, 1970), p. 144, makes the same point : 'It cannot be the task of a pluralistic state to protect the religious teaching of a church where this does not coincide with the common good of the respective society'

stated that though error has no theoretical right to exist, nevertheless the failure to impede it with civil laws and coercive measures can be justified in the interests of a higher and more general good :

Reality shows that error and sin are in the world in great measure. God reprobates them, but He permits them to exist. Hence the affirmation : religious and moral error must always be impeded when it is possible, because tolerance of them is in itself immoral, is not valid absolutely and unconditionally. Moreover, God has not given even to human authority such an absolute and universal command in matters of faith and morality. Such a command is unknown to the common convictions of mankind, to Christian conscience, to the sources of revelation and to the practice of the Church . . . The duty of repressing moral and religious error cannot therefore be an ultimate norm of action. It must be subordinate to higher and more general norms, which in some circumstances, permit and even perhaps seems to indicate as the better policy toleration of error in order to promote a greater good ¹²⁷.

Though Pius XII concedes that "the greater good" may "in some circumstances" take precedence over "the duty of repressing moral and religious error", he does not specify what constitutes "higher and more general norms". St. Thomas narrows the issue down considerably when he says that laws, aimed at the common good, should take account of the many things that the common good comprises : persons, matters, time, etc. So proceeding from the principle that "all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude", the thomistic principle of legislation, comprising at once the scope of the law as well as its moral character, may be summed up in his own words as follows :

Wherefore there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue, but only in regard to those that are ordainable to the common good — either immediately, as when certain things are done directly for the common good, or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace ¹²⁸.

Law, Morals and Abortion St. Thomas' principle of legislation still leaves the question of legalized abortion unanswered. Can it then be said that abortion falls within the thomistic framework of law in such a way that a law that allows abortion or one that disallows it is ordainable to the common good, either immediately or mediately ? What are the lessons of experience in the matter, both with regard to permitting abortion as well as with regard to forbidding it ? Specifically, in view of the strong pressures to reform the law in

¹²⁷ Cf. Gustave WEIGEL, S.J., "The Church and the Democratic State", *Theology Digest*, 1953, I:169-175. St. Thomas expresses the same principle in *Suppl. S. Th.*, q. 67, a. 3 ; also ad 1.

¹²⁸ I-II, q. 96, a. 3.

the liberal direction and the wide gap that exists between what the laws propose and what the people dispose in the matter of abortion, can it be said that the observance of the law is so extremely harmful as to necessitate a change in the law, so widespread a practice as to obtain the force of a law, abolish law or be the interpreter of law? ¹²⁹ Furthermore, can it be said that abortion is of the same nature as murder, "without the prohibition of which human society could not be maintained?" ¹³⁰

It is difficult to say how St. Thomas himself would have applied his principles to abortion. One thing he certainly would have said as a rule is that the people's demands may be helpful in indicating which direction they want the law to take — and the legislator would be well advised to be in touch with popular feelings — but it is a serious question whether the law should be determined by the kind of "intolerance, indignation and disgust" that Lord Devlin speaks of. On the contrary, "it should strive to embody rational judgments and so modify public opinion, not blindly follow in the wake of emotional prejudice" ¹³¹.

As far as abortion itself is concerned, the whole problem presented itself to him in a totally different perspective. His casuistic considerations, to begin with, were based on the theory of a successive animation and though he considered abortion "*grave peccatum et inter maleficia computandum*" ¹³², he did not consider it, before animation, the same kind of sin as is involved in the destruction of a human being: for between "what is seed and what is not seed is determined by sensation and movement" ¹³³. In this respect, he even went so far as to say that "before the infusion of the rational soul, dead embryos will not rise again" ¹³⁴. However, he was equally clear in stating that there was actual homicide when an ensouled embryo was killed ¹³⁵.

In view of St. Thomas' considerations on self-defence, can an argument be made to morally justify abortion to save the mother's life? Speaking of homicide, St. Thomas makes a distinction between killing "sinners" ¹³⁶ and killing "inno-

¹²⁹ *Ibid.*, q. 97, aa. 2-3

¹³⁰ *Ibid.*, q. 96, a. 2

¹³¹ STEVAS, *Life, Death and the Law*, *op. cit.*, p. 43.

¹³² IV, d. 31; cf. II-II, q. 154, aa. 11-12.

¹³³ Explaining why Aristotle, *Pol.* VII:1334b6-1337a7, accepted abortion as a lesser evil, St. Thomas' Commentary, *In Pol.*, XII:1241 (completed by Peter of Alvernia) says: "Sed quia datum est pueros non reservari ad vitam, declarat, si necesse sit istud fieri, qualiter cum minori culpa fiet: dicens, quod si aliquibus coniugatis fiant plures quam sit determinatum a lege, et necesse eos exterminari, magis procurandum est fieri abortum antequam sensus et vita insint quam cum infuerint: procurans enim abortum postquam infuerint, homicida a lege reputatur; et magis peccant; semen enim et non semen determinatur per sensum et motum". Emphasis is mine.

¹³⁴ IV, d. 44, qq. 1, 4; I, q. 76, a. 3; q. 77, a. 7; q. 118, a. 2.

¹³⁵ II-II, q. 64, a. 8, ad 2.

¹³⁶ *Ibid.*, a. 2.

cents" ¹³⁷, declaring that it is lawful, sometimes mandatory, to kill the former but "in no way lawful" to kill the latter. Speaking of self-defence as such, however, and without making any distinctions at all between "sinners" and "innocents", he declares that under the conditions of the double effect principle it is lawful for "someone" to kill "someone" ¹³⁸. On the basis of this principle, John T. Noonan, Jr., argues that, for an argument to be made to justify abortion to save the mother's life, "much would depend on how absolutely Thomas meant his declaration . . . that 'in no way is it lawful to kill the innocent'. If the statement held literally, it would seem to preclude capital punishment for a repentant thief, who has become innocent, as most men become innocent, by repentance; yet Thomas justified capital punishment" ¹³⁹. In my opinion, the texts cited appear to leave no doubt that from the moral standpoint St. Thomas meant his declaration to be taken categorically. As for inflicting punishment on a repentant thief, Noonan appears to overlook the fact that the repentant thief is not innocent absolutely: the repentant thief still has some debt to pay to society ¹⁴⁰. At any rate, Noonan goes on to say that "it cannot be said definitively how Thomas would have answered . . . in the case of therapeutic abortion to save the mother's life", but later on in his discussion he concludes that "once the humanity of the fetus is perceived, abortion is never right except in self-defence" ¹⁴¹.

Strictly from the moral standpoint, other than saying that St. Thomas recognized abortion as immoral but not homicide unless the embryo is ensouled, it appears unwise to draw any other conclusion to morally justify abortion and then apply it to our situation.

From the ethico-legal standpoint, however, some observations are in order. In this respect, St. Thomas' *Commentary* on Aristotle's acceptance of legalized abortion as a lesser evil provides us with a starting point. It goes as follows:

Sic igitur Aristoteles non dicit secundum intentionem suam, quod debeant exterminari aliqui nati; sed secundum legem gentium; nec quod procurandus sit abortus absolute, sed si interficiendi sunt ab aliquibus, magis faciendum est hoc ante sensum et vitam, non sicut bonum secundum se, sed sicut minus malum ¹⁴²

This passage is significant in that abortion is not viewed as a positive good; accepting it as a lesser evil further requires that if it should be procured at all, it had better be procured during the course of the first trimester, before sensation and

¹³⁷ *Ibid.*, a. 6; also *De Malo*, q. 13, a. 4, ad 11: "To kill the innocent imports a determination of evil, and this can never be well done".

¹³⁸ *Ibid.*, a. 7.

¹³⁹ John T. NOONAN, "An Almost Absolute Value in History", in Noonan, *op. cit.*, p. 25.

¹⁴⁰ I-II, q. 105, a. 2, ad 9.

¹⁴¹ NOONAN, *op. cit.*, *loc. cit.*, pp. 25-26, 58.

¹⁴² *In Pol.*, XII:1241. Cf. *supra*, note 45.

life begin. Though it does not necessarily follow that this passage reflects St. Thomas' position on the problem (it was actually written by Peter of Alvernia), it is not inconsistent with St. Thomas' philosophy of law. It would then appear that if some answer is at all possible within the thomistic approach, it ought to be looked for, I think, not in his moral considerations of abortion but in his concept of law as society's instrument to promote the human common good. Again, this does not mean that St. Thomas provides an instant solution to the present problem; it is rather his whole philosophy of law and of the common good that one must take into account, so that if one can say that there is no one principle applicable to the proscription of abortion, one can also say that there is no other which rules out its prescription.

St. Thomas' principle of legislation envisages the human common good, understood in terms of "a common good of *human persons*, just as the social body itself is a whole of human persons"¹⁴³. The major test he proposes for deciding when certain practices become a fit subject for the criminal law may then be put interrogatively as follows: a) does the practice substantially injure the common good? b) does it substantially respect individual freedoms and choices? The answer to the former question moves in at least two directions: i) that the practice of abortion is so detrimental to the common good that it should be proscribed; ii) that it is precisely any law proscribing abortion that is detrimental to society. The answer to the latter question envisages other tests that he proposes: is the prescription or the proscription of abortion within the reach of the virtuous and vicious alike, just and equitable, possible to nature as concretely experienced, according to the customs of the country, adapted to place and time, necessary, useful, helpful to discipline? Briefly, does it serve the people it is intended to serve? Under what circumstances and conditions, if any, and to what extent, if at all, can it then be said that abortion legislation serves the human common good?

The answers to these questions should provide a basis for the beginning not the end of the argument on abortion legislation.

¹⁴³ MARITAIN, *The Person and the Common Good*, *op. cit.*, p. 50. Emphasis is author's.