Morals and the Criminal Law

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NOTES AND COMMENTS

MORALS AND THE CRIMINAL LAW

General jurisprudential discussion does not often become the concern of a wide audience. Outside a small specialist circle even the cultivated public is for the most part unaware of the exchange of mighty blows that so consumes the academics. But occasionally a controversy is, or is thought to be, of such central importance or of such practical implication that it breaks out of the cloister and becomes a subject of general notice. This has happened recently in England over the question of the relationship between the criminal law and general morality.

The discussion was set off by a lecture delivered by Lord Devlin (Sir Patrick Devlin as he then was) as the 1959 Maccabean Lecture in Jurisprudence of the British Academy, under the title, "The Enforcement of Morals." A partial explanation of the interest aroused by this lecture is no doubt to be found in the person of its author. British judges do not often speak publicly on basic jurisprudential topics, and when a judge of Lord Devlin's eminence does so his pronouncements are rightly given close attention. Again, Lord Devlin had taken as his text certain important statements of policy advanced in the Report of the Wolfenden Committee on Homosexual Offences and Prostitution and this Report had itself been a matter of lively public discussion. But the feature of Lord Devlin's lecture that aroused most interest and generated most heat was that his central thesis appeared to be an attack on a view of the nature and function of the criminal law which had been accepted for so long by an important section of public opinion that it might fairly be called the orthodoxy on this point. The position under attack is the utilitarian or Benthamite view of morality and law.

In Bentham's view, man is placed "under the empire of pleasure and of pain." Under his principle of utility all human action is to be scrutinized against the criterion of its tendency to produce pleasure or pain and judged by the final balance in the pleasure-pain ledger, by the felicific calculus. Pleasure and pain are not here to be understood in the grossest physical sense, for they include emotional enrichments and deprivation. (Bentham includes in his list such pleasures as friendship, good reputation, benevolence,

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3. BENTHAM, THEORY OF LEGISLATION 2 (Hildreth ed. 1876).
and knowledge and their corresponding pains.) Man must be taken in his actual constitution and subjected to an essentially social, communal judgment: "That which is conformable to the utility, or the interest of a community, is what tends to augment the total sum of the happiness of the individuals that compose it." By the judgment of the legislator it is bad for X to do that which brings him 5 units of pleasure if it is likely in sum to bring 6 units of pain to others. For Bentham, there is no other admissible test of the rightness or wrongness of action and, in the first instance, the test must be the same whether we speak in moral or legislative terms.

If [the partisan of the principle of utility] finds in the common list of offences some indifferent action, some innocent pleasure, he will not hesitate to transport this pretended offence into the class of lawful actions; he will pity the pretended criminals, and will reserve his indignation for their persecutors.

But the criteria for the advisability of criminal legislation are not at all stages the same as the criteria for the simple moral judgment of condemnation. Even though an act may be condemned as immoral by the operation of the principle of utility, there may be other outbalancing reasons why it should not be condemned by the criminal law. The chief of these, in Bentham's exposition, would be that the punishment would be inefficacious as a deterrent, that is, where it would not prevent the disapproved conduct; secondly, that the punishment would be unprofitable, that is, where the mischief produced by the criminal prohibition would be greater than the mischief produced by letting the disapproved act go unpunished; and, thirdly, that the punishment would be needless, that is, where the mischief may be prevented without the punishment. In all these cases, Bentham would have the acts go unpunished, even though they were morally reprehensible under the principle of utility.

Moreover, Bentham recognized that when legislators calculate the harmfulness of conduct they must pay attention to the attitude of the public at large toward such conduct, however irrational such attitude may seem to be. His position here is put in a powerful passage, which deserves quotation for its particular relevance to this topic:

But when I say that antipathies and sympathies are no reason, I mean those of the legislator; for the antipathies and sympathies of the people may be reasons, and very powerful ones. However odd or pernicious a religion, a law, a custom may be, it is of no consequence, so long as the people are attached to it. The strength of their prejudice is the measure of the indulgence which should be granted to it.... The legislator ought to yield to the violence of a current which carries away everything that obstructs it.

But ought the legislator to be a slave to the fancies of those whom he governs? No. Between an imprudent opposition and a servile compliance,

4. Id. at 20-27.
5. Id. at 2.
6. Id. at 3-4.
7. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 281-88 (Harrison ed. 1948).
there is a middle path, honourable and safe. It is, to combat these fancies with the only arms that can conquer them,—example and instruction. He must enlighten the people, he must address himself to the public reason; he must give time for error to be unmasked.

It is to be observed, however, that too much deference for prejudices, is a more common fault than the contrary excess.8

As a system of moral philosophy the principle of utility has come under telling attack. It has been pointed out that the notions of pleasure and pain are subjective, so that what \( X \) may experience as pleasure \( Y \) may experience as pain. In this way there may be a clash of interests, and Bentham provides no guide for the individual who is faced with such a clash. Indeed, according to the notion of the empire of pleasure and pain, man must ineluctably act in a way that brings pleasure to him. He can have no reason for acting in any other way whatever harm his acts may bring to others. If a good action is one that brings more pleasure than pain, it is then difficult to see in what sense the individual can be said to act wrongly except in the sense of a social judgment of what is pleasure and pain for the greatest number.9 Again, it has been said that pleasure and pain are not susceptible to nice calculation.10 The moral arithmetic here must be very sketchy and must often be no more than an intuition or guess. But, as his defenders have insisted, Bentham was not in fact so much interested in constructing a moral philosophy as in erecting a method of approach for the legislator. His primary interest was in law making and law reform. Viewed in this light, many of the weaknesses of the principle of utility disappear. Thus, in practice we are not so much concerned with the individual’s view of what is for him pleasure or pain as with a social view of what is pleasure or pain for the greatest number. It is in the sphere of public decisions with respect to the greatest happiness of the greatest number that the principle of utility is designed to operate, rather than in the individual’s guiding of his personal life. And when the technique is confined to the making of public decisions, the clash between individual and public interest is no longer strictly relevant. The objection of the roughness of the calculation also loses much of its force when made in this context. For, though in personal life there may be agonizing choices between two courses of action in both of which are nicely balanced the pleasure-pain account, the ledger in public decisions, such as those reflected in criminal legislation, will be read in millions of units and all that will be required is reasonable conviction of a substantial benefit. As Dicey put it, one does not need to weigh butcher’s meat in diamond scales.11

10. Ayer, supra note 9, at 247, 257-58.
This Benthamite approach does not of course reduce criminal legislation to a process of strict calculation. In the first place, there may be genuine dispute about the actual consequences of conduct that it is sought to prohibit or no longer to prohibit, or about the consequences of the prohibition or its removal. So, one may argue about the precise deterrent effect of capital punishment, or about the possible spread of homosexuality if the criminal prohibition were removed. The resolution of such arguments clearly depends very much on the available information about social practices and the impact of laws. Again, even if in agreement about the actual consequences of conduct or of criminal prohibition or, more often, while still in disagreement about them, one may also dispute whether certain consequences should be regarded as harmful. That is to say that even in the public sphere there may be disagreements about pleasures and pains. This disagreement may take two forms. It may be a simple denial by one side that an admitted consequence is harmful at all. So, one may agree that to remove the criminal prohibition from homosexual conduct will lead to an increase in such conduct but may simply not regard this as harmful. Secondly, the disagreement may be less abrupt and more quantitative, i.e., one may agree that a spread of homosexuality is harmful but may regard it as much less harmful than does the other side and, on the other hand, may regard the effects of law enforcement in this field as much more harmful than does the other side. Disagreements of the first kind (a total clash over the harmful character of an admitted consequence) are probably rare, and the more typical conflict is between two views of the degree of harm involved, usually complicated by a disagreement over the actual consequences to be expected. Thus, the Benthamite approach neither eliminates clashes over values nor does it provide any simple resolution of such conflicts; it is not a legislative computer. This cannot be better demonstrated than by the dramatic twentieth century shift in Bentham’s own emphasis on individual liberty and laissez faire economics in his concrete application of the principle of utility.

But what is, or ought to be, enduring is the Benthamite method of public debate about public decision making. Bentham’s values may not always be our values but his method of discussion ought to be our method. In the first place, he insisted upon obtaining the best possible information for decision making, demanding careful investigation of actual social behavior and institutions, delicate projection of contemplated legislation in terms of its probable effects, and public scrutiny and discussion of such information. In so doing, Bentham became the great forerunner of modern sociological and realist schools of jurisprudence. The other fundamental aspect of his method of discussion was an insistence upon an explicit statement of value positions and their defense, as far as this may be possible, in rational debate. Legislation and decision-making, he felt, must be examined in the arena of reasoned discussion in the light of information about their probable consequences and the values which they profess to serve. This is the method of modern democracy; it is the method of the common law courts in England at their best; it is the method of
the United States Supreme Court. It involves the recognition that though rational argument cannot solve disputes about conflicts of values, such argument can solve a host of problems on which there is no real dispute about values and that, even when such a dispute exists, the insistence on reasonable public discussion is of the greatest importance in aiding judgment and influencing opinion. This is a tradition which we readily accept and in which we are now immersed, but it is no more than two centuries old and Bentham was its prophet and nurse.

If Lord Devlin's lecture involved no more than a disagreement with what is probably the majority of current intelligent opinion on the evaluation of the present state of the law in the field of sexual offences and certain other fields, its appearance would not have been so profoundly important. Lord Devlin's thesis is so very disquieting because it constitutes an attack on the whole Benthamite position of rational debate about public decision making. It is here that Lord Devlin's views become dangerous and here that they must be resolutely opposed.

Lord Devlin begins by recognizing that the present law of sexual offences in Britain is haphazard and not always closely linked with popular moral notions. The question he wishes to consider is whether there are any principles which can regulate the embodiment of the moral law in the criminal law. The inquiry must be a general one and cannot be confined to the field of sexual morals. The question is:

What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?12

There is, already, in these opening passages an identification of the concepts of immorality and sin which is disturbing to the secular-minded reader. Lord Devlin is to be excused somewhat here for he was concerned with the report of the Wolfenden Committee which had set a bad example by equating immorality and sin. The vital passages in the Report of the Committee are those which put forward:

Our own formulation of the function of the criminal law so far as it concerns the subjects of this enquiry. In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined.13

The Committee recommended:

That homosexual behavior between consenting adults in private should no longer be a criminal offence [following on the 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.\(^\text{14}\)

In Lord Devlin's view this amounts to setting up a concept of private immorality which is to be prohibited criminally only if it infringes certain further criteria, and it is with this view that Lord Devlin proceeds to take issue.

"As a judge," he writes, "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."\(^\text{15}\) Why, he asks, do we not treat a female abortionist as an unlicensed midwife in passing sentence?\(^\text{16}\) His tacit answer is because the former impinges on our sense of sin. Here, it may be suggested, is the first example of a series of somewhat misleading illustrations which Lord Devlin uses to support his argument. There is evidently a large legal gap between the notion of a midwife, whether licensed or unlicensed, who aims and endeavours to deliver a child safely and an abortionist who aims to terminate a pregnancy. The question of whether the termination of pregnancy ought to be a criminal offense is a separate question on which there is a good deal of dispute. But, as the law stands, it is a serious felony, and it is natural that this should be reflected in the sentencing policy of the courts. If abortion were legalized (as some argue it should be) then, presumably, an unlicensed abortionist would be treated in the same way as an unlicensed midwife. The example thus seems to have little point except to indicate a present judgment of the criminal law that the termination of pregnancy is generally illegal. It is difficult to see that this has much to do with a sense of sin, and even Lord Devlin admits later in his lecture that many people do not think abortion to be wrong.\(^\text{17}\)

Lord Devlin believes that "a complete separation of crime from sin ... would not be good for the moral law and might be disastrous for the criminal."\(^\text{18}\) The opposite point of view to this, he suggests, is that which holds that "A state which refuses to enforce Christian beliefs has lost the right to enforce Christian morals."\(^\text{19}\) But, he goes on, "If this view is sound,
it means that the criminal law cannot justify any of its provisions by reference to the moral law. It cannot say, for example, that murder and theft are prohibited because they are immoral or sinful.”

Much is involved in these statements. How far the administration of the law and the control of crime depend on a sense of sin, if by that is meant a religiously oriented sense, is arguable, but it is no doubt true that a strong and widely held acceptance of religious teaching is on the whole a valuable supporter of law enforcement agencies, unless the law itself offends against religious tenets. If for a sense of sin we substitute the notion of a sense of infringing morality without the religious connotation, then it is difficult to see how such a sense could ever be completely separated from the state of the law. To contemplate such a possibility is to ignore the interdependence of law and morality while seeming to defend it. The pressure exerted by generally held views of what is right and wrong upon legislatures when legislating, the support that the law in its administration receives from such widely held feelings, and, in turn, the support that general feelings of right and wrong receive from law enforcement are inevitable facts of the system of social control. The exact nature of the interdependence may be debated, the comparative importance of the law as compared with general feelings of morality may be the subject of controversy, but the existence of some interdependence is unquestionable. But this still leaves open the question of whether it is wise and proper to prohibit criminally any particular species of conduct. It is probable, for example, that the “sense of sin” to which Lord Devlin refers, is most often felt by most people with respect to aspects of their behavior into which the criminal law does not enter at all. It is, for the most part, with respect to cowardice, cruelty to others, or parsimony that the sense of sin is felt. With all this the criminal law has very little to do. There are indeed situations in which a sense of wrongdoing might be keenly felt by the individual, where the criminal law might well interfere, but where, in common law jurisdictions, it has chosen not to do so. An example of this would be the absence of a legal duty to aid others in peril.

The greatest confusion is introduced, however, by Lord Devlin’s casual shifts from general references to morality to specific references to “sin,” “Christian morals” and the “moral law.” (The “moral law” is an ambiguous term which seems to attempt to get the best of both worlds, by being free of overt theological implications, but at the same time obliquely implying authoritative attributes by the use of the word “law.”) His objection to the point of view that “a state which refuses to enforce Christian beliefs has lost the right to enforce Christian morals” need not detain us long, since to talk of a “right” to legislate does not seem very meaningful. One may discuss

20. Ibid.
21. See Lundstedt, Superstition or Rationality in Action for Peace passim (1925); Lundstedt, Law and Justice (Acta Institutii Upsaliensis Jurisprudentiae Comparativae I) (1952); Olivecrona, Law as Fact passim (1939).
whether the state of the law or contemplated legislation is prudent or wise but nothing seems to be added by questioning the "right" to legislate, unless one is talking in terms of constitutional law, which Lord Devlin clearly is not. The greatest difficulty here, however, is to give any precision to ideas of moral law or Christian morality. Lord Devlin's examples of murder and theft seem particularly ill chosen. One has not heard that it was or is legal to murder and steal in Classical Greece or Rome, in modern Muslim countries or in Soviet Russia. The criminal prohibitions of murder and theft are of course extremely easy to defend on utilitarian grounds. This is not to deny the importance of the sense of horror that most men have at the contemplation of killing. The derivation of that sense, and how much it owes to immemorial law enforcement may be left to the psychologists and anthropologists for there is no need to inquire into it nor into any religious beliefs in order to justify the present state of the law. Indeed, if one addresses oneself seriously to the question of what issues in the contemporary criminal law appear to be vitally connected with specifically Christian beliefs, or the beliefs of specific Christian sects, it is only in very controversial fields such as the prohibition of contraceptive practices, abortion, sterilization and euthanasia that examples occur. Here the arguments rage, and to refer one to Christian morals is to beg the questions and not to answer them.

Lord Devlin does proceed to bring his generalities on Christian morals and the moral law to a practical concentration on certain aspects of sexual morality. "It is true," we are told, "that for many centuries the criminal law was much concerned with keeping the peace and little, if at all, with sexual morals. But it would be wrong to infer from that that it had no moral content . . . ."22 It is difficult to see why anyone should dream of making such an inference unless he took the peculiar view that morality was restricted to questions of sexual behavior. Yet at times Lord Devlin himself seems to approach this view for he tells us, very oddly, on the same page that, "Rules which impose a speed limit or prevent an obstruction on the highway have nothing to do with morals." It is, to say the least, possible to argue that it is much more immoral deliberately to choose to exceed a speed limit and so put one's fellows in great danger than to take a minority view of the proper object of sexual activity.

In another general attack on the position which he characterizes as a separation of law and morality, Lord Devlin lists a number of existing criminal law principles whose justification he cannot find in any utilitarian principle of "the preservation of order and decency" and which therefore must be justified, he argues, in terms of some moral law which cannot be pinned down in concrete terms.23 The examples put forward are the effect given the consent of the victim generally in criminal law and in particular the effect given consent to euthanasia, suicide, attempted suicide, abortion, incest and duelling. These examples certainly deserve close attention.

22. DeVLIN 7.
23. Id. at 8-9.
On the point of consent generally it would seem that Lord Devlin does not state the present law in England in sufficient detail. His assertions that "the criminal law has never permitted consent of the victim to be used as a defence" and that "It is not a defence to any form of assault that the victim thought his punishment well deserved and submitted to it . . ."24 are almost certainly too emphatic and consequently misleading. The position in fact appears to be that in the general crime of assault at common law the consent of the victim will be a defense provided that no serious bodily harm was caused.25 If serious bodily harm is caused it is easy to see why consent should be no defense. There is the general loss to society of the services of the victim when serious bodily harm is inflicted and a consequent possible imposition on the public charge. Then there is the danger that if X may with impunity inflict serious bodily harm on Y with Y's consent, X may by a process of addiction, as it were, come to inflict serious harm on those who do not consent. But most important of course is the simple postulation by society that the infliction of serious bodily harm is an evil which is not negated by the presence of consent. This may be expressed either by saying that such consent can never be regarded as rational and therefore is to be ignored, or by saying that even if the consent is free and full it is nevertheless to be ignored. No one, presumably, would wish to alter the state of the law on this point, so it is certainly an example of unanimous moral feeling reflected in the criminal law. It therefore supports any argument as to the coincidence of law and morals which is content with saying that a community's deeply held and widely shared values are often protected by criminal legislation. But there is no need to defend such law in mysterious terms which are divorced from utilitarian notions. It can be defended simply by saying that in the publicly drawn pleasure-pain ledger of the society the infliction of grievous bodily harm is by public judgment in all cases to be counted as an evil that outweighs the good of freedom of action and choice. Whether that judgment of society is in itself rational is not a question capable of rational answer. Lord Devlin seems to be suggesting a level of "rational" justification for criminal prohibition (which has to do with talk of order, decency etc.) and on the other hand a level of "irrational" justification which refers only to moral feelings or the "moral law," and his argument seems to be that the first method of justification sometimes fails and we have to have recourse to the second. The answer is that there are not two methods but only one which is more or less rational and more or less irrational. Our anxiety should be

24. Id. at 8.

to make it as rational as possible; the danger of Lord Devlin's way of putting things is that it is likely to make it as irrational as possible.

On the question of killing with consent, the body of opinion in favor of legalizing euthanasia indicates that the view of law and morality advanced by Lord Devlin is not beyond dispute. Nevertheless, it must be admitted that there is no argument for a general legalizing of all killings with the consent of the victim. Many jurisdictions, however, do provide a lesser penalty in such cases, which demonstrates a recognition of a lessening of the moral guilt involved. But arguments other than the dictates of morality may be advanced to defend the present state of the law—the interest of society in prohibiting a diminution of its members, the potentially damaging effect on the character of the killer, and, most cogent of all, the great difficulty in many cases of being satisfied that a full and free consent has been obtained. One might also point here to evidence that those who consent to being killed (or indeed to having grievous bodily harm inflicted on them) are for the most part mentally sick so that a full and free consent is too rare and uncertain a phenomenon for the law to rely upon.

With respect to suicide, the actual movement of public opinion has been such that, since Lord Devlin wrote, both suicide and attempted suicide have ceased to be criminal offenses in Britain. Abortion again is an act whose criminal character is much in dispute and whose prohibition, it may reasonably be claimed, causes more social harm than would the legalization of such practices under specified conditions and with appropriate safeguards. Likewise, there seems little reason why incest should be a crime, unless perhaps for eugenic reasons or in circumstances where it would amount to some other existing crime. Indeed, at present the great majority of prosecutions for incest are in cases where the act at the same time amounts to some other sexual offense. As for duelling, it is easy to find utilitarian reasons for its prohibition. Such combats have an obvious tendency to lead to bodily harm or death and so all the arguments cited above with respect to the relevance of consent here apply.

The examples offered by Lord Devlin thus fall for the most part into that area of the criminal law which is presently the subject of keen debate. That debate has arisen precisely because it is felt by many people that there are no good utilitarian reasons for the perpetuation of criminal sanctions for some of these acts. To cite their presence in the criminal law as a rebuttal of the utilitarian position is thus not a tenable argument. In some instances, it shows no more than that the criminal law is in an antiquated and unreason-

27. German Federal Republic, Strafgesetzbuch § 216; Italy, Codice Penale art. 579. Similar provisions are to be found in the penal codes of the Netherlands, Spain, Poland and Uruguay.
28. Suicide Act, 1961, 9 & 10 Eliz. 2, c. 60.
29. See the discussion in Williams, op. cit. supra note 26, at 146-247.
able state. In others, where the prohibition is one which still commands general support, as in the cases of killing and causing serious bodily harm with consent, it merely demonstrates that some generally agreed values of society are accurately reflected in the criminal law. The task of the investigator and legislator must be one of constant inquiry into the accuracy of the reflection of existing values in the criminal law and a constant appraisal of those values themselves, in so far as they are open to rational appraisal. It is dangerously easy to point to an existing criminal prohibition as evidence of a community value, when in fact the law may lag well behind mores. It is even more dangerous to be dissuaded from examination of the alleged community value merely because it is expressed in an ancient criminal prohibition.

Lord Devlin proceeds in his inquiry by framing three questions which he suggests are helpful to the discussion. The first and second are as follows:

1. Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?
2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?

The use of the word “right” here is odd. As a matter of fact social attitudes of approval or disapproval grow up with regard to modes of conduct. To say that they are matters of morals is to say that they are modes of conduct about which such attitudes exist. What then can be meant by asking if there is a “right” here? It would appear from the general trend of Lord Devlin’s argument that he is referring here by “matters of morals” to matters of sexual behavior, but, even so, it seems unhelpful to talk in terms of rights. Lord Devlin is not advertsing here to the advisability of passing laws on such points because this is the subject matter of his third interrogatory. He clearly treats the first and second questions as something anterior, and it is in this sense that it is difficult to see what can be meant. Indeed, in turning to his answer to this self examination we find that the reply only amounts to a declaration that there is such a thing as a public morality, i.e., widely held attitudes of approval or disapproval towards certain modes of conduct. But surely no one ever doubted this. His discussion is more enlightening when he turns to the subject matter of his third question:

3. If so [i.e., if society has the right to pass laws on matters of morals] ought it to use that weapon in all cases or only in some: and if only in some, on what principles should it distinguish?

Lord Devlin’s three questions thus resolve themselves into only one legitimate question, which might be phrased as follows:

31. Id. at 10-12.
32. Id. at 9.
In what circumstances should a legislature criminally prohibit a course of conduct which is disapproved by widely held public opinion? [If the difference is felt to be one of substance, the word “immoral” may be substituted for “disapproved by widely held public opinion.”]

This contention, it is submitted, is borne out by the fact that in answering his three questions, Lord Devlin is in fact almost exclusively concerned with the dilemma posed by his third interrogatory.

Before society may intervene, Lord Devlin suggests, there must be a “collective judgment” of disapproval against the conduct in question. But it is not at all clear what he means by “collective judgment” for he admits that “Some people sincerely believe that homosexuality is neither immoral nor unnatural,” but suggests that there is a collective judgment against it. Even though one clearly cannot offer a criterion of any precision for measuring the diffusion and strength of public feeling that ought to influence a legislature in debating the advisability of a criminal prohibition, it is, nevertheless, a matter that deserves as close an inquiry as may be possible. A great many laws are kept on the books by assertions of public revulsion which might not stand up on examination. Three factors deserve consideration: (1) the proportion of the community who disapprove of the practice, (2) the strength of their disapproval (will they riot or attack those who practise it if it is legalized?) and (3) the qualitative nature of the majority and minority groups (a strong majority of cultivated opinion may be significant even if it is but a minority of public opinion as a whole). The importance of these inquiries is too easily obscured by the simple demand for a “collective judgment,” though it is true that Lord Devlin does return later to the question of the strength of the disapproval.

Lord Devlin also tells us that the collective judgment is only justified if “society is affected” by the practice. In terms of the “right to pass judgment” this does not mean very much, but in terms of the advisability of legislation it means a great deal and appears to be a strange surrender of Lord Devlin's major argument that the utilitarian test is unsatisfactory. And it is followed by a strange linking of the collective judgment with certain subsidiary prohibitions of an obviously utilitarian aspect.

If society is not prepared to say that homosexuality is morally wrong, there would be no basis for a law protecting youth from “corruption” or punishing a man for living on the “immoral” earnings of a homosexual prostitute . . . .

But this seems greatly misconceived. The drinking of alcohol is not generally regarded as immoral in itself, yet there are laws prohibiting minors from drinking on licensed premises. Heterosexual activity is not \textit{per se} immoral,

\begin{itemize}
\item 33. \textit{Id.} at 10.
\item 34. \textit{Ibid.}
\item 35. \textit{Ibid.}
\item 36. \textit{Ibid.}
\end{itemize}
yet there are laws prohibiting assaults on young girls (even with their consent) and laws making it criminal to live on the earnings of a female prostitute. To prohibit acts of a similar nature in a homosexual context need not involve a general judgment about homosexual acts between consenting adults.

The same analytical lapse marks Lord Devlin’s reference to monogamy, which he regards as an institution that is “built-in” to our society. “The institution of marriage would be gravely threatened if individual judgments were permitted about the morality of adultery...”\textsuperscript{37} This view appears to be shared by Dean Rostow in his comment on Lord Devlin’s lecture. After referring to the prosecutions of Mormons in the United States, he writes:

Should we not then conclude that monogamy is so fundamental a theme in the existing common morality of the United States that the condemnation of polygamy as a crime is justified, even though in the end the repugnance to it rests on “feeling” and not on “reason”?\textsuperscript{38}

But the relationship between the institution of monogamy and the criminal law is or may be much more complex than these comments indicate. To what extent are individual judgments about adultery not permitted? In England adultery is not a crime, though it is of course a ground for divorce. Bigamy is a crime but as such has come under a good deal of attack. It has been suggested that it be removed from the statute-book in its present general form and reincorporated as a sexual offense where it involves fraud on a female and, on the other hand, reduced to a summary offense against the registration laws where it involves two parties one of whom knows the other to be already married.\textsuperscript{39} One must agree with Lord Devlin and Dean Rostow that it is difficult to conceive of any Western system abandoning monogamy as an institution. Indeed, even in non-Western and non-Christian countries the trend is towards monogamy, presumably because it is an efficient, useful and easily organizable mode. But there is always the question of how much debate and how much change we can contemplate in our society. Monogamy exists at the moment side by side with a heavy divorce rate and, presumably, side by side with a great deal of adultery. Monogamy is thus only protected by the criminal law to a limited extent, and what is ensured and protected is not the indissoluble sexual union of one man and one woman but rather a form of registration entailing certain legal consequences which again can be dissolved in certain eventualities. It is thus quite possible to conclude that the criminal prohibition of bigamy is or ought to be aimed at suppressing two evils: (1) the procurement of sexual relations by fraud, and (2) the confusion of a public system of registration on which a host of rights, duties, powers and privileges depends. Indeed, no other conclusion is possible, for what other evil is to be seen in bigamy unless one takes the frankly religious

\textsuperscript{37} Devlin 11.
\textsuperscript{38} Rostow, supra note 1, at 190.
position of regarding it as a defiling of a sacrament? Making bigamy a crime is thus just as defensible on utilitarian grounds as is making a crime of rape or voting twice.

Later in his lecture, Lord Devlin gives it as his view that “Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy.” Adultery is not a crime in England, he thinks, because “a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment.” That adultery is a human weakness is not a very convincing reason for not punishing it. So is cheating on one’s income tax returns. The sensible reason for not punishing adultery is surely the recognition that happy marriages are not made by the criminal law. It may be difficult to measure the social value secured by some criminal sexual prohibitions, but it can scarcely be doubted that no good at all would ensue in Britain from declaring adultery to be a criminal offense.

Lord Devlin attacks the approach of the Wolfenden Committee as being “wrong in principle” in endeavouring to specify those circumstances in which it may be proper for the criminal law to intervene. The Wolfenden Committee with regard to sexual offenses had characterized these circumstances among others as including the “exploitation and corruption of others.” Lord Devlin suggests that this is so wide a characterization that it “can be supported only if it is accepted that the law is concerned with immorality as such.” It may well be that the exploitation and corruption of others is so wide a formulation as not to be of much practical help in a given case. Indeed it may be a mistake to attempt to confine the proper conditions for legal intervention within any single comprehensive formula. But the task should rather be of intensive investigation of social consequences in each particular case. The danger of Lord Devlin’s approach is that an established evaluation of collective judgments in society should replace the social research that is necessary. The alarming tendency of Lord Devlin’s thesis becomes more apparent when he turns to the question of how the collective judgment of society is to be ascertained. “It is,” he tells us, “that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling.” “Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral.” Here is an overt rejection of rationality startling in its frankness. The yardstick is to be the feeling of right minded people, though we are not told

40. Devlin 22.
41. Ibid.
42. Id. at 13.
43. See text at note 13 supra.
44. Devlin 13.
45. Id. at 15.
46. Id. at 16.
who are to be considered "right minded." Without qualification, this remark-
able statement has a frightening evocation of the notorious Nazi law of 1935
that empowered the judges to punish acts that deserved punishment "accord-
ing to the healthy instincts of the people." 47 Much of the sting is, however,
removed by the qualifications that Lord Devlin proceeds to offer. We are told
that "there must be toleration of the maximum individual freedom that is
consistent with the integrity of society"48 and that "nothing should be
punished by the law that does not lie beyond the limits of tolerance."49 The
first is a very large admission and the second almost tautologous. We are told
further that "majority dislike" is not enough; there must be a "real feeling of
reprobation."50 So, with respect to homosexual behaviour, "I do not think one
can ignore disgust if it is deeply felt and not manufactured. Its presence is a
good indication that the bounds of toleration are being reached."51 It is this
feeling of disgust that is taken, in Lord Devlin’s view, to justify the criminal
prohibition of cruelty to animals.52

The prohibition of cruelty to animals had earlier been considered by
Bentham as an exercise in the theory of utility. His answer had been forth-
right:

It may come one day to be recognized that the number of legs, the
villosity of the skin, or the termination of the os sacrum are reasons
equally insufficient for abandoning a sensitive being to the same fate [i.e.,
the caprice of a tormentor]. What else is it that should trace the insuper-
able line? Is it the faculty of reason, or, perhaps, the faculty of dis-
course? But a full-grown horse or dog is beyond comparison a more
rational, as well as a more conversable animal, than an infant of a day, or
a week, or even a month old. But suppose the case were otherwise, what
would it avail? The question is not, Can they reason? nor, Can they
talk? but, Can they suffer?53

Is this not much more satisfactory than to rest content with the mere ob-
servation of the reasonable man’s wave of disgust? The Benthamite method
compels us to do our best to express our disgust in the language of values.
The value here advanced is that the infliction of suffering on any sensate
creature is to be deplored and prohibited, unless there are very compelling
reasons that outbalance this value (as in the case of vivisection). If we pursue
this rigorous method into the example of homosexual behaviour, it can be
seen that the reaction of disgust which it is alleged is felt by the majority of
right thinking men is much less easy to state in the form of a defensible value
judgment. Here the disgust is perhaps more akin to the disgust which some
people may feel about gluttony or snoring or wearing gaudy ties. One cannot

47. See Friedmann, op. cit. supra note 9, at 351.
48. Devlin 17.
49. Ibid.
50. Ibid.
51. Ibid.
52. Id. at 18.
help suspecting that the morality of an established caste is being too unin-
quiringly proffered here as the morality of the right thinking majority. For is
it not a strange society that is disgusted at private, consensual, homosexual
behaviour, but can look with equanimity upon fox and stag hunting? Such an
established morality sustained a severe shock recently in Britain when the
men and women in a jury box could not be persuaded to condemn
\textit{Lady Chatterley's Lover} as an obscene book.\textsuperscript{64} It is not beyond the bounds of
possibility that proper inquiry might reveal that, while the ordinary man
contemplates homosexual behaviour with aversion and distaste, the knowledge
of its practice by others does not disgust him so deeply as Lord Devlin sus-
ppects. The disgust of the ordinary man is a dangerous guide for legislation,
but judicial reliance upon notions of what disgusts the ordinary man is even
more dangerous. Popular prejudice, wrote Bentham,

\begin{quote}
\text{\textit{serves oftener as a pretext than as a motive. It is a convenient cover
for the weakness of statesmen. The ignorance of the people is the
favourite argument of pusillanimity and indolence; while the real motives
are prejudices from which the legislators themselves have not been able
to get free. The name of the people is falsely used to justify their
leaders.}}\textsuperscript{65}
\end{quote}

Indeed, the casual introduction into English criminal law of the statutory pro-
vision creating the offense of gross indecency between men is a perfect
example of the harm that may be done by enacting a criminal prohibition
without full contemplation of its possible consequences.\textsuperscript{66}

If the powerful feelings of the ordinary man are to be a guide to legislation,
where are we to stop? There has been in recent years in Britain powerful
pressure for the reintroduction of corporal punishment. The Home Secretary,
while stoutly resisting this pressure, has admitted that the majority of public
opinion favors such a reintroduction.\textsuperscript{67} These majority feelings are probably
strong and passionate. They must nevertheless not be acceded to, as the
government has happily realized.

Lord Devlin pursues this matter of the criminal prohibition of homo-
sexuality by saying:

\begin{quote}
\text{\textit{We should ask ourselves in the first instance whether, looking at it
calmly and dispassionately, we regard it as a vice so abominable that
its mere presence is an offence. If that is the genuine feeling of the society
in which we live, I do not see how society can be denied the right to
eradicate it.}}\textsuperscript{58}
\end{quote}

\textsuperscript{54.} The Queen v. Penguin Books Ltd., [1961] \textit{Crim. L. Rev. (Eng.)} 176; \textit{The Trial
of Lady Chatterley} (Rolph ed. 1961); Clark, \textit{Obscenity, The Law and Lady Chatterley},

\textsuperscript{55.} \textit{BENTHAM, Theory of Legislation} 78 (Hildreth ed. 1876).

\textsuperscript{56.} See St. John-Stevas, \textit{op. cit. supra} note 26, at 210. Dicey, \textit{op. cit. supra} note 11,
at 41-42, comments on the circularity of the process by which legislation with the passage
of time influences public opinion and so in turn influences the legislature itself when future
legislation is in question.

\textsuperscript{57.} 638 H.C. Deb. 91 (1961).

\textsuperscript{58.} \textit{DEVLIN} 18.
It is not easy to see how a judgment that uses terms such as “abominable vice” can be made “calmly and dispassionately.” But, passing over this, we find again in the quoted passage the unhelpful reference to a society’s “rights” to pass laws. There is no suggestion of an inquiry into the harm such homosexual behaviour does to society, into the effectiveness of criminal prohibition as a check, or into the evils which may attend criminal prohibition. The only yardstick is the depth of disgust. As was seen earlier in the quotation from Bentham, the utilitarian method does not deny the relevance of the majority’s passionate disapproval of a mode of conduct when contemplating its criminal prohibition. But the utilitarian method leads one to evaluate that disgust in terms of stated values, and, if it is found to be irrational, to bow to it only with the greatest reluctance while continuing with strenuous attempts to eradicate it through education. What is contemplated in Britain as a consequence of the removal of the criminal prohibition on acts of homosexuality done in private between consenting adults? Would there be riots in the streets? Would homosexuals be stoned? If so, why does this not happen in the great majority of European countries where such conduct is not criminally prohibited? Can it be that the British are disgusted so much more easily than the French or Italians?

To the qualification that the feeling of disgust must pass beyond the limits of tolerance, Lord Devlin adds others, *vis.*., that the law should be “slow to act” in making criminal prohibitions on matters of morals and that “as far as possible privacy should be respected.” This is a welcome admission that the individual’s freedom of choice is a value to be set against the reprobation of the right thinking man. The law, too, Lord Devlin tells us, ought to be concerned with the minimum and not the maximum of moral behaviour. These reservations, however, although they appear to temper the severity of Lord Devlin’s approach, are not finally reassuring, for we are offered no guide as to their comparative importance when set beside the reprobation of the “right minded person.”

Towards the end of his lecture Lord Devlin gathers up his arguments and illustrations into a central thesis. Society, he argues, depends for its stability upon the existence of a common morality. This is as essential to its continuance as the freedom from external aggression or from internal rebellion. It is, therefore, not possible to mark out, as the Wolfenden Committee sought to do, a sphere of private morality or private sin which can never be the law’s business. Thus he notes:

The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals . . . . But the true principle is that the law exists for the protection of society. It does not discharge its function by

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59. *Id.* at 19.
61. *Id.* at 20.
protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.\textsuperscript{62}

Earlier he had observed:

I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality.\textsuperscript{63}

The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.\textsuperscript{64}

We may agree tentatively with Lord Devlin that any attempt to plot an area of human activity that can never be the business of the criminal law will be difficult and dangerous. Certainly privacy cannot be the sole criterion, though activities which are carried on privately are always less susceptible to law enforcement and attempts at law enforcement in such areas always lead to attendant dangers of blackmail. Lord Devlin himself gives the example of a large proportion of society choosing to get drunk every night in the privacy of their homes, his inference being that if this were to happen it would be appropriate for the criminal law to intervene.\textsuperscript{65} On the other hand, it is arguable that if society came to such a pass the criminal law could do little to rescue it. But, granting the point that it is possible to conceive of private, immoral practices becoming so widespread that they are as much a danger to society as armed rebellion, the inquiry cannot stop at that point.

In the first place condemnation of behaviour as "immoral" is not sufficient to establish it as a danger to society. Lord Devlin suggests that the criminal law exists for the protection of society rather than, or as well as, for the protection of individuals. But as Bentham said, "An act cannot be detrimental to a state, but by being detrimental to some one or more of the individuals that compose it,"\textsuperscript{66} even though those individuals may not be identifiable. The "immorality" with which the criminal law is concerned thus becomes that species of conduct which is likely to harm specific individuals or an indefinite number of unidentifiable individuals, which is capable of sufficiently precise definition to be the subject of law enforcement, and which is by its nature susceptible to law enforcement—always provided that the attempt to suppress it by law enforcement will not do more harm than good. Within this context there may be wide divergences by minority groups from conventional mores which make the intervention of the criminal law inexpedient. It is after all to be hoped that one of the chief values of our "common morality" is tolerance and that

\textsuperscript{62} Id. at 23.
\textsuperscript{63} Id. at 14.
\textsuperscript{64} Id. at 15.
\textsuperscript{65} Ibid.
\textsuperscript{66} BENTHAM, \textit{op. cit. supra} note 53, at 313.
this is a value always to be weighed carefully when considering penal legisla-
tion. To contend that a minority sexual practice and armed rebellion, or
subversive activity and an equal attack upon the "common morality," are
equally deserving of criminal prohibition is to neglect that painstaking in-
quiry into the consequences of behavior and the efficacy of prohibition which
should always precede criminal enactments. What ideas are so built into our
"community of ideas" that to abandon them would mean destruction? What
institutions and practices are so fundamental that their modification would
mean disintegration? There is room for much disagreement here, and if
history teaches us anything it is that "fundamental institutions" and "built
in ideas" often may decay and be modified without any consequent catastrophe
for the society in question. "A rebel," Lord Devlin tells us, "may be rational
in thinking that he is right but he is irrational if he thinks that society can
leave him free to rebel." As it stands, this is a dangerous statement. If it is
confined to armed rebellion and treasonable activities it is innocuous. If it has
a wider meaning, as it seems to have in the context, it is alarmingly totali-
tarian. Our society rightly allows many lesser modes of rebellion, if by these
are meant deviations from the common morality. The Benthamite argument
will always be that such deviations should go untouched unless and until
they satisfy the utilitarian tests for the passage of criminal prohibition.

The weakness of Lord Devlin's position here is perhaps demonstrated
by a curious passage at the end of his lecture where he discusses the crime of
abortion. "[A] great many people nowadays," he complains, "do not under-
stand that abortion is wrong." (The use of the word "understand" here
would seem to indicate some revelation granted to the author and which
many people have unfortunately not enjoyed.) Lord Devlin then goes on to
admit that the law prohibiting abortion functions very imperfectly and in
practice is invoked only when something has gone wrong and the woman has
died, or where a professional abortionist is involved. The result is that
abortion is in fact illegal because it is dangerous, is dangerous because it is
performed by the unskilled, and is performed by the unskilled because it is
illegal. It is therefore an excellent example of more harm than good resulting
from a criminal prohibition. While admitting this aspect of the matter, Lord
Devlin's comment is that this shows "what happens to the law in matters of
morality about which the community as a whole is not deeply imbued with a
sense of sin . . ." But since he has admitted that many people do not think
abortion is wrong, it is evident that by morality here he does not mean com-
monly shared attitudes of approval and disapproval but rather the morality of
a Church group.

This is expressed most frankly in the concluding paragraph of Lord
Devlin's lecture, which deserves to be quoted in full.

67. DEVLIN 25.
68. Id. at 24.
69. Ibid.
70. Id. at 25.
A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law. If morals could be taught simply on the basis that they are necessary to society, there would be no social need for religion; it could be left as a purely personal affair. But morality cannot be taught in that way. Loyalty is not taught in that way either. No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail.71

This passage is unconvincing mainly because it is never made clear what is meant by "morality." To say that "morality is necessary to society" seems to imply that morality is an additive which might be removed so as to secure the collapse of society. If morality is taken to mean widely shared attitudes of approval and disapproval towards modes of conduct, then morality is co-existent with and coterminal with society and to speak of morality and society as separate entities is meaningless. The question at issue is whether particular attitudes of disapproval toward particular modes of conduct ought to be supported by the prohibitions of the criminal law. On this point a paraphrase of Lord Devlin's argument could perhaps fairly be put as follows: There are some particular attitudes of disapproval which are necessary for the maintenance of society. The most effective way of maintaining these attitudes is through religion. The law must therefore support the churches by adding to their influence the weight of criminal prohibition, where that can be effective. This is something of a mutual bargain. The law must enforce Christian morals because without the help of Christian teaching generally the legal system as a whole would be in danger.

This position can be attacked on various points. It provides no test at all for deciding what disapproved conduct is so dangerous to society that it deserves criminal prohibition. It makes the very large assumption that society cannot remain stable without religion, an assumption that seems to be effectively contradicted by the experience of many contemporary societies. And it makes the quite unjustified leap, even on its own premise, that the law must enforce Christian morals simply because the Christian church is generally speaking an effective upholder of the legal system. This is a point of view that in England the Anglican church has itself abandoned, having spoken out plainly in recent years in favour of the abolition of the criminal prohibitions on homosexual behavior between consenting adults and on suicide.72

71. Ibid.
It may be well in conclusion to summarize briefly the relationship between the criminal law and general moral feelings that is here advocated and to indicate finally how Lord Devlin's position endangers this view.

Fortunately for humanity there is for the most part very wide agreement in any given society about what values deserve to be protected and consequently about what constitutes bad conduct that deserves to be discouraged. There is such general agreement about the evil quality of killing, physical violence, theft and damage to property that there is no need constantly to be enunciating our scheme of values on these points. The hard core of the criminal law has thus been pretty constant in all societies at all times in recorded history. With the movement of opinion there is a contraction of some areas of the criminal law and an expansion of others. So the definitions of murder and manslaughter have become stricter and narrower over the centuries while, on the other hand, the last two centuries have been a much expanded list of offenses of fraud and dishonesty. It will be commonplace to say that these changes reflect social, economic and intellectual developments that modify the set of public values. What the Benthamite position demands is that we should not unreflectingly accept any part of our criminal law simply because it is there and has been there for a long time, and that we should not hastily enact any fresh prohibition without long and painful debate. The examination of existing law and the debate about proposed laws should be conducted by making as explicit a statement as is possible of the values that the law is designed to protect, by a careful investigation of the harm done to those values by the conduct prohibited or which it is sought to prohibit, and by a careful consideration of the probable efficacy of legal prohibition. In this debate the prevalence of feelings of disgust or revulsion in the community towards given conduct is one factor to be considered and no more than that. It can never replace careful investigation of the social consequences of conduct and criminal prohibition, and if that careful investigation returns a verdict contrary to that of the disgusted majority, then that majority feeling must be ignored, unless to ignore it would lead to disturbance of a kind more harmful than the prohibition in question. The legislator cannot be wiser than he is, but he does not have to be as stupid as the stomach of the man in the street.

This method of proceeding, that Bentham advocates, is rational only in the sense that rational argument is possible after an explicit statement of values, assuming that there is agreement about these values. The element of irrationality that inheres in any value judgment inheres in this method also and the method is advanced therefore not because it is wholly rational but because it is as rational as you can get and frankly confesses its irrational aspects.

My quarrel with Lord Devlin is thus not that he substitutes an irrational method for a wholly rational one. By suggesting that the utilitarian method purports to be a wholly rational one and by appearing to plead for a necessary element of irrationality, Lord Devlin is in fact winning a hollow victory. The objection is that Lord Devlin is denigrating the element of rationality
that is possible and is, indeed, elevating irrationality to a dangerous peak. He
does this by concentrating, as the central point in his thesis, on the feelings
of reprobation of the man in the street and by correspondingly denying the
efficacy of the utilitarian examination of conduct which generates such feelings
in the man in the street. Dean Rostow, in commenting on Lord Devlin’s lecture
and Professor Hart’s retort, suggests that Lord Devlin has so qualified and
modified this central point that his final position is much the same as that of
those who seem to disagree with him and that the difference is at the most a
shift of emphasis. But it is surely a shift of emphasis that assumes vital
proportions, such an enormous difference of degree that it becomes a dif-
ference of kind. For the quarrel with Lord Devlin is ultimately a quarrel about
values. It is the value that he gives to the revulsions of the reasonable man that
is challenged, on the ground that the acceptance of his evaluation would
threaten other and more important values in our society. In opposition to
Lord Devlin’s quietist acceptance of majority feeling we may finally set a
memorable passage from Bentham:

I suppose myself a stranger to all the common appellations of vice and
virtue. I am called upon to consider human actions only with relation to
their good or bad effects. I open two accounts; I pass to the account of
pure profit all the pleasures, I pass to the account of loss all the pains.
I faithfully weight the interests of all parties. The man whom pre-
judice brands as vicious, and he whom it extols as virtuous, are, for the
moment, equal in my eyes. I wish to judge prejudice itself; to weigh
all actions in a new balance, in order to form a catalogue of those which
ought to be permitted, and of those which ought to be forbidden.

This is commended as a better text for the legislator than Lord Devlin’s
lecture.

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was initially prepared in the course of the LL.M degree program of New York University
School of Law.