My aim in this article is not to review once again the now famous controversy between Lord Devlin and Professor Hart. We already have an extensive literature on the subject and I do not wish to add to it. My aim is a more basic one. Instead of taking sides or looking for common ground between the two protagonists, I propose to re-examine the alleged issue of their controversy in the light of its historical setting. That this issue may not be clear is indicated by the fact that it is formulated indiscriminately both as the enforcement of morals and as the enforcement of morals as such. In my view, it is important to distinguish four separate issues which are telescoped in the Hart-Devlin controversy. I shall label the affirmatives of these issues respectively the “enforcement of morals as such in the stronger sense”, the “enforcement of morals as such in the weaker sense”, the “enforcement of morals in the stronger sense”, and the “enforcement of morals in the weaker sense”. I shall use the first label to denote the proposition that every immoral act should eo ipso also be an illegal act. I shall use the second label to denote the proposition that some immoral acts should qua such acts also be illegal acts. I shall use the third label to denote the proposition that the immorality of some acts should be the decisive factor in making them illegal; and I shall use the last label to denote the proposition that the immorality of an act should be a relevant factor in deciding whether to make it illegal.

I shall submit that it is paradoxical to speak of the enforcement of morals as such. If law and morals are two separate but
overlapping systems each of which carries its own sanctions—and that is the model subscribed to both by Lord Devlin and by Professor Hart—then morals can only be enforced *qua* morals, and law *qua* law.

I have said that I would re-examine the alleged issue of the Hart-Devlin controversy in the light of its historical setting. This is necessary because the Hart-Devlin controversy has tended to become identified with another controversy, namely, that which originated in Sir James Fitzjames Stephen's attack on Sir John Stuart Mill's celebrated essay *On Liberty*. Although these two controversies are historically and philosophically related, there are important differences between Lord Devlin's and Stephen's positions, and between Professor Hart's and Mill's positions. Stephen's main target was Mill's principle of self-protection, which Mill used to define the limits of legal and moral restraints on the liberty of the individual. Lord Devlin, on the other hand, was primarily concerned to refute the principles enunciated by the Wolfenden Committee, which were designed to mark out the limits of legal intervention in the field of morals. Professor Hart sided with the Wolfenden Committee and Mill against Lord Devlin and Stephen, and as a result these two controversies have tended to become identified.

II. *Mill's Principle of Self-protection.*

Mill laid down his famous principle of self-protection in his essay *On Liberty*. The subject of the Essay is, in his own words, civil or social liberty, "the nature and limits of the power which can be legitimately exercised by society over the individual". All that makes existence valuable to anyone, depends on the enforcement of restraints on the actions of other people. Some rules of conduct must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. What these rules should be is the principal question in human affairs, but if we except a few of the most obvious cases no two ages and scarcely any two countries have decided it alike.  

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4 Note that Lord Devlin was not familiar with the work which allegedly inspired him. Devlin, *op. cit.*, footnote 1, p. vii.
5 The Committee on Homosexual Offences and Prostitution, Cmnd. 247 (1963).
6 The pioneering work in this field was done by Bentham, not by Mill. See chapter 12 of Bentham's Theory of Legislation which was first published in French in 1802. The subject was treated by Bentham in his Introduction to the Principles of Morals and Legislation, the first edition of which was printed in 1780.
7 This essay was first published in 1859. I shall refer to it hereafter as the Essay.
8 Everyman's Library, p. 65.
The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind is 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.¹⁰

Mill is careful to say that his doctrine is meant to apply only to human beings in the maturity of their faculties. Thus children must be protected against their own actions as well as against external injury, and despotism is a legitimate mode of dealing with barbarians, provided the end be their improvement and the means justified by effecting that end. Liberty as a principle has no application to any state of things anterior to the time when mankind has become capable of being improved by free and equal discussion.¹¹

For Mill the idea of utility, and not the idea of abstract right, is the ultimate appeal on all ethical questions;

... but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation.¹²

In all things which regard the external relations of the individual, he is de jure amenable to those whose interests are concerned, and, if need be, to society as their protector. But there are often good reasons for not holding him to his responsibility. They must arise from the special expediencies of the case, either because it is the kind of case in which he is on the whole likely to act better when left to his own discretion, or because the attempt to exercise control would produce greater evils than those

¹⁰ Ibid., pp. 72-73.
¹¹ Ibid., p. 73.
¹² Ibid., p. 74. There are also, Mill continues, many positive acts for the benefit of others which he may be rightfully compelled to perform, such as to give evidence in court, to bear his fair share in the common defence, or in any other joint work necessary in the interests of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow creature's life, or to protect the defenceless against ill usage, things which whenever it is obviously a man's duty to do he may be made responsible to society for not doing. A person may cause evil to others not only by his actions, but also by his inactions, and in either case, Mill says, he is justly accountable to them for the injury, though the latter case requires a much more cautious exercise of compulsion than the former. Ibid.
which it would prevent. In these cases the conscience of the agent
should step into the vacant judgment seat, and protect those in-
terests of others which have no external protection.\textsuperscript{13}

Mill makes a point of stressing that his doctrine is not one of
selfish indifference. On the contrary, he favours a great increase
disinterested exertion to promote the good of others. The busi-
ness of education is to cultivate both \textit{self-regarding} and \textit{social}
(other-regarding) virtues, but when the period of education is
passed it is by conviction and persuasion only that the former
should be inculcated. The individual himself has his own well-
being more at heart than anybody else, and he has far better means
of knowledge in regard to his own feelings and circumstances than
anybody else. In this field individual spontaneity is entitled to free
exercise. All errors which he is likely to commit against advice and
warning are far outweighed by the evil of allowing others to con-
strain him to what they deem his good. This is not to say that
the feelings with which a person is regarded by others, ought not
to be affected in any way by his self-regarding qualities or de-
ficiencies. This would be neither possible nor desirable. A person
may be admired or even despised for the way he conducts his
own life, and we have a right to act on our opinion. Thus a person
may suffer very severe penalties at the hands of others for faults
which directly only concern himself; but he suffers these penalties
only in so far as they are the \textit{natural} consequences of the faults
themselves, not because they are purposely inflicted on him for the
sake of punishment.\textsuperscript{14}

Mill went out of his way to deal with the question: “How can
any part of the conduct of a member of society be a matter of
indifference to the other members?” He admits that no person
is an entirely isolated being and that it is impossible for a person
to do anything seriously or permanently hurtful to himself without
mischief reaching at least to his connections, and often far beyond
them. When a person violates a \textit{distinct and assignable obligation}
to any other person, the case is taken out of the self-regarding
class, and becomes amenable to \textit{moral} disapprobation in the
proper sense of the term. If, for example, a man, through in-
temperance or extravagance, becomes unable to pay his debts,
or, having undertaken the moral responsibility of a family, be-
comes from the same cause incapable of supporting or educating
them, he is deservedly reprobated and might be justly punished,
but it is for the breach of duty to his family or creditors, not for
the extravagance. Similarly, whoever fails in the consideration
generally due to the interests \textit{and feelings} of others, not being
impelled by some more imperative duty, or justified by allowable

\textsuperscript{13} \textit{Ibid.}
\textsuperscript{14} \textit{Ibid.}, pp. 132-134.
self-preference, is a subject of moral disapprobation for the failure, but not for the cause of it. In like manner, when a person disables himself by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offence. Thus no person ought to be punished simply for being drunk; but a soldier or policeman ought to be punished for being drunk on duty. "Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom. If grown persons are to be punished for not taking proper care of themselves, I would rather it were for their own sake, than under pretence of preventing them from impairing their capacity of rendering to society benefits which society does not pretend it has the right to exact.

Society, Mill says, has the power to educate the younger generation, and it has the ascendancy which the authority of received opinion always exercises over those least fitted to judge for themselves. Aided by the natural penalties which fall upon those who incur the distaste or contempt of those who know them, society does not need the power to enforce commands and enforce obedience in the personal concerns of individuals.

The strongest of all the arguments against the interference of the public with purely personal conduct, according to Mill, is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place. On questions of social morality the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still more often right because on such questions they are only required to judge of their own interest. But the opinion of a similar majority, imposed as a law on the minority on questions of self-regarding conduct, is quite as likely to be wrong as right; for in these cases public opinion means, at the best, some people's opinions of what is good or bad for other people.

Mill is careful to reject any automatic application of legal or moral sanctions. Conduct might be harmful, yet in some cases it might only make matters worse to punish it by a legal sanction, or even by moral constraint. In other cases, Mill points out, the conduct though harmful to some other individuals, is nevertheless

15 Ibid., p. 138.
16 Ibid., pp. 138-139.
17 Ibid., p. 139.
18 Ibid., p. 140.
19 See supra.
legitimate and does not justify the interference of society. Such oppositions of interest between individuals often arise from bad social institutions, and some would be unavoidable under any institutions. Whoever succeeds in an overcrowded profession, or in a competitive examination, reaps benefit from the loss of others. But it is better for the general interest of mankind that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors to immunity from this kind of suffering, and feels called to interfere only when means of success have been employed which it is contrary to the general interest to permit, namely, fraud, or treachery, and force.

Again, trade is a social act. The doctrine of Free Trade, according to Mill, rests on its economic superiority and not on the principle of individual liberty. Nor is that principle involved in most of the questions which arise respecting the limits of that doctrine; as, for example, what amount of public control is admissible for the prevention of fraud by adulteration; how far sanitary precautions, or arrangements to protect work-people employed in dangerous occupations, should be enforced on employers. Such questions involve considerations of liberty only in so far as leaving people to themselves is always better, caeteris paribus, than controlling them. On the other hand, there are questions relating to interference with trade which are essentially questions of liberty. Mill includes as examples of such questions the prohibition of the importation of opium into China, and the restriction on the sale of poisons. These interferences are objectionable not as infringements on the liberty of the producer or seller, but on that of the buyer. But, Mill says, the sale of poisons may be legitimately controlled for the prevention of crime or of accidents, which is one of the undisputed functions of government.

Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightfully be prohibited. Of this kind are offences against decency.

Mill then poses the question whether what the agent is free to do, other people ought to be equally free to counsel or instigate, even where the instigator profits from promoting what the state considers to be an evil. Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling-house? There are, he says, arguments on both sides.

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21 Ibid., pp. 150-151.
22 Ibid., p. 153.
23 Ibid., pp. 153-155. A further question, Mill points out, is whether
III. Composite Elements in Mill's Principle of Self-protection.

Enough has been said to show that Mill's principle of self-protection as developed by Mill in the Essay is neither simple nor simply a principle of self-protection. It is a compound of a number of overlapping elements, which can only be demonstrated through the examples given by Mill, and not an exhaustive deductive principle under which all the cases can be subsumed.\textsuperscript{24} Hence, any constructive criticism of the Essay must take into account these different aspects of the principle, or it will merely succeed in destroying one element at the cost of distorting the others. The first question which is raised by Mill's principle of self-protection is: what is its object? Is it merely to protect the liberty of each individual so that each can be given the maximum amount of liberty consonant with the liberty of everybody else, or is the protection of liberty a means and not an end? In some passages Mills seems to suggest that liberty is the highest good, and that the only legitimate object of social control is to protect the liberty of each individual from interference by others, but this interpretation is inconsistent with another element, namely, that of social harm. So far from being restricted to illegitimate interference with the liberty of individuals, social harm for Mill, as we have seen, comprises a great variety of actions and even inactions. Social harm is by no means limited to physical harm to persons and to property; it also includes certain types of moral harm and certain public violations of good manners. Focusing on this element, the prevention of social harm is the higher good to which liberty must be sacrificed where necessary.

Mill gives us only one general principle for circumscribing the area of social harm, and that is the negative principle that an individual's own good, either physical or moral, is not a sufficient warrant for interfering with his liberty. But although this principle leads to a distinction between self-regarding and other-regarding acts, Mill's principle of self-protection cannot be reduced to a statement of this distinction. For one thing, as I have said, it is made up

\textsuperscript{24} This emerges clearly from Professor H. J. McCloskey's article on Mill's Liberalism (1963), 13 Philosophical Quarterly 143. There Professor McCloskey stresses the need to examine Mill's writings more closely to determine what precisely is the nature of his liberal philosophy. But see A. Ryan's critical comment, Mr. McCloskey on Mill's Liberalism (1964), 14 Philosophical Quarterly 253, and Professor McCloskey's Mill's Liberalism —A Rejoinder to Mr. Ryan (1966), 16 Philosophical Quarterly 64. See also H. J. McCloskey, Some Arguments for a Liberal Society (1968), 43 Philosophy 324.
of composite elements and cannot be reduced to any one thing. For another, Mill put forward the distinction between self-regarding and other-regarding acts as a guiding principle, and not as a self-sufficient automatic test. This is borne out by his admission that no man is an island, and by some of the applications of the principle. In any event, Mill left no doubt that the other-regarding nature of an act only raises a *prima facie* presumption that it should be restrained. This presumption may be rebutted, if on balance the act is socially beneficial notwithstanding its harmful consequences to some individuals, or if on balance it would be undesirable to restrain it, weighing the harmfulness of the act against the evils which would result from restraining it.

On the other hand, Mill does sometimes give the impression as if the self-regarding or other-regarding nature of an act were a relatively simple question of *fact*. This would seem to be implied by his attempt to support the distinction on the ground that society can afford to bear the inconvenience of merely contingent injury for the sake of the greater good of human freedom. But what is or is not a merely contingent injury to society calls for a *value* judgment. What is merely a remote contingency to a liberal may be a serious risk to a conservative. The distinction between self-regarding and other-regarding acts is, I suggest, a *normative* and not a factual distinction. The question is where we *ought* to draw the distinction, not where it *is*, and how we answer it will depend not only on our values, but also on the purpose for which the question is asked. Thus, all other things being equal, we will be more reluctant to classify an act as other-regarding for the purpose of imposing a *legal* sanction than for the purpose of imposing a moral sanction. The values which inspired Mill were liberal and utilitarian, and it is on these values that he drew, and on which we must draw, to flesh out the dry bones of the distinction between self-regarding and other-regarding acts.

So far I have treated liberty as if it were a homogeneous concept, and as if Mill always used it in the same sense. Unfortunately, however, this is not the case. According to Sir Isaiah Berlin, there are two concepts of liberty which are telescoped in Mill’s account:

One is that all coercion is, in so far as it frustrates human desires, bad as such, although it may have to be applied to prevent other, greater evils; while non-interference, which is the opposite of coercion, is good as such, although it is not the only good. This is the “negative” conception of liberty in its classical form. The other is that men should seek to *discover* the truth, or to develop a certain type of character of which Mill approved—fearless, original, imaginative, independent, non-conforming to the point of eccentricity, and so on—and that truth can be found, and such character can be bred, only in conditions of freedom. Both these are liberal views, but they are not identical, and the
connexion between them is, at best, empirical.25

Berlin prefers the "ideal" of negative liberty to that of positive liberty:

The "negative" liberty that they strive to realize seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of "positive" self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it recognizes the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.26

According to Professor McCloskey, Berlin's claims are equally compatible with positive liberty construed simply as self-determination. It has been a commonplace, he says, to distinguish positive and negative liberty, though usually those who have drawn this distinction have argued that one or the other is not really liberty, Berlin being unusual in acknowledging both as genuine concepts of liberty. Professor McCloskey claims that there are several concepts of liberty, and not merely one or two.27 This is not the place to examine the various concepts of liberty, but it is important to note Professor McCloskey's distinction between non-interference unqualified, and non-interference with rights. If, he states, liberty is simply to be left alone, that is not to be interfered with, where interference is not defined on the basis of a theory of rights, liberty appears as a stunted, sterile thing, rather than as the glorious ideal it is so often portrayed as being. The common liberal position is that liberty consists in non-interference with our rights to liberty of thought, speech, action, contract, property, happiness, and so on, that is as consisting in the enjoyment of all our rights, including the right to liberty. (The liberty in the right to liberty cannot be negative liberty unqualified; it is better interpreted as the right to self-determination.)28

It can readily be seen that if a theory of rights is a hidden element in the principle of self-protection, we are introducing a Trojan horse into the citadel. Add to this the qualification in favour of immature people, which is capable of logical extension to a wide variety of people in certain situations, and the principle will be in danger of collapse from within. But although Mill makes reference to rights in the Essay, he forgoes, as we have seen, any advantage which could be derived from the idea of abstract right, as a thing independent of utility.29 He postulates there an

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26 Ibid., p. 56.
28 Ibid., at pp. 486-491.
29 Professor McCloskey points out that Mill's use of the term "utility" in the Essay is misleading. Mill, he says, does try to defend liberty in terms of its utility, but not in the sense suggested by his utilitarianism, for most of Mill's arguments are directed at showing the utility of liberty as means
a priori connection between utility and his principle of self-protection on the premise that utility in the largest sense is grounded on the permanent interests of a man as a progressive being, and that those interests authorize the subjection of individual spontaneity to external control only in respect of those actions of each which concern the interest of other people.  

IV. Mill’s Position on the Enforcement of Morals.

In the Hart-Devlin controversy, Mill is usually depicted as the father figure of liberal opposition to the enforcement of morals. According to Professor McCloskey, on the other hand, a closer reading of Mill reveals that he favours the enforcement of morals to such an extent that if his liberal theory were consulted today, “it would probably result in substantially more moral legislation than prevails in Great Britain and vastly more than most liberals would regard as permissible or desirable”. In my view, Mill’s position on the enforcement of morals can only be understood if we keep in mind two factors which are often obscured. First, Mill in the Essay was not concerned to mark out the limits of legal intervention in the field of morals, but to define the limits of legal and moral restraints on the liberty of the individual. Secondly, for Mill the notions of any right and wrong were inseparable from the idea of a sanction. This position outlined in the Essay is explicitly stated in his Utilitarianism:

We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. It is a part of the notion of Duty in everyone of its forms, that a person may rightfully be compelled to fulfil it. Duty is a thing which may be exacted from a person, as one exacts a debt. . . . Reasons of prudence, or the interest of other people, may militate against actually exacting it; but the person himself, it is clearly understood, would not be entitled to complain. There are other things, on the contrary, which we wish that people should do, which we like or admire them for doing, perhaps dislike or despise them for not doing, but yet admit that they are not...

knowledge, truth, rationality, rational belief, progress, moral responsibility, and self-perfection. Although Mill notes some considerations which relate to liberty as an aid to happiness, more usually the arguments linking liberty and happiness relate to happiness expanded to include liberty as part of rather than as a means to the end. Mill’s Liberalism, op. cit., footnote 24, at p. 145. Mill’s general doctrine of utilitarianism is set out in his Utilitarianism, which was published after the Essay in 1863. For an interesting interpretation, see J. O. Urmson, The Interpretation of the Moral Philosophy of J. S. Mill (1953), 3 Philosophical Quarterly 33, and J. D. Mabbott, Interpretations of Mill’s “Utilitarianism” (1956), 6 Philosophical Quarterly 115.

30 See supra.
31 Mill’s Liberalism, op. cit., footnote 24, at p. 156.
32 See supra.
bound to do; it is not a case of moral obligation; we do not blame them, that is, we do not think that they are proper objects of punishment.\footnote{Utilitarianism, Everyman's ed., p. 45.}

On the whole, I agree with Mr. Ryan's interpretation of Mill here: \footnote{Op. cit., footnote 24, at pp. 258-259.} Unlike McCloskey, who draws but one line between morality and law, Mill draws at least two. The first is between morality and law, drawn on positivist grounds as to fact, and on grounds of expediency as to whether a law is needed to enforce a moral rule; \footnote{Cf. the following passage where Mill uses a theory of rights: "The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law." Op. cit., footnote 33, p. 132.} the second is between aesthetics, prudence and sympathy which carry no sanctions, and law and morality which do. What McCloskey calls "private morality" falls largely under the headings of aesthetics and prudence, and "self-regarding morality" must do so entirely. Such things as being educated, cultivated and the like are aesthetic, while the avoidance of drunkenness, not frequenting prostitutes, not gambling, and so on, are prudent. Morality applies to the social feelings and actions of man, and if we call "moral" things which are not, what we do is to force compliance with our likings and dislikings from the more weak-minded of our fellows. Aesthetic qualities cannot be a matter of calculation and social rules, because they are matters for the imagination. Prudential behaviour, on the other hand, is open to calculation, but not social enforcement. The reason is not, as McCloskey seems to think, that to say that a man knows his own good better than anyone else, means that he knows all the means to his own good. The point is that prudential rules are hypothetical, not categorical imperatives. (Do X this way, if you want to do X.) In a tolerably advanced society, no one knows better than I what I want. It is a distrust of expertise about ends that is common to liberal thought.

Mr. Ryan, however, expects too much from Mill's distinction between self-regarding and other-regarding acts. This can be seen from Professor McCloskey's point that Mill in a number of passages supports legislation to restrain acts which the state considers to be an evil, even though the acts are self-regarding. \footnote{A Rejoinder to Mr. Ryan, op. cit., footnote 24, at p. 66.} Of course, Mill cannot have it both ways; he must be consistent. If he classifies an act as "self-regarding", then he is estopped from claiming that it ought to be the subject of a legal or moral sanction. On Mill's model, a lot of acts generally considered to be immoral would escape any sanction for this reason. But this may be an advantage, not a drawback. Mill's utilitarian approach in
terms of the appropriateness of social control through legal or moral sanctions, forces us to consider the merit of imposing any sanction for the doing of an act, and not merely the merit of imposing a legal sanction. Thus the tendency in the Hart-Devlin controversy is to admit that homosexuality is always immoral, but to resist the legal enforcement of the moral rule. Mill, on the other hand, would have regarded homosexuality between adults in private as self-regarding, and therefore as beyond the reach of legal and moral sanctions. A homosexual would merely be exposed to the natural inconveniences of the spontaneous unfavourable judgment of the majority who dislikes the practice.

It may be argued that it is difficult to hold the line between the inconveniences which are strictly inseparable from the unfavourable judgment of others and moral reprobation. Mill himself, as we have seen, admits that a person may suffer very severe penalties for faults which directly only concern himself. A person who suffers these penalties may be forgiven for failing to appreciate that he suffers them merely as the natural consequences of the faults themselves and not because they are purposely inflicted on him for the sake of punishment. Nevertheless, I do not think that Mill's distinction can be dismissed. There is a difference between the two cases, not only in the degree of the permissible penalty, but in their rationale. In one case the penalty is inseparable from a person's liberty to voice his likes and dislikes of the dispositions of others although they harm nobody. In the other case a wrong has been committed and the offender is punished because of what he has done.

It follows from what I have said that Mill rejects both the enforcement of morals as such, and the enforcement of morals in the stronger sense. This conclusion can be derived both from Mill's principle of self-protection and from his utilitarianism. According to the former, this principle, however we construe it, must be the decisive factor in making any act illegal, while according to the latter the decisive factor must always be the balance of utilitarian considerations. But there is no conflict between Mill's principle of self-protection or his utilitarianism and the enforcement of morals in the weaker sense. Mill's principle of self-protection merely restricts the area of legal and moral restraints to the class of other-regarding acts. Within that class, the immorality of an act is a relevant factor in deciding whether to make it illegal in the sense that the availability of a moral sanction may or may not require the backing of a legal sanction. This question can, and according to Mill, should be decided on the balance of utilitarian considerations. It should not be thought that Mill was blind to the relevance of morals as a source of legal values. But for Mill

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37 See infra.
not all *conventional* "moral" values are *moral* values. In order to qualify, they have to be something more than mere likes and dislikes; they have to satisfy the principle of utility, which, according to Mill, requires that they relate to the class of other-regarding acts. Suppose, however, that a conventional moral value qualifies as a value that should be enforced through a moral sanction. That is not necessarily the end of the matter, for on testing the moral value on the principle of utility, it may well be found that it should also be enforced as a *legal* value. In this way, moral values can find their way into the law.

V. Stephen's Attack on Mill.

The first four chapters of Stephen's *Liberty, Equality, Fraternity*\(^{38}\) are devoted to an attack on Mill's principle of self-protection. The nature of this attack is well summarized in Stephen's preface to the second edition of his work. Dealing with Morley's\(^{39}\) criticism that he "failed to see that the very aim and object of Mr. Mill's *Essay* is to show on utilitarian principles that compulsion in a definite class of cases—the self-regarding parts of conduct, namely—and in societies of a certain degree of development, is always bad," he replies:

That this was Mr. Mill's "very aim and object", I saw, I think, as distinctly as Mr. Morley himself. My book is meant to show that he did not attain his object, that the fundamental distinction (about self-regarding acts) upon which it rests is no distinction at all, and that the limitation about "societies of a certain degree of development" is an admission inconsistent with the doctrine which it qualifies.\(^{40}\)

Stephen then dismisses the charge that he omitted to recognize that the *positive* quality of liberty was the essence of Mill's doctrine. Liberty, he says, is a eulogistic word; substitute for it a neutral word like "leave" or "permission" and it becomes obvious that nothing whatever can be predicated of it, unless you know who is permitted by whom to do what. Of course, liberty may have positive *effects*. "Give all men leave to steal, and no doubt some men will steal, but this does not show that liberty itself is a definite thing, with properties of its own, like coal or water."\(^{41}\)

The real difference between Mr. Mill's doctrine and mine, Stephen says, is this: "We agree that the minority are wise and the majority foolish, but Mr. Mill denies that the wise minority are

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\(^{38}\) This work was first published in 1873. The second edition, which contains Stephen's notes in reply to his original critics, was published in 1874. All references here will be to the edition edited by R. S. White, Cambridge U.P. (1967).

\(^{39}\) For a brief biographical note on Morley, see *ibid.*., p. 26, footnote 3.


ever justified in coercing the foolish majority for their own good, whereas I affirm that under certain circumstances they may be justified in doing so. Mr. Morley says that Mr. Mill’s principle would protect the minority from being coerced by the majority, whereas my principle would expose them to such coercion. My answer is that in my opinion the wise minority are the rightful masters of the foolish majority, and that it is mean and cowardly in them to deny the right to coerce altogether for fear of its being misapplied as against themselves."

Stephen’s constant emphasis in his work is on Mill’s failure to prove his case. In his first chapter on the doctrine of liberty in general, he reformulates Mill’s theory of liberty in psychological terms: “No one is ever justified in trying to affect any one’s conduct by exciting his fears, except for the sake of self-protection”; or “It can never promote the general happiness of mankind that the conduct of any persons should be affected by an appeal to their fears, except in the cases excepted”. Surely, he says, these are not assertions which can be regarded as self-evident, or even as otherwise than paradoxical. All morality and all existing religions appeal either to hope or fear, and to fear far more than to hope. Criminal legislation is an engine of prohibition which is unimportant in comparison. Positive morality is nothing but a body of principles and rules more or less vaguely expressed, by which certain lines of conduct are forbidden under the penalty of general disapprobation, quite irrespective of self-protection. Mr. Mill admits in so many words that there are “inconveniences which are strictly inseparable from the unfavourable judgment of others”. What, Stephen asks, is the distinction in principle between such inconveniences, and similar ones organized, defined and inflicted upon proof? There is, moreover, a practical relation between the morality preached and these inconveniences. Strenuously preach and rigorously practice that our neighbour’s private character is nothing to us, and the number of unfavourable judgments formed, and therefore the number of resulting inconveniences, will be greatly reduced.

Stephen mentions three important purposes of coercion other than self-protection: (1) coercion for the purpose of establishing and maintaining religions; (2) coercion for the purpose of establishing and practically maintaining morality; and (3) coercion for the purpose of making alterations in existing forms of government or social institutions. The first and second of these purposes, he says, were no doubt intended to be condemned by Mill’s principle. Indeed, as he states it, the principle would go very much further. It would condemn, for instance, all taxation

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43 Ibid., p. 32.
44 Ibid., pp. 57-60.
without consent, except for the upkeep of the military or of the administration of justice. As regards the third purpose, Mill and his disciples would be the last persons in the world to say that the social changes since the sixteenth century have not on the whole been eminently beneficial to mankind, but nothing can be clearer than that they were brought about by force, often by that of a numerically small minority. The only way of reconciling this purpose with Mill’s principle is to describe such force as a case of self-protection, but if this is done then political and social systems can be upset at will and the principle does not apply to the very cases in which it is most needed. Mill’s principle assumes the existence of an ideal state of things in which everyone has precisely the position which, with a view to the general happiness of the world, he ought to have.\textsuperscript{44}

Not only, Stephens says, is an appeal to facts and experience opposed to Mr. Mill’s principle, but the Essay contains exceptions and qualifications which are really inconsistent with it. The principle “is meant to apply to human beings in the maturity of their faculties”. But either this exception means only that there is a sphere within which the taste of mature people ought not to be interfered with, which no one denies; or it means that in all civilized countries the mass of adults is able to promote its own interests better than anybody else.\textsuperscript{45} The force of this criticism is that the qualification leaves ajar a door which if opened would be destructive of the principle.

For Stephen, the question whether liberty is a good or a bad thing is as irrational as the question whether fire is a good or a bad thing; it is both good and bad according to time, place and circumstances. Since Stephen’s own approach to liberty is utilitarian, he fails to see how Mill could deny its correctness “consistently with the general principles of the ethical theory which is to a certain extent common to us both”.\textsuperscript{46} Compulsion, he says, is bad—(1) when the object aimed at is bad; (2) when the object aimed at is good, but the compulsion employed is not calculated to obtain it; (3) when the object aimed at is good, and the compulsion employed is calculated to obtain it, but at too great an expense. Thus to compel a man to commit a murder is bad because the object is bad. To inflict a punishment sufficient to irritate but not to deter is bad—even if the object is good, because the compulsion is not calculated to effect its purpose. To compel people not to trespass by shooting them with spring-guns is bad, because the harm done is out of all proportion to the harm avoided.

\textsuperscript{44} Ibid., pp. 61-66.
\textsuperscript{45} Ibid., pp. 67-68.
\textsuperscript{46} Ibid., p. 85.
If, however, the object aimed at is good, if the compulsion employed such as to attain it, and if the good obtained overbalances the inconvenience of the compulsion itself I do not understand how, upon utilitarian principles, the compulsion can be bad. I may add that this way of stating the case shows that Mr. Mill's "simple principle" is really a paradox. It can be justified only by showing as a fact that, self-protection apart, compulsion must always be a greater evil in itself than the absence of any object which can possibly be obtained by it. 47

There would be, Stephen concedes, a much stronger case for Mill's principle, if it were limited to the medium of the criminal law. The doctrine would then be that men are not justified in imposing the restraints of criminal law on each other's conduct except for the purpose of self-protection, but that they are justified in restraining each other's conduct by the action of public opinion not only for the purpose of self-protection, but for the common good, including the good of the persons so restrained. Although Stephen states that he would still not agree with this doctrine, he does not think that this issue is worth discussing. Criminal law, he says, "has found its level in this country, and, though in many respects of great importance, can hardly be regarded as imposing any restraint on decent people which is ever felt as such". 48 The only restraints under which anyone will admit that he frets are the restraints of public opinion. This is the practically important matter, this is the great engine by which the whole mass of beliefs, habits and customs, which collectively constitute positive morality, are protected.

Stephen's many valuable criticisms of Mill's principle of self-protection are weakened by his dogmatism, which greatly exceeds Mill's. Thus Stephen will have no truck at all with the distinction between self-regarding and other-regarding acts. Not only does it not provide a self-sufficient automatic test, not only is it unworkable in many cases; it is "no distinction at all". Similarly, the limitation about "societies of a certain degree of development" is not only capable of extension to all people who are handicapped; it is "inconsistent" with the doctrine which it qualifies. Again, Stephen takes it for granted that because there is an empirical connection between moral reprobation and "inconveniences which are strictly inseparable from the unfavourable judgment of others", the distinction between the two is therefore worthless; or that because liberty is not one homogeneous concept, it can have no positive aspects, only positive effects. In Stephen's treatment of Mill, everything which is not definitely white is necessarily black; he makes no allowance there for shades of gray. However, we shall see when we come to deal with his

47 Ibid., pp. 85-86.
48 Ibid., p. 144.
49 Ibid., pp. 59-60.
own position on the enforcement of morals,⁵⁰ that in practice his pragmatism is stronger than his dogmatism, and that his respect for the liberal values which he purports to despise, is stronger than his contempt. Just as Mill’s bent towards extreme laissez-faire liberalism is tempered by his regard for practicalities and for the moral virtues which Stephen defends, so Stephen’s bent towards extreme dictatorial conservatism is curbed by his pragmatism and his regard for the liberal values which he attacks. There is considerable common ground between Mill and Stephen, but they arrive at it from opposite sides.

VI. Stephen’s Position on the Enforcement of Morals.

Stephen introduces this topic in his chapter on The Doctrine of Liberty in its Application to Morals as follows: “I now pass to what I have myself to offer on the subject of the relation of morals to legislation, and the extent to which people may and ought to be made virtuous by Act of Parliament, or by ‘the moral coercion of public opinion’”⁵¹. Stephen follows the arrangement suggested previously, namely, by considering whether the object for which the compulsion employed is good, whether the compulsion employed is likely to be effective, and whether it will be effective at a reasonable expense.

The object of morally intolerant legislation is to establish, to maintain, and to give power to that which the legislator regards as a good moral system or standard. This object is good if and in so far as the system so established and maintained is good. How far any particular system is good does not admit of any final answer, but there are a considerable number of things which appear good and bad, though no doubt in different degrees, to all mankind. For the practical purpose of legislation, refinements are of little importance. In England at the present time the differences between speculative men relate not so much to the question whether particular acts are right or wrong as to general ethical questions. “The result is that the object of promoting virtue and preventing vice must be admitted to be both a good one and one sufficiently intelligible for legislative purposes.”⁵²

If this is so, the only remaining questions will be as to the efficiency of the means at the disposal of society for this purpose, and the cost of their application. Society, Stephen says, has at its disposal two great instruments by which vice may be prevented and virtue promoted, namely, law and public opinion; and law is either criminal or civil. The use of each is subject to certain limits and conditions. Criminal law is by far the most powerful

⁵⁰ See infra.
⁵² Ibid., p. 150.
and the roughest engine which society can use for any purpose. Before an act can be treated as a crime, "it ought to be capable of distinct definition and of specific proof, and it ought also to be of such a nature that it is worth while to prevent it at the risk of inflicting great damage, direct and indirect, upon those who commit it. These conditions are seldom, if ever, fulfilled by mere vices".53

A little later on, however, Stephen appears to contradict what he has just said.

If we now look at the different acts which satisfy the conditions specified, it will, I think, be found that 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. The punishment of common crimes, the gross forms of force and fraud, is no doubt ambiguous. It may be justified on the principle of self-protection, and apart from any question as to their moral character. It is not, however, difficult to show that these acts have in fact been forbidden and subjected to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feeling of hatred—call it revenge, resentment, or what you will—which the contemplation of such conduct excites in healthily constituted minds. If this can be shown, it will follow that criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance above-mentioned are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.54

The strongest of all proofs, Stephen says, that self-protection is not the only end of criminal law is to be found in the principle universally admitted and acted upon as regulating the amount of punishment. "Other illustrations of the fact that English criminal law does recognize morality are to be found in the fact that a considerable number of acts which need not be specified are treated as crimes merely because they are regarded as grossly immoral."55 But Stephen goes on to mention some "highly important qualifications, of which I will only say here that those who have due regard to the incurable weaknesses of human nature will be very careful how they inflict penalties upon mere vice, or even upon those who make a trade of promoting it, unless special circumstances call for their infliction".56 It is one thing, he adds, to tolerate vice so long as it is inoffensive, and quite another to give it a legal right to assert itself in the face of the world.

Stephen then shows by examples how the civil law quite properly promotes virtue and prevents vice. All the commoner

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53 Ibid., p. 151.
54 Ibid., p. 152.
55 Ibid., p. 154. By the "acts which need not be specified" Stephen refers to what the Victorians generally called "unnatural vices". Sodomy was a capital crime until 1861. Ibid., editor's footnote 18.
56 Ibid., p. 155.
and more important rights and duties, he says, presuppose some theory of morals.

Replying to Mr. Morley’s comment that the “actual existence of laws of any given kind is wholly irrelevant to Mr. Mill’s contention, which is that it would be better if laws of such a kind did not exist”, Stephen says that one may be disposed to doubt whether the practical conclusions to which most nations have been led by experience are without merit. As to Morley’s point that Mill did not deny that society ought to have a moral standard, but only set aside from it self-regarding acts, Stephen replies that this exception is neither possible nor desirable in the case of moral coercion, and that in the case of legal coercion, the question whether it is possible or desirable depends on considerations drawn from the nature of law, civil and criminal.

Having concluded that both law and public opinion do in many cases, and rightly so, exercise a powerful coercive influence on morals, he mentions four great leading principles which lay down limits to the possibility of useful interference: (1) Neither legislation nor public opinion ought to be meddlesome. (2) Both legislation and public opinion, but especially the latter, are apt to be most mischievous if they proceed upon imperfect evidence. (3) Legislation ought in all cases to be graduated to the existing level of morals in the time and country in which it is employed. (4) Legislation and public opinion ought in all cases whatever scrupulously to respect privacy.

... there is a sphere, none the less real because it is impossible to define its limits, within which law and public opinion are intruders likely to do more harm than good. To try to regulate the internal affairs of a family, the relations of love or friendship, or many other things of the same sort, by law or by the coercion of public opinion, is like trying to pull an eyelash out of a man’s eye with a pair of tongs. They may put out the eye, but they will never get hold of the eyelash.

Although Stephen’s conception of privacy is more restricted than Mill’s notion of self-regarding acts, there is an obvious relation between the two, particularly if we bear in mind that the distinction between self-regarding and other-regarding acts was put forward as a guiding principle and not as a self-sufficient automatic test. Stephen’s apparently contradictory attitude to the punishment of vice by the criminal law can be reconciled if the role of the criminal law is restricted to the grosser forms of vice.

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57 “As to Mr. Mill’s doctrine that the coercive influence of public opinion ought to be exercised only for self-protective purposes, it seems to me a paradox so startling that it is almost impossible to argue against it.” Op. cit., ibid., p. 158.
58 Ibid., p. 155, footnote. Here Stephen seems to concede some significance to the distinction between self-regarding and other-regarding acts.
59 Ibid., pp. 159-160.
60 Ibid., p. 162.
According to Stephen, the punishment of such vice may be justified on the principle of self-protection, but the principle is not the only reason for its suppression; the grosser forms of vice are also outlawed to gratify the feeling of hatred, revenge or resentment which such conduct excites. But granted that this is a factor in outlawing the grosser forms of vice, it does not follow that criminal law "is in the nature of a persecution of the grosser forms of vice", independently of utilitarian considerations. Stephen himself was a utilitarian, and the influence of this doctrine on him can clearly be seen in his strong emphasis on the need for utility in the enforcement of morals through law and public opinion. Stephen's point, I suggest, is not that criminal law persecutes the grosser forms of vice independently of utilitarian considerations, but that all utilitarian consideration are not reducible to Mill's principle of self-protection. The gratification of the feeling of hatred, revenge or resentment in a public and legal manner is an example of other utilitarian considerations. The solemn denunciation of the judge has a deterrent effect not only on the offender and on potential offenders, but on the victim and potential victim who might otherwise take the law into their own hands.

For a utilitarian, the decisive factor in making any act illegal must always be the balance of utilitarian considerations. Consequently, if Stephen can be taken to advocate the enforcement of morals as such, or the enforcement of morals in the stronger sense, this would be inconsistent with his utilitarianism. Let us look at the evidence. Stephen clearly does not favour the enforcement of morals as such in the stronger sense, since he makes it plain that coercion is not justified in all cases, but only where it is useful. There is one passage which at first glance seems to support the enforcement of morals as such in the weaker sense: "Other illustrations of the fact that English criminal law does recognize morality are to be found in the fact that a considerable number of acts which need not be specified are treated as crimes merely because they are regarded as grossly immoral." In my view this

61 "In a certain sense I am myself a utilitarian. That is to say, I think that from the nature of the case some external standard must always be supplied by which moral rules may be tested; and happiness is the most significant and least misleading word that can be employed for that purpose. It is, too, the only object to which it is possible to appeal in order to obtain support. A moral system which avowedly had no relation to happiness in any sense of the word would be a mere exercise of ingenuity for which no one would care. I know not on what other footing than that of expediency, generally in a wider or narrower sense, it would be possible to discuss the value of a moral rule or the provisions of a law." Ibid., p. 227. But Stephen made it plain that he did not agree either with Mill's or Bentham's doctrine. Ibid. For a statement of his own doctrine, see his Note on Utilitarianism, ibid., p. 272.

62 See also ibid., p. 152, and H. L. A. Hart, op. cit., footnote 1, pp. 60-69.

63 See supra.
interpretation should be rejected for two reasons. First, the passage must be read in the context of Stephen's attack on Mill's principle of self-protection. Secondly, we must pay attention to the words "treated as" and "regarded as", and not merely to the word "merely". These words are inconsistent with the enforcement of morals as such; for if all or some immoral acts were *qua* immoral acts also illegal, then such acts would be crimes and would not merely be treated as crimes because they are regarded as grossly immoral. On the other hand, the word "merely" does suggest that Stephen regarded the immorality of some acts as the decisive factor and not only as a relevant factor in making them illegal.

For a utilitarian, as I have said, the decisive factor must always be the balance of utilitarian considerations. But there is no conflict between utilitarianism and the enforcement of morals in the weaker sense. The immorality of an act is a relevant factor in deciding whether to make it illegal in two senses: first, in the sense that the availability of a moral sanction may or may not require the backing of a legal sanction; and secondly, in the sense that moral values may be sources of legal values, since on testing a moral value on the principle of utility it may well be found that it should also be enforced as a legal value. For Mill, as we have seen, not all conventional moral values are moral values; in order to qualify, they have to relate to the class of other-regarding acts. This qualification is in no way central to utilitarianism. What is central to it, is that conventional moral values must be brought into line with utilitarian moral values. There can be no question of enforcing merely conventional moral values either through moral or through legal sanctions. Only values which have satisfied the principle of utility can be enforced, and their appropriate mode of enforcement must be decided on the balance of utilitarian considerations. Conventional moral values are relevant as candidates to be tested on the principle of utility for moral or legal enforcement, but they do not in themselves constitute approved moral or legal values.

To sum up, I do not think that Stephen intended to depart from a utilitarian position. Hence, looking at his work as a whole, I do not think that he should be convicted either of the heresy of mistaking conventional moral values for utilitarian moral values, or of the heresy of advocating the enforcement of morals as an end in itself, and not as a means to an end. On the other hand, he can hardly escape the charge of tending to accept too readily conventional moral values, particularly those of which he approves, as satisfying the principle of utility.

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64 See *supra*.
65 See *supra*.
VII. The Wolfenden Report.

For our purposes, the most significant part of the Report is that which deals with the Committee’s general approach to the problem of homosexuality and prostitution. The Committee recognized that the “laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good . . .”.67 The Committee formulates the function of the criminal law so far as it concerns the subject of its inquiry as follows: “. . . 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 especially vulnerable . . .”.68 But it is not in the Committee’s view the “function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined . . .”.69

It is interesting to note that the passage of the Wolfenden Report which figures most prominently in the Hart-Devlin controversy is contained in chapter 5 which deals with homosexuality, and not in the part which sets out the Committee’s general approach to the problem. It is put forward as an additional counter-argument to the arguments against a change in the law.

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.70

I suggest that we can draw the following general conclusions from the principles enunciated by the Wolfenden Committee:

(1) Laws ought to be acceptable to the general moral sense of the community. They ought not to lag too far behind it, nor be too far ahead of it.71

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68 Para. 13.
69 Para. 14.
70 Para. 61. See also para. 227.
71 Para. 16.
(2) Criminal law ought not to interfere with private moral conduct, except in so far as it directly affects the public good and makes such intervention desirable. (In that case, however, it would appear that the conduct is not "private", and if that is so there is no need for the exception.)

(3) Conduct in private is not necessarily private conduct in the sense that it does not directly affect the public good so as to make the intervention of criminal law undesirable. Conduct in private is conduct in a place in which members of the public are not likely to see and be offended by such conduct. In the field of sexual morals, conduct in private between consenting adults does not directly affect the public good so as to make the intervention of the criminal law desirable. (Cf. treason, homicide, or serious assault.)

(4) Criminal law is not concerned with moral reprobation.

(5) In the field of sexual morals, the function of criminal law is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of the handicapped. Opinions will differ on what these things are, and they will be based on moral, social, or cultural standards.

It will readily be seen that the Committee's distinction between private moral conduct and conduct which directly affects the public good is closely related to Mill's distinction between self-regarding and other-regarding acts. Unlike Mill, however, who used the distinction as a guiding principle to define the limits of legal and moral restraints on the liberty of the individual, the Committee used it as a guiding principle to mark out the limits of legal intervention in the field of morals. The Committee did not take the view that self-regarding acts are not subject to moral reprobation. We must not be misled by the term "private morality"; the Committee meant by it that there is a sphere of morality which should be beyond the limits of legal intervention, and not that "morality" in these cases is a matter of private likes and dislikes. In order to qualify for legal, though not for moral enforcement, conventional moral values must relate to conduct which directly affects the public good. This qualification is inconsistent with the enforcement of morals as such, and with the enforcement of morals in the stronger sense, but it is perfectly consistent with the enforcement of morals in the weaker sense. Within the class of acts which directly affect the public good, the

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72 Para. 64.
73 Para. 62.
74 Para. 13, supra.
75 Para. 15.
76 In para. 257, a paragraph concerned with Prostitution, the Committee states that "it is not the duty of the law to concern itself with immorality as such".
immorality of an act is a relevant factor in deciding whether to make it illegal in two senses: first, in the sense that the availability of a moral sanction may or may not require the backing of a legal sanction; and secondly, in the sense that moral values may be sources of legal values, since it may well be found that in the interest of the public good a moral value should also be enforced as a legal value.

VIII. Lord Devlin's Three Interrogatories.

Lord Devlin formulates the nature of his inquiry as follows: "What is the connection 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?" The statements of principle in the Wolfenden Report, he says, provide an admirable and modern starting point for such an inquiry. Lord Devlin conducts his inquiry by addressing the following three interrogatories to himself "in the belief that they cover the whole field":

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?
3. If so, 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 answers the first two interrogatories in the affirmative, and the wider proposition in the last in the negative. According to Lord Devlin, there is a case for a "collective judgment" (as distinct from a large number of individual opinions which sensible people may refrain from pronouncing if it is upon somebody else's private affairs) only if society is affected. Without a collective judgment there can be no case at all for intervention. Lord Devlin claims that expressions such as "private morality" suggest that there ought not to be a collective judgment about immorality per se. But although the language of the Report may be open to question, Lord Devlin says, the conclusions at which the Committee arrives answer this question unambiguously. 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, as the Report recommends.

This attitude the Committee makes even clearer when it comes to

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78 Ibid., pp. 7-8.
79 Ibid., p. 8.
deal with prostitution. The Report takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution. "What the Report seems to mean by private morality might perhaps be better described as private behaviour in matters of morals."

For the reasons given, I do not think that the Committee contradicted itself on the public status of morals. I have suggested that "private morality" in the Report means that there is a sphere of morality which is beyond the limits of legal intervention, and not that "morality" in these cases is a matter of private likes and dislikes. Lord Devlin's criticism, however, is pertinent to this aspect of Mill's doctrine.

The answer to the first interrogatory, Lord Devlin says, determines the way the second should be approached and may indeed very nearly dictate the answer to it. If society has no right to make judgments on morals, the law must find some special justification for entering the field of morality. But if society has the right to make a judgment and has it on the basis that a recognized morality is as necessary to society as a recognized government, the society may use the law to preserve morality in the same way as anything else that is essential to its existence. "If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such."

The Wolfenden Report, notwithstanding that it seems to admit the right of society to condemn homosexuality and prostitution as immoral, requires special circumstances to be shown to justify the intervention of the law. I think that this is wrong in principle and that any attempt to approach my second interrogatory on these lines is bound to break down. I think that the attempt by the Committee does break down and that this is shown by the fact that it has to define or describe its special circumstances so widely that they can be supported only if it is accepted that the law is concerned with immorality as such.

Surely, this is a non-sequitur. It rests on Lord Devlin's failure to distinguish between the enforcement of morals as such, and the enforcement of morals in the stronger and in the weaker sense. The Wolfenden Committee's recommendations for safeguards against exploitation and corruption show that it regarded the immorality of these acts as a relevant factor in recommending them to be made illegal; but they do not prove that it regarded the immorality of the acts as the decisive factor, let alone that it favoured the enforcement of morals as such.

Similarly, Lord Devlin's further conclusion that "it is not possible to set theoretical limits to the power of the State to legis-

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82 See supra.
84 Ibid.
late against immorality”, is only warranted if it is interpreted to mean that the relevance of the moral factor in legislation cannot be excluded a priori by some theoretical limit. I have already indicated that the Committee did not try to do this; it proposed the distinction between self-regarding and other-regarding acts as a guiding principle, and not as a self-sufficient automatic test.\(^{85}\)

It is tempting to say that Lord Devlin substituted for the theoretical distinction between self-regarding and other-regarding acts, the practical discrimination of every right-minded man between that part of morality which is necessary for the existence of society, and that part which is not. This interpretation is supported by his comment on Shaw's case:\(^{86}\)

Hitherto the role of the jury has been negative and never formally recognized. The jury resists the enforcement of laws which it thinks to be too harsh. The law has never conceded that it has the right to do that, but it has been accepted that in practice it will exercise its power in that way. The novelty in the dicta in Shaw's case is that they formally confer on the jury a positive function in law enforcement. It cannot be intended that the jury's only duty is to draw the line between public morality and immorality.\(^{87}\)

The reductio ad absurdum of the majority opinion of the House in Shaw's case is that there is no need for any formulated criminal law. Each case as it arises may safely be left to be decided with reference to the common sense morality of the jury. Parliament would merely reserve the power of altering the law if it dislikes the fruits of the legal process.\(^{88}\) In actual fact, however, Lord Devlin does put forward certain theoretical guiding principles for limiting the intervention of the law in the area of morals in dealing with his third interrogatory:

Immorality . . . , for the purpose of the law, is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its locus standi. It cannot be shut out. But—and this brings me to the third question—the individual has a locus standi too; he cannot be expected to surrender to the judgment of society the whole conduct of his life. It is the old and familiar question of striking a balance between the rights and interests of society and those of the individual. This is something which the law is constantly doing in matters large and small.\(^{89}\)

One cannot, Lord Devlin says, talk sensibly of a public or private morality any more than one can talk of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to

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\(^{85}\) See supra.


\(^{87}\) Lord Devlin made this comment in a later article reprinted in the chapter on Democracy and Morality, op. cit., footnote 1, p. 99.

\(^{88}\) Ibid., p. 99.

\(^{89}\) Ibid., p. 15.
reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. They cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the law-making power but to guide those who apply it. Lord Devlin then lays down the following "elastic" principles for the guidance of the legislature when considering the enactment of laws enforcing morals: The first is that there must be tolerance of the maximum individual freedom that is consistent with the integrity of society. The second is that in any new matter of morals the law should be slow to act, since in the next generation the swell of indignation may have abated. The third elastic principle, which Lord Devlin advances more tentatively, is that as far as possible privacy should be respected. This distinction does not justify the exclusion of all "private immorality" from the scope of the law. Lord Devlin suggests that its influence should be reduced from that of a definite limitation to that of a matter to be taken into account. Thus, since the gravity of the crime is also a proper consideration, a distinction might well be made in the case of homosexuality between the lesser acts of indencency and the full offence, which on the principles of the Wolfenden Report it would be illogical to do.90

The last and the biggest thing to be remembered, Lord Devlin says, is that the law is concerned with the minimum and not with the maximum. The question of society's right to pass a moral judgment must be kept separate from the question whether the arm of the law should be used to enforce the judgment. "The arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one."91

It follows from Lord Devlin's recommendations of the above elastic principles as limiting criteria, that he cannot be taken to advocate the enforcement of morals as such in the stronger sense. On the other hand, the language of some of his statements suggests that he favours the enforcement of morals as such in the weaker sense. I submit that it is paradoxical to speak of the enforcement of morals as such. If law and morals are two separate but overlapping systems each of which carries its own sanctions—and that is the model subscribed to by Lord Devlin—then morals can only be enforced qua morals, and law qua law.

There is an obvious parallel between Lord Devlin's and Stephen's positions, but there are also important differences. Both their positions are internally inconsistent. In Stephen's case the inconsistency takes the form of a tension between his utilitarian-

90 Ibid., pp. 16-20.
91 Ibid., p. 20.
ism on the one hand and his isolated support for the enforcement of morals in the stronger sense. In Lord Devlin's case, the inconsistency takes the form of a tension between his approach to the enforcement of morals as a means to the end of preserving the existence of a society, and his support for the enforcement of morals as such in the weaker sense. I have suggested that, looking at Stephen's work as a whole, he did not intend to depart from a utilitarian position, and that he should not be convicted either of the heresy of mistaking conventional moral values for utilitarian values, or of the heresy of advocating the enforcement of morals as an end in itself. It is a good deal more difficult to credit Lord Devlin with any overall intention. We may say that he is not really advocating the enforcement of morals as such as an end, but only the enforcement of morals in the weaker sense as a means to the end of preserving the existence of a society. However, given the ambiguity and dubiousness of that end, the means tend to become the end; Lord Devlin's belief in the instrumental value of enforcing conventional morals tends to become a belief in the value of enforcing conventional morals as such. The value of enforcing a specific moral code is at least capable of rational examination, but there is no way of examining the value of enforcing conventional morals as such. It is no accident, I think, that Lord Devlin in practice advocates the enforcement of a moral code of which he approves.

IX. Professor Hart's Fourth Question.

Professor Hart distinguishes four questions concerning the relation between law and morals which require separate consideration:92

The first question is historical and causal. Has the development of the law been influenced by morals? The answer, according to Professor Hart, is yes.

The second question is analytical or definitional. Must some reference to morality enter into an adequate definition of law or legal system, or is it just a contingent fact that law and morals often overlap (as in their common proscription of certain forms of violence and dishonesty) and that they share a common vocabulary of rights, obligations and duties? This question, Professor Hart contends, has been clouded by vague words like Positivism and Natural Law, and too little has been said about the criteria for judging the adequacy of a definition of law.

A third question concerns the possibility and the forms of the moral criticism of law. Is law open to moral criticism? Or does the admission that a rule is a valid legal rule preclude moral

criticism or condemnation of it by reference to moral standards or principles?

The fourth question is the subject of these lectures. It concerns the legal enforcement of morality and has been formulated in many different ways: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime?93

This is not the place to comment on the first three questions, but it should be noted that Hart's first question is concerned with past history, and not with the living relation between law and morals. According to Professor Hart, the fourth question in all three formulations is not only one about morality, but also itself a question of morality.

To make this point clear, I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished "positive morality", the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including positive morality. We may call such principles "critical morality" and say that our question is one of critical morality about the legal enforcement of positive morality.94

The distinction between critical and positive or conventional morality is valuable inasmuch as it distinguishes questions of value from questions of fact, but we must beware of regarding these questions as unrelated. Just as our values would not be our values but for certain facts, and vice versa, so our critical morality would not be our critical morality but for the fact that there are certain conventional moralities, and vice versa. In a pluralistic society there is no one positive or conventional morality, only a wide variety of overlapping moral outlooks which are constructed with more or less critical acumen. It would be wrong to think of these outlooks as fully developed rational systems. We should think of them instead as rough moral tools which are constantly being modified, polished or allowed to rust, by the pressures of the individual's life and those of society around him.

All three formulations of Professor Hart's fourth question refer (in the first, implicitly and in the second and third, explicitly) to the enforcement of morals as such, and it is ostensibly on this proposition that Professor Hart joins issue with Lord Devlin. Since neither Professor Hart nor Lord Devlin, however, distinguish between the enforcement of morals as such in the stronger and in the weaker sense, and the enforcement of morals in the stronger and in the weaker sense, the exact proposition in issue between them is unclear. Nevertheless, there can be no doubt that Professor Hart rejects the enforcement of morals as such, and

93 Ibid., p. 4.
94 Ibid., p. 20.
also the enforcement of morals in the stronger sense. His attitude to the enforcement of morals in the weaker sense is less clear. His answer to his first question shows that he recognizes, as a fact of history, that moral values have been sources of legal values. On the other hand, his positivist approach to law leaves little room for a continuation of this process, except in the area of the penumbra where the law is still unsettled. What is more, in his rebuttal of the argument from the criminal law as it is, he seems to deny not only that the immorality of the acts in question was, or should be, the decisive factor in making them illegal, but also that it was, or should be, a relevant factor in the sense that in these cases moral values were, or should be, sources of legal values.

Professor Hart starts out with an example stressed by Lord Devlin. Subject to certain exceptions such as rape, the criminal law, according to Lord Devlin, has never admitted the consent of the victim as a defence. It is not a defence to a charge of murder or deliberate assault, and this is why euthanasia or mercy killing terminating a man’s life is still murder. This is a rule of criminal law which many now would wish to retain, though they would also wish to object to the legal punishment of offences against positive morality which harm no one. Lord Devlin thinks that these attitudes are inconsistent, for he asserts of the rule under discussion, “There is only one explanation”, and this is that “there are certain standards of behaviour or moral principles which society requires to be observed”. Among these are the sanctity of human life and presumably the physical integrity of the person. So in the case of this rule and a number of others, Lord Devlin claims, the “function” of the criminal law is “to enforce a moral principle and nothing else”.

Lord Devlin, it should be noted, does not argue from an “is” to an “ought”. He merely exhorts us to consider carefully the consequences of adopting the principles of the Wolfenden Report as exclusive criteria of criminality. Would we really agree that all the specific crimes mentioned above ought to be abolished, or would we in the light of this insight have second thoughts? This point is conceded by Professor Hart, but he rejects Lord Devlin’s conclusion that there is only one explanation for the above rule as

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56 Professor Hart does not subscribe to Mill’s principle of self-protection. There may, he says, be grounds justifying the legal coercion of the individual other than the prevention of harm to others. “But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right.” *Ibid.*, p. 5. There are, he says elsewhere, “multiple criteria, not a single criterion, determining when human liberty may be restricted”. See *Immorality and Treason*, Listener, vol. 62, no. 1583, at pp. 162-163.


simply not true. It "may perfectly well be explained as a piece of paternalism, designed to protect individuals against themselves". Professor Hart admits that a modification in Mill's principle is required if it is to accommodate instances of paternalism. This would not, however, lead to the abandonment of the objection to the use of the criminal law merely to enforce positive morality. It is too often assumed that if a law is not designed to protect one man from another, its only rationale can be that it is designed to punish moral wickedness.

I agree, that strictly construed, Professor Hart's argument from paternalism is simply designed to show that there are other explanations of the above rule than the immorality of the acts in question. Nevertheless, it does seem to imply that these explanations are the right ones, and that the immorality of the acts is not, and should not be a relevant factor in disregarding the victim's consent. Professor Hart says that it is too often assumed that if a law is not designed to protect one man from another, its only rationale can be that it is designed to punish moral wickedness. One might retort that it is too often assumed that if the criminality of an act can be justified in apparently non-moral language, the moral factor is irrelevant. Thus Professor Hart seems to assume that his explanation in terms of "paternalism" automatically excludes the moral factor, but the paternalism to which he appeals is in fact a moral paternalism which could not stand on its own feet.

The second example which Professor Hart claims is "abused" by the moralists is that given by Stephen of the moral gradation of punishment. According to Hart, Stephen's argument is a non-sequitur generated by his failure to distinguish two distinct and independent questions: "What sort of conduct may justifiably be punished?" and "How severely should we punish different offences?" So if in the course of punishing only harmful activities we think it right to mark moral differences between different offenders, this does not show that we must also think it right to punish activities which are not harmful.

Of course, Professor Hart is right in claiming that this conclusion does not follow, but he is wrong in thinking that the two questions are entirely independent of each other. Surely, the approval of moral gradations in punishment shows that moral values are sources of legal values in criminal law, and that these sources cannot be sealed off without distorting its function.

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99 Ibid., p. 31.
100 Ibid., pp. 33-34.
101 For other possible explanations, Professor Hart refers to G. Hughes, Morals and the Criminal Law (1961-62), 71 Yale L.J. 662, at p. 670.
102 See supra.
Professor Hart's third example concerns the crime of bigamy. The punishment of bigamy not involving deception, Professor Hart says, is curious, since in England and in many other jurisdictions where it is punishable, the sexual cohabitation of the parties is not a criminal offence. The explanation advanced by Professor Hart is based on a general distinction between the immorality of a practice and its aspect as a public offensive act or nuisance. Bigamy without deception is punished because it is a public act, offensive to religious feelings, and not because of any private immorality. Although in modern times, Professor Hart admits, perhaps insufficient attention has been given to this distinction, it 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. The recent English law relating to prostitution attends to this difference. It has not made prostitution a crime but punishes its public manifestations in order to protect the ordinary citizen from something offensive.\(^{104}\)

Professor Hart's explanation in terms of indecency does not exclude the moral factor, for the kind of indecency with which we are normally concerned cannot be used in a moral vacuum, but has itself a moral content.\(^{105}\) If bigamy without deception were punished only in order to protect religious sensibilities from outrage by a public act, there would be no reason to protect these sensibilities. As Professor McCloskey points out, Professor Hart's example of intercourse between a married couple shows that some acts which are not immoral in private, may be immoral in public.\(^{106}\) No one would be offended by a married couple's intercourse in public if it were not immoral. As regards Professor Hart's example of homosexual intercourse, all that it proves is that the immorality is heightened if the act is done in public, not that we have two independent elements, immorality and indecency. The same is true of prostitution. Soliciting would not be regarded as sufficiently offensive to require the protection of the criminal law, if prostitution were not regarded as immoral.

**Conclusion**

It is important to distinguish four separate issues which are tele-


\(^{105}\) See also Devlin, *op. cit.*, footnote 1, p. 120.

scoped in the Hart-Devlin controversy. I have labelled the affirmatives of these issues respectively the "enforcement of morals as such in the stronger sense", the "enforcement of morals as such in the weaker sense", the "enforcement of morals in the stronger sense", and the "enforcement of morals in the weaker sense". Not one of the writers mentioned advocates the enforcement of morals as such in the stronger sense. Lord Devlin advocates the enforcement of morals as such in the weaker sense, but this is inconsistent with his approach to the enforcement of morals as a means to the end of preserving the existence of a society. Quite apart from the internal inconsistency in Lord Devlin's position, I have submitted that it is paradoxical to speak of the enforcement of morals as such. If law and morals are two separate but overlapping systems each of which carries its own sanctions—and this is the model subscribed to by Lord Devlin—then morals can only be enforced qua morals, and law qua law.

Although there is one passage in Stephen's work which seems to support the enforcement of morals as such in the weaker sense, that interpretation should be rejected. On the other hand, the passage does suggest that Stephen supports the enforcement of morals in the stronger sense, but this view is inconsistent with his utilitarianism. For a utilitarian, the decisive factor in making any act illegal must always be the balance of utilitarian considerations. There is no conflict between utilitarianism and the enforcement of morals in the weaker sense. The immorality of an act is a relevant factor in deciding whether to make it illegal in two senses: first, in the sense that the availability of a moral sanction may or may not require the backing of a legal sanction; and secondly, in the sense that moral values may be sources of legal values, since on testing a moral value on the principle of utility it may well be found that it should also be enforced as a legal value.

Looking now at the other side, Mill, the Wolfenden Committee and Professor Hart all reject the enforcement of morals as such, and also the enforcement of morals in the stronger sense. In Mill's case, this conclusion can be derived both from his principle of self-protection and from his utilitarianism. In the Committee's case, it can be derived from the distinction between private moral conduct and conduct which directly affects the public good. This distinction is closely related to Mill's distinction between self-regarding and other-regarding acts. Mill used the distinction as a guiding principle to define the limits of legal and moral restraints on the liberty of the individual; the Committee used it as a guiding principle to mark out the limits of legal intervention in the field of morals. Only Professor Hart can be taken to reject the enforcement of morals in the weaker sense, but it would be unsafe to ascribe to him the view that the immorality of an act should
I would like to end on a plea for the enforcement of morals in the weaker sense. The immorality of an act should never be the *decisive* factor in making it illegal, since the appropriateness of a moral sanction does not entail the appropriateness of a *legal* sanction. What is grist to the fine mill of morality, may well escape the clumsy engine of law or be mangled by it. But any attempt to exclude the immorality of an act as a *relevant* factor in deciding whether to make it illegal, is both dangerous and futile. It is dangerous because it leads to the illusion that a legal system can function without the foundation and the frame of reference of a moral system, and it is futile because moral values have a way of infiltrating into even the most antiseptic legal system.

But a word of caution is necessary here. We must not think of law as taking over moral *rules* lock, stock and barrel. Even if moral rules could be formulated with sufficient precision, they would still have to be adapted from their moral environment to serve the special end of *legal* enforcement. It is more fruitful to think of legislators and judges as craftsmen who work up moral and other values into the *form* of law for the benefit of the society they serve.