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Kadish refers cautiously to the use of the criminal law as a tool for social control. Surely, there is a definite political element in the making of the criminal law, like there is indeed in all other areas of the law. But, where the legislator turns to the task of shaping society as well as controlling abuses within it, the question necessarily arises as to whether the moral of such laws should not be debated publicly, and whether it is the criminal law which is the proper means for legislating this kind of social design.

If we were always conscious of the general goals of prospective legislators, we might insist that their general programs be the subject of national debate. But in fact in this country we are little aware of the political and philosophical ramifications of our various attitudes on specific issues. The result is often the mixture of the Constitution's libertarian ideals with quite different social or moral political attitudes in the law, and especially in the criminal law.

In the non-philosophical world of Anglo-American politics and law, the criminal law is usually not bound by any one general theory, though various theories about correction and social control may be called upon to support what already exists. For the most part, the criminal law does not stem from any grand design or theory, but is either a matter of practical convenience or is the result of causes which stir public sentiment or morality. Although theoretical debate may have far-reaching consequences for the manner in which the criminal law touches the lives of individuals, the public is generally far more concerned about various specific offenses. And when a change is made in the nature and requirements of the law in this area, it is probably far more a reflection of legislative

interpretation of the public will, or what the public will stand for, than an expression of criminological theory.

Yet what the public appears to want, or will stand for, does seem to reflect tacit political attitudes or inclinations, unphilosophical as the English-speaking public may be. And from time to time these ideals become the real subject of discussion in the debate over any given issue. Perhaps a paradigm example of such an instance occurred several years ago when England discussed reforming the prohibitions against acts of male homosexuality, a subject always surrounded by emotion and anxiety. In September, 1957, the Wolfenden Report ([1]) had appeared, recommending ending of the prohibition for private homosexual acts between consenting adults. Some months later, Sir Patrick Devlin (since, Lord Devlin), who as a leading jurist had concurred in the ultimate recommendations of the Wolfenden Committee, attacked the language and logic of the Report itself in a lecture to the British Academy. That lecture was later included in a book which is an extended treatment of the subject of enforcement of morals ([2]). The lecture aroused extensive reaction itself ([3]), and remains at the center of popular discussion in this area. Neither the Wolfenden Report nor Devlin's reaction to it make any pretentions of being a complete philosophical exposition, and in fact the debate revolves more or less around two general positions which reflect again simply the conservative and liberal attitudes.

After consideration of arguments specifically bearing on the practice of homosexual acts themselves the Wolfenden Report concludes the Committee's examination of the problem by confronting a general proposition which could as easily be applied to all sorts of similar prohibitions based exclusively on moral objections where no outward harm to other persons is involved:

> "...We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. 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 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 emphasise the personal and private nature of moral and immoral conduct is to emphasise 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" [4]

The criterion of no objective harm is rarely seen the same by the moralist of tradition, however, for he may see the basic structure of society threatened by the defiance of moral tradition. The idea that the structure of society is simply the work of tradition is, moreover, a very old and widespread conviction. In the Analects of Confucius, for example, a follower more zealously traditionalist than Confucius himself defends just that idea. A high officer of the ancient Chinese state of Wei said:

> "For a man of high character to be natural is quite sufficient; what need is there for art [i.e. style, form, or even culture] to make him such ?"
>
> (Analects XII. 8. 1)

Upon which the zealous Confucian defended:

> "Culture [or form] is just as important as inborn qualities [or substance]: and inborn qualities no less important than culture. The hide of a tiger or a leopard stripped of its hair, is like the hide of a dog or a goat stripped of its hair." [5]

This idea would seem to have much to say for it in those Oriental societies where the state power was distant and often inaccessible for the needs of the common man. There, customary usage bound the small society together with bonds of mutual deference and form. Difficulties or disputes which arose in those societies were settled preferably by mediation. Resort to law, where it was possible, was frowned upon, both because it meant invoking the authority of a distant or uninterested

magistrate to meddle in the internal affairs of the local community, and because it meant literally rejecting principles of customary morality or equity for the mere chance that a magistrate, armed with a law designed to maintain order and not principally to adjudicate disputes, would act justly. And even if he did, or wanted to, the magistrate had no investigative apparatus, and frequently no police power to speak of, either to protect person or property, or to enforce peace between parties over a long period. He could only manage to compromise himself, therefore, if he became entangled in a local affair far from his base, which he could not settle promptly ([6]). In the context of the self-controlled local community of an Oriental empire, where representational power was used for other purposes than constant police protection and recourse to law, tradition, customary usages, the rites and ceremonies, politeness, and accepted *mores,* taken as a whole, gave the world of this little society a sense of order it might otherwise not have had.

Any given member of the community might enjoy his particular moral standing in the community according to whether he derived the abstract principles of his behavior from the tradition and *mores* of his society. This attitude is perhaps not too distant from what Lord Devlin means when he says:

> "Most men take their morality as a whole and in fact derive it, though this is irrelevant, from some religious doctrine. To destroy the belief in one part of it will probably result in weakening the belief in the whole." [7]

The Judaeo-Christian doctrine of sin, which even the Indian religious concept of violation of *dharma* does not approach, and a tradition of exact theology, gives a whole new dimension of reinforcement to the Eastern notion of the unity of moral law and social order ([8]), which, in China at least, is simply an expression of moral outlook and philosophical tradition. To describe Lord Devlin's world view, we should perhaps speak in terms of the social teachings of the Church of Rome and a late Archbishop of Canterbury ([9]), of the unity of Christianity and social order ([10]). In contrast not only to the individualistic

liberal, but also to the individualistic Protestant conceptions of man, in the conservative and Catholic tradition, man's role as primarily a social being is emphasized. Professor F. S. C. Northrop describes this conservative conception of man's social role which is derived from early Christian theology. He contrasts what he calls the elements of Lockean and Protestant non-conformist individualism in American democracy with the philosophy of British conservatives which he describes as "theologically grounded, anti-laissez-faire, organic, hierarchical conception of the good state and the good individual" ([11]). He traces the origins of this social trait in England to the historical consolidation of national feeling under Queen Elizabeth I and the articulation of a tolerant religious compromise in Anglicanism which combined the social doctrines of the Roman Chruch with the demands of reformers. But above all he sees this kind of social consciousness in England as the historical result of a social theory set down by Richard Hooker in his *Ecclesiastical Polity* ([12]).

The Western liberal democracies' ideal of rule of law has, however, created legal institutions and recourse, not available to the members of traditional Oriental or Medieval or even Elizabethan society. This is not to say that liberal democratic society has dispensed with the need for or the value of traditional *mores*. But it does mean that moral, religious, and political pluralism is possible in a society of law guaranteed under legal rights and legal institutions. The violation of the rites and ceremonies which could upset the lives of a traditional Chinese or Indian village, or Medieval, Christian, European village, or American small town, for that matter, is hardly of the same order of disruption for modern legal society as it may once have been, and in some cases may still be for societies governed primarily by tradition. Again, this is not to say that the traditionalist or fundamentalist in our present legal society might not be offended or outraged if he knew we were somehow disdainful of his rites, ceremonies, or beliefs. The point is, however, that democratic pluralism establishes legal tolerances within which we think we can at least stop short of legal liability.

For Lord Devlin, however, an act of private behavior which if known could serve to subvert public morality is to be regarded with the same concern as under conservative Confucian identification of form and substance:

> "All sexual immorality involves the exploitation of human weaknesses. The prostitute exploits the lust of her customers and the customer the moral weaknesse of the prostitute. If the exploitation of human weaknesses is considered to create a special circumstance, there is virtually no field of morality which can be defined in such a way as to exclude the law. I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality... Society is entitled by means of its laws to protect itself from dangers whether from within or without. Here again I think that the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within... an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. This is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The supression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity." [13]

It would appear then that Lord Devlin is also aware of and not averse to the apparent identification of society and its morality in his line of thought. Professor Hart has made the same point regarding what one can infer from Devlin's philosophy:

> "There seems... to be central to Lord Devlin's thought something more interesting, though no more convincing, than the conception of social morality as a seamless web. For he appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to

> the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place." [14]

In reply Lord Devlin indicates that he does not conceive of morality — or society — being frozen at one stage of development any more than a contract would be precluded from amendment, or that the "inclusion of a penal section into a statute prohibiting certain acts freezes the whole statute into immobility and prevents the prohibitions from ever being modified" ([15]). It seems, at least, that Lord Devlin does not want to preclude change, although he has certainly not provided for it so far as morality goes. What is more important for our understanding his position is, however, his identification of society with its established morality, for as he says: "I would venture to assert, for example, that you cannot have a game without rules and that if there were no rules there would be no game" ([16]).

With that it should be clear, if it were not before, that Lord Devlin is convinced that modern Western society is as much dependent on its moral order as on the law. In the abstract this may still sound inoffensive. The problems arise — as Professor Hart suggests — when morality changes, or when a pluralistic society with perhaps non-conflicting but also non-congruent moralities exists. Because we are, ostensibly, dedicated to the continuity of our particular society, we are, according to Lord Devlin, committed to the preservation of its "morality":

> "A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the

> law... No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are morals which are taught by the established Church — on these points the law recognizes the right to dissent — but for the compelling reason that without the help of Christian teaching the law will fail". [17]

The question of pluralism aside, a vital issue is settled here in the abstract consideration of the rationale for enforcement of morals. For Locke ([18]) and Mill ([19]) society existed as a historical structure guaranteeing our civil, legal rights: to that extent our rights were our primary legal consideration. For the moralistic traditionalist — if he expresses himself like Lord Devlin — morality may and should be enforced to preserve society, and, without it, society cannot exist. Society is in turn obliged to teach and preserve established morality, which is tantamount to saying established religion or religions. The primary consideration, then, may be religion and the institutions of society, for they are each bound to the other — but clearly, though we may benefit individually from their existence, we are bound to uphold their particular established existence as primary. Lockean society promised us guarantees. In Lord Devlin's society we are participants bound to uphold the preservation of society, morality, and religion, in order that we, and others, may benefit collectively. The same argument of the traditionalist conservative holds, by the way, equally for the social democrat and the Marxist. It is merely that they have replaced traditional or Christian social teaching with rationalist social doctrines ([20]).

Devlin, himself, descended from Locke and Mill, with the rest of us, has his own reservations about such apparent logical consequences of the assumption of the unity of moral law and social order:

> "... that authority should be a grant and liberty not a privilege, is, I think the true mark of a free society."[21]

For the more orthodox conservative or collectivist, social rationalist or radical who might be an adherent of the kind

of system which Lord Devlin seems to have described, with the exception of the above reservation the benefits of society are to be enjoyed collectively in order to be enjoyed at all, or, enjoyed genuinely. To the conservative or collectivist the individualistic liberal seems to advocate a selfish personalism. For that liberal, on the other hand, if liberties cannot be enjoyed separately, and individually there is no collective benefit, for the collective benefit is only the possibility of our separate individual benefits. For individualistic liberalism, collectivism is the annihilation of the collective benefit, by pre-emption of the rights of the individual.

In all fairness, one must, however, interject that without the "spirit" of legal, liberal democracy its guarantees can be easily frustrated too. For there are both those who go to lengths to get all they can within the law, and those, too, who use the limit of the law to fight for another system. That is a weakness of libertarian democracy, but one it will have to bear if it is to survive as an ideal. The German constitutional lawyers talk about "self-destructive democracy": ([22]) the fact that the enemies, or even the friends, of government under liberal democratic principles can manage to bring it down as long as it cannot act to curb the action of those who exercise their freedom of action in a liberal democratic society in a manner calculated to confound and defy the institutions which guarantee legal rights to them ([23]). Success of that liberal democratic system, perhaps far more than any other, requires adherence to its forms, but above all mutual tolerance and deference often beyond the common practice, but hopefully not beyond the common endurance, if it is to accomplish what it was organized to do. But, tolerance, however desirable or necessary, is not identical with the system of "role of law" itself. (*)

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(*) The following contribution is taken from the forthcoming: *On the Identification of Social and Moral Order in the Criminal Law*: Individual Rights vs. Collective Responsibilities in American and German Criminal Law Reform, by O. LEE and T. R. ROBERTSON.

NOTES

([1]) Great Britain, Home Office/Scottish Home Dept., Committee on Homosexual Offenses and Prostitution: *Report of theCommittee...*, H.M.S.O., London, 1957 (reprinted 1962). Cmnd. 247. (Cited hereafter as Wolfenden Report).

([2]) Patrick DEVLIN, *The Enforcement of Morals*, O.U.P., London, 1965.

([3]) A bibliography of these is included in Devlin's book at p. xiiif. See also a review of the book itself by Glanville WILLIAMS, *Authoritarian Morals and the Criminal Law*, in *Criminal Law Rev.*, 1966, pp. 132-47.

([4]) *Wolfenden Report*, p. 24, para. 61.

([5]) (Analects XII.8.1) = W. E. SOOTHILL, *The Analects of Confucius*. Yokohama, 1910, p. 575; (XII.8.3) = Arthur WALEY, *The Analects of Confucius*, Vintage, New York, p. 165f; James LEGGE, *The Four Books*, Confucian Analects, etc., Paragon Reprint, New York, 1966, p. 163. Literal translation leaves much to be desired for English style; good style often is too free a translation, hence the reference to both translations.

([6]) In recent years the study of the customary law of traditional societies has been fairly extensive. See e.g.: Laura NADER; K. F. KOCH; B. COX, *The Ethnography of Law: A Bibliographic Survey*, in *Current Anthropology*, Vol. 7, no. 3, June, 1966, pp. 267-94.

A further discussion of this point will be contained in: O. LEE, *Burmese Custom, Buddhist Ethics, and British Legal Practice in the Development of Burmese Buddhist Law, forthcoming*. One of the most illuminating single examinations of the mediation system of customary law compared with mediation in Western legal matters is: F. S. C. NORTHROP, *The Mediational Approval Theory in American Legal Realism*, in 44 *Virginia Law Rev.* (1958), pp. 358ff.

([7]) DEVLIN, *op. cit.*, p. 115. This notion is criticized by H.L.A. HART, *Law, Liberty, and Morality*, Vintage, New York (c. 1963), esp. pp. 51,72; and WILLIAMS, *loc. cit.*, p. 140f.

([8]) For a sociological analysis of the function of the unity of moral law and social order in the traditional societies of South and East Asia, see Paul MUS in *Annuaire du College de France*, 56 (1956), pp. 272-79, 57 (1957), pp. 333-44, 58 (1958), pp. 372-74, 59 (1959), pp. 413-25, 60 (1960), pp. 307-08.

([9]) Cf. William TEMPLE, *Christianity and Social Order*, Penguin, New York, 1942, p. 34. For an older statement which seems to have represented the same general thesis to the idealistically minded conservatives of the last century see: COLERIDGE, *Church and State*.

([10]) A very efficient and compact digest of the Catholic social teachings is contained in: Union Internacional de Estudios Sociales, *Codigos de Malinas*, social, familiar, moral internacional, moral politica, 2nd ed., Editorial Sal Tarrae, Santander, 1959.

([11]) F. S. C. NORTHROP, *The Meeting of East and West: An Inquiry Concerning World Understanding*, Macmillan, New York, 1950, p. 170. See also

George TREVELIAN, *English Social History*, Longmans, Green, New York, 1942.

([12]) Richard HOOKER, *The Works of ...*, Vincent, Oxford, 1843.

([13]) DEVLIN, *op. cit.*, pp. 12f.

([14]) HART, *op. cit.*, p. 51f. See also Richard WOLLHEIM, *Crime, Sin, and Mr. Justice Devlin, Encounter*, Nov., 1959, p. 34.

([15]) DEVLIN, *op cit.*, p. 13f., n. 1.

([16]) *Ibid.*, p. 13, n. 1.

([17]) *Ibid.*, p. 25.

([18]) John LOCKE, *Second Treatise of Government* (1690), many eds.

([19]) John Stuart MILL, *On Liberty* (1859), many eds., cap. Ch. IV, "Of the Limits of Society over the Individual".

([20]) See esp. Gustav RADBRUCH, *Rechtsphilosophie*, 6th ed., E. WOLF (ed.), Kochler, Stuttgart, 1963, esp. p. 226 f.; F. A. HAYEK, "Kinds of Rationalism", in *Studies in Philosophy, Politics, and Economics*, Univ. of Chicago Pr., 1964; J. L. TALMON, *The Origins of Totalitarian Democracy*, London, 1952.

([21]) DEVLIN, *op. cit.*, p. 102.

([22]) See Theodor MAUNZ; G. DÜRIG; R. HERZOG, *Grundgesetz Kommentar*, Beck, Munich, 1968, Vol. I, pp. 18, 4-5; and H. VON MANGOLDT; F. KLEIN, *Das Bonner Grundgesetzt*, 2nd ed., Vahlen, Berlin, 1955, pp. 113-16.