UNMAKING CRIMINAL LAWS

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If recent English experience is anything to go by, it is very difficult to unmake a criminal law—to declare by Act of Parliament that conduct which formerly constituted a crime shall no longer be criminal. I am only concerned with crimes which are also commonly called 'sins', because they are infringements of the moral law. Omitting all reference to transitory wartime legislation, and going back as far as the beginning of the century, I can only think of one such crime which has been removed from the English criminal calendar, and that is suicide. The removal was effected by the Suicide Act 1961, about which I shall have something to say. In 1957 the report of the Wolfenden Committee[1] on homosexual offences and prostitution recommended the legalization of acts of homosexuality performed in private between consenting male adults, but it cannot be said to have received a boisterous Parliamentary welcome, and it is difficult to believe that any action will be taken on this part of the report in the absence of further pressure from influential quarters. For some time there has been a strong body of medical opinion in favour of a reform of the abortion laws, but there certainly is no immediate prospect of legislation on the subject. A few small voices have from time to time been raised in favour of the legalization of euthanasia, and the question of mercy killing was considered by the Royal Commission on capital punishment which sat from 1949-1953. Euthanasia was also mentioned in the course of some of the discussions which preceded the Suicide Act 1961, but it would be idle to pretend that there is any likelihood of further legislation.

I have no reason to suppose that the Australian record for unmaking criminal laws and the likelihood of further action in that direction in any Australian State differ substantially from the English. It is of course true that, both in England and in Australia, the gravity of certain crimes has been reduced in the course of this century. I need only mention the reduction of one kind of child

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[1] Report of the Committee on Homosexual Offences and Prostitution (1957) Cmd 247, part I.

murder to the lesser offence of infanticide in England and Victoria, and the creation of the new crime of non-capital murder by the much controverted English Homicide Act of 1957; but I am concerned with the total repeal of a law under which a particular type of conduct is subjected to criminal punishment.

Why is such a repeal so rare? One answer to this question is that it is usually undesirable to unmake criminal law, and this answer must be accepted, provided it is recognized to be no more than a general statement. In general the criminal law has selected as proper subjects for its attention those parts of the moral law which are suitable for enforcement by the infliction of punishment following upon a judicial enquiry, and in general the criminal law disregards those parts of the moral law which are unsuitable for enforcement in this way. But there is always the peripheral case, and it is with peripheral cases that I am concerned.

Two further reasons why criminal laws are seldom repealed are the fear that to do so might lead to an increase in the amount of the prohibited conduct, and the fear that the odium attached by society to such conduct might be diminished. This second reason was clearly recognized in the report of the English Royal Commission on capital punishment and the Wolfenden report of 1957. Paragraph 59 of the report of the Royal Commission contains the following statement:

> We think that it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence of the crime of murder. "The fact that men are hanged for murder is one great reason why murder is considered so dastardly a crime." This widely diffused effect on the moral consciousness of society is impossible to assess, but it must be at least as important as any direct part which the death penalty may play as a deterrent in the calculations of potential murderers.

In paragraph 60 of their report the Wolfenden Committee refer to the difference between creating a new crime and repealing an existing criminal law; they recognize that it is a serious matter to reverse a long-standing tradition.

In terms of the dichotomy between crime and sin, we may say that even in peripheral cases, where it is disputable whether a sin should be treated as a crime, there is some reason for continuing an existing legal prohibition whenever there is a real danger that its repeal will augment the amount of the sin or, in the long run, reduce the effectiveness of the moral law. Accordingly, whenever the repeal of a criminal law is mooted, it is proper to ask first, 'Is it likely

to lead to an increase in the prohibited conduct?' Secondly, 'Is it likely to lead in the long run to a weakening of the moral condemnation of such conduct?' But I do not think that it is right to conclude that the prohibition must be continued if these questions are answered in the affirmative, and I believe that there has been so little unmaking of criminal law in recent years because inadequate account has been taken of other questions which it is proper to raise.

The Proper Sphere of the Criminal Law

The precise terms of these further questions will be mainly determined by the questioner's views concerning the proper sphere of the criminal law. John Stuart Mill's famous statement of the principle underlying his essay *On Liberty* is a suitable point at which to begin a brief discussion of this subject:

> The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant, he cannot rightfully be compelled to do or forbear because it would be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.[2]

Even if we do not accept harm to others as the sole criterion for determining the proper sphere of the criminal law, the question whether the prohibited conduct has this effect must be regarded as a very pertinent one to ask when the abolition of a crime is suggested. But there remains the problem of the precise implication of the expression 'harm to others', and it is a problem which was not as fully considered by Mill as it might have been. He would not have excluded every kind of moral harm because he cast no doubt on the propriety of punishing the corrupters of youth and there are certain passages in which he canvasses the possibility of punishing those who encourage the performance of immoral acts which are not themselves the subject of legal punishment. I shall have more to say about this kind of case later. Subject to the problem of moral harm, I am prepared to define harm to others as any physical or proprietary damage, or any unreasonable interference with an individual's rights as a member of the public. I would add that no 'harm' has been done in this context when a sane adult consents to the infliction of injury. It follows that if euthanasia, or the causing of physical injury with consent, are to be punished it must be for a different reason

[2] J. S. Mill, *On Liberty* (5th ed.) 21-22.

than their tendency to harm other individuals. This is also true of a self-inflicted injury whether it be caused directly or indirectly by, for example, excessive indulgence in drink or drugs. To meet such cases, I would be prepared to ask anyone considering the merits of repealing a criminal law whether the prohibited practice is actually or potentially harmful to society. Mill would probably have objected to the question in this form, for he was opposed to intervention by the law in cases of what he described as 'contingent injury'.[3] Although a particular practice may be of a kind which leads men to deteriorate to such an extent that they abandon their families, the law must not, according to Mill, take any steps in the matter before the family has been abandoned. There is of course a serious danger of unwarranted State interference whenever people are threatened with punishment in order to prevent them from impairing their capacity to serve society, but I think that this may be a justification for criminal punishment in some circumstances. If it were always necessary to wait for the harm to occur, it would be wrong to punish the promoters of a rebellion before the rebellion had started. The doctrine that society has a right to safeguard its own existence undoubtedly lends itself to gross abuse, but it cannot wholly be disregarded as a criterion of criminal punishment on this account. I must emphasize, however, that harm to society is, in my view, only one among many other tests which must be applied in deciding whether certain conduct should be treated as a crime or a sin.

The immediate reaction to Mill's essay on liberty was Stephen's *Liberty, Equality, Fraternity*. The central theme of this book is that all attempts to lay down theoretical limits on the use of power must fail. It is the authoritarian answer to liberalism, but Stephen was as conscious as any man ever has been of the importance of public opinion in matters of legislation.

> Legislation ought in all cases to be graduated to the existing level of morals in the time and country in which it is employed. We cannot punish anything which public opinion, as expressed in the common practice of society, does not strenuously and unequivocally condemn.[4]

This passage prompts a further question to be raised when considering whether a sin should continue to be treated as a crime. Is the prohibited practice strenuously condemned by public opinion? If the practice is not condemned, or not strenuously condemned, prohibition will come to be more honoured in the breach than the observance. This is a wretched fate for any law, more particularly a criminal law.

If the prohibited practice is strenuously condemned by public

[3] *Ibid.* 156. [4] Stephens, *Liberty, Equality, Fraternity* (2nd ed.) 173.

opinion, should this fact be regarded as conclusive of the issue whether a particular crime ought to be retained? I think it should only rank as a reason in favour of retention which is liable to be counteracted by other considerations, such as the fact that the conduct in question does no harm to other individuals or to society, but I express this view with diffidence because it is opposed by Stephen and Lord Devlin.

According to Stephen the criminal law embodies in a singularly emphatic manner a principle which is absolutely inconsistent with and contradictory to Mill's, the principle that 'there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity'.[5] In order to ascertain whether a practice is so gross and outrageous that it must be prevented at all costs, Stephen would, it seems, have consulted the intuitions of right-thinking men; if these are unequivocally condemnatory, the practice must be treated as a crime, even if its punishment is not essential to the protection of other individuals.

In 1959, Lord Devlin expressed a substantially similar opinion in his famous Maccabaean lecture entitled 'The Enforcement of Morals'. Eighteen months earlier the Wolfenden Committee had recommended the legalization of homosexual behaviour in private between consenting male adults. The Committee took the view that, in this field, the proper function of the criminal law is:

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.[6]

The Committee considered that the decisive argument in favour of their recommendation was:

> 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.[7]

Though confined to the sphere of sexual behaviour, these views are substantially those of Mill. Lord Devlin attacks them simply as propositions of jurisprudence. He expresses no opinion with regard to the desirability of the Committee's recommendations.

[5] *Ibid.* 175. [6] Para. 13. [7] Para. 61.

The main point of Lord Devlin's attack is the distinction drawn by the Wolfenden Committee between public and private morality. Lord Devlin considers that every society has a morality which is as essential to its existence as its government. Society has the right to pass judgment on all moral questions and, in theory, to enforce every moral rule, even if that rule is not directed against harm to others and affects merely private behaviour. The moral judgments of society are to be ascertained by reference to that darling of the lawyers, 'the reasonable man' or 'the man in the jury box'; 'For the moral judgments of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous'. Lord Devlin recognizes that there are what he describes as 'elastic' principles which limit the theoretical omnipotence of society with regard to the enforcement of morals. The first of these principles is that there must be toleration of the maximum individual freedom that is consistent with the integrity of society, but the limits of toleration may be exceeded, for 'no society can do without intolerance, indignation and disgust'. Lord Devlin said that we should ask ourselves whether, looking at it calmly and dispassionately, we regard homosexuality as a 'vice so abominable that its mere presence is an offence'. If that is the genuine feeling of the society in which we live, he did not see how society could be denied the right to eradicate homosexuality.

Other elastic principles mentioned by Lord Devlin are that the law should be slow to act in any new matter of morals; that, as far as possible, privacy should be respected, and that the law is concerned with the minimum, not the maximum; but the whole tenor of the Maccabaean lecture is that, once it is clear that a particular practice causes the average man to have strong feelings of intolerance, indignation and disgust, the case for continuing to punish a sin as a crime is almost conclusively established. The elastic principles are guides to the would-be creator of new crimes, rather than to those who are considering the abolition of an existing offence. If Lord Devlin is right, those who are considering the abolition of an existing offence ought to place in the fore-front of their enquiry the question whether the prohibited practice causes the average man to have intense feelings of indignation and disgust, as greater importance would have to be attached to the answer to this question than to the answer to any other question which might be formulated. I do not think that Lord Devlin is right, and my reason is really a political one. I think that, in a democracy such as those to which we are accustomed, the deviant minority must almost always bow to the will of the majority, but there are exceptions to this rule, and it seems to me that one very obvious exception is when the majority

can advance nothing more than an emotive argument in favour of their view. Legislation in a democracy ought to be a rational process, and it would be most irrational to expect someone who is given to a particular practice to assent to the idea that he should go to prison for persisting in it merely because it makes most other people feel sick.[8]

I now propose to consider the case for and against abolition of certain crimes in the light of six questions prompted by the foregoing theoretical discussion. The questions are: Would the repeal of the relevant law lead to an increase in the prohibited practice? Would it weaken the moral condemnation of that practice? Is the prohibited practice harmful to other individuals? Is it actually or potentially harmful to society? Is the practice strenuously condemned by public opinion? And, is the criminal sanction effective? It will not be necessary to consider every question at length in each case, but I do not think that any of them has priority over the others. I do not anticipate that, in relation to any one of the crimes I shall consider, the answer to all the questions will be either in the affirmative or in the negative. It is a matter of weighing the pros and cons. No one who indulges in such a process can say exactly why pros or cons weigh more heavily with him. Reasoning in these matters has to come to an end somewhere if action is ever to be taken, but I think that it is most important that any decision about the creation or continuance of a crime should be reached after as much reasoned consideration as possible. I also think that periodical investigations into the question whether certain criminal laws are fit for repeal are highly desirable, for although it is a most necessary evil, the criminal law is none the less an evil, and the less there can be of it compatibly with social well-being the better. When considering whether to create or abolish a crime the onus (though it is often very easily discharged) is on those who contend that a particular practice should be punished. The pain inflicted on the criminal and his family, the possibilities of blackmail, and the expenditure of public time occasioned by police investigations and trials, are factors which ought never to be ignored when a peripheral case in which a sin is punished as a crime comes up for consideration.

The crimes which I propose to consider are homosexuality in private between consenting male adults, suicide, euthanasia, and abortion. I shall then say something about the position of those who aid, abet, or encourage the commission of acts which are condemned by society although they have ceased to be crimes. The readers of Mill will recollect how he leaves open the question

[8] This argument is substantially that of Professor Hart in the *Listener* (1959) Vol. 62, 162 (30 July).

whether, fornication and gambling being tolerated, a person should be free to be a pimp or to keep a gambling house,[9] and lawyers have recently been reminded of this question by the speeches in the House of Lords in *Shaw v. Director of Public Prosecutions*.[10]

Private homosexuality between consenting male adults

If the recommendation of the Wolfenden Committee were to be implemented, and homosexuality in private between men over twenty-one were to cease to be a crime, would there be an increase in such behaviour? The answer to this kind of question must be largely, if not entirely, a matter of guess-work, but I find it difficult to believe that there would be any noticeable increase in this kind of conduct. I do not think people's sexual proclivities are likely to be affected by legislation. As a member of one of the bodies which recommended the abolition of the crimes of suicide and attempted suicide, I was surprised by the number of apparently intelligent people who suggested that our proposals might lead to an increase in the number of suicide attempts. These suggestions were plainly fatuous. I would not be prepared to say that suggestions that the adoption of the Wolfenden recommendation would lead to an increase in homosexuality are equally fatuous, but I confess to a suspicion that they assume that the criminal law exerts a far greater influence over human conduct than is in fact the case. The removal of the criminal sanction on suicide is not likely to increase those who want to kill themselves. The removal of the sanction on homosexuality between consenting male adults is scarcely more likely to convert heterosexuals into homosexuals, although there may of course be an occasional homosexual who is affected by the sanction.

Would the legalization of private homosexual behaviour between consenting male adults weaken moral condemnation of the practice? In order to answer this kind of question I think it is necessary to differentiate between two meanings of the word 'sin'. A sin may be an infringement of the divine law, or an infringement of the moral law, and in this context the 'moral law' means rules derived from the complex of reason, custom, feeling and opinion which constitute the mores of a society. For those who hold that homosexuality is prohibited by divine law, the removal of the criminal sanction will not affect the moral condemnation. As a general rule, I would say that the removal of the legal sanction does tend to weaken the moral law, but I am not sure that this is the case so far as homosexuality is concerned. For those who do not consider that it is prohibited by divine law, the objection to the practice is that it is contrary to

[9] Mill, *op. cit.* 177. [10] [1961] 2 W.L.R. 897; (1961) 45 Cr. App. R. 113.

nature, and I do not believe that the strength of this objection would be greatly reduced if homosexuality between consenting male adults was legalized, any more than I think that the moral condemnation of lesbianism would be increased if it were to be made criminal.

The existence of the parties' consent would prevent the implementation of the Wolfenden recommendation from being harmful to other individuals. Would it be harmful to society? This matter was considered by the Wolfenden Committee,[11] who concluded that there was no evidence that the adoption of their recommendation would demoralize society. This is hardly surprising for, so far as I am aware, no one has ever suggested that homosexuals are more or less prone to anti-social behaviour than other people. Once again the fatuity of the argument in support of the objection to the proposal is impressive. An appeal appears to have been made to the suggested reasons for the decline of certain ancient civilizations, and I do not see how anyone could fail to share the Committee's view that it would be wrong to frame the laws which should govern present-day England by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstance from our own. It was also suggested that homosexuals are a bad security risk in certain civil service posts because their proclivities render them particularly vulnerable to blackmail. This may well be true, but it is of course equally true of those who have heterosexual involvements, and anyone who advanced the security risk argument as a ground for punishing adultery or fornication would be laughed out of court.

As the Wolfenden Committee pointed out, the root objection to homosexuality is that it very naturally disgusts most people. We therefore come back to the question raised by Lord Devlin's lecture. If homosexual behaviour arouses a very high degree of intolerance, indignation and disgust amongst the bulk of society, is that in itself sufficient justification for punishing the practice? I am by no means clear that the very proper antipathy felt by the average Englishman or Australian is up to the postulated fever pitch but, even if it were, I would be opposed to allowing it to be decisive of the question whether private homosexual behaviour between consenting male adults should be legalized. I would therefore number the prohibition on this practice amongst the criminal laws which ought to be unmade. The practice is legal in a number of European countries, and who is to say that society in those countries is noticeably more decadent than it is in our own?

[11] Para. 53 ff.

Suicide

Section 1 (1) of the English Suicide Act 1961 simply states that, 'The rule of law whereby it is a crime for a person to commit suicide is hereby abolished'. In consequence of this provision, attempted suicide has also ceased to be a crime in England. There is no point in going into my six questions at any length so far as this subject is concerned. Of course the Act will not lead to an increase in the number of suicides or attempted suicides; of course suicide will continue to be regarded as a sin by Christians and it is difficult to see how the attitude of non-Christians would be affected by the Statute; of course suicide is harmful to society and condemned by public opinion, but I think it falls outside the proper sphere of the criminal law. I recognize that, in times past, the withholding of burial rites may have deterred an occasional suicide, but I find it hard to believe that this or any other sanction operates as a deterrent today, and a criminal law, with a wholly ineffective sanction, is, to my mind, a contradiction in terms. The right way to deal with the unfortunate person who attempts to take his life is to provide him with an opportunity for care and treatment. This has been done in England by the Mental Health Act 1959, and I accordingly welcome the Suicide Act as an almost unique instance of the unmaking of a criminal law which punishes what is commonly regarded as a sin.

Had the Act done no more than abrogate the rule under which suicide is a crime, those who advise or assist another to kill himself would have been guilty of no crime. I am not sure that this would have been a bad thing, and it would have brought English law into line with that of some other European countries, but the Act goes on to provide that someone who aids, abets, counsels or procures the suicide of another or an attempt by another to commit suicide is guilty of a crime punishable with a maximum of fourteen years imprisonment. This provision is of theoretical interest for at least two reasons. In the first place, it punishes those who assist another to do what is not criminal. Mill considered that 'whatever it is permitted to do, it must be permitted to advise to do'.[12] The law of criminal conspiracy and prostitution already contradicted Mill's views to some extent, and we now have another situation to which they do not apply. The second reason why the provision is of theoretical interest is that it produces what some people consider to be an anomaly. If, at B's request, A places poison in B's hands to enable him to commit suicide, A is guilty of the new crime of aiding suicide; but if, at B's request, A administers a lethal injection, A is guilty of murder. Is there a moral distinction here? I doubt it, but we have reached the boundary of the problem of euthanasia.

[12] Mill, *op. cit.* 177.

Euthanasia

When people advocate the legalization of euthanasia or mercy killing, they may be referring to a number of different types of homicide. These include the killing by request of someone who is mortally ill, the killing of such a person when he is unconscious or unable, for some other reason, to assent or dissent, the killing of an infant monster, and the killing of those who are incurably insane. I should have thought that the legalization of this sort of conduct would unquestionably lead to its increase. To enquire whether it would weaken the moral condemnation of the conduct is largely beside the point, for there will always be those who condemn it on moral grounds and those who, on the contrary, would say that there is a moral duty to kill in each instance. There is, however, a grave danger that it would diminish the importance attached to the sanctity of human life and, so far as I am concerned, that puts any form of euthanasia which does not entail the consent of the deceased completely out of court. In terms of the questions I raised earlier on, it would be harmful to society in the long run; I hope and believe that it is condemned by public opinion, and I do not doubt that the sanctions of the criminal law are as effective in this as in any other instance. I am of course aware that there occasionally come before the courts tragic cases of mercy killing in which anything in the nature of serious punishment would itself be a crime. I also realize the difficulty which must sometimes confront a doctor when his duty to reduce his patient's pain can only be fulfilled by acts which he knows will probably end the patient's life. These cases must, I think, be dealt with either by a prudent exercise of the discretion not to prosecute, or by the recognition that, at least in some instances, the defence of necessity is available, or else by means of the prerogative of mercy. As a general rule I am not impressed by the suggestion that a change in the law would be the thin end of the wedge but, in this instance, it is difficult to free oneself entirely from the fear that the extermination of monsters and the incurably insane would be extended to those who are weak in body or mind.

So far as consensual euthanasia is concerned, I would have no objection to a Statute legalizing the killing by a doctor of his patient at the patient's request, provided that the doctor believed the patient to be suffering from an incurable illness and in severe pain which is likely to endure without being relieved by drugs. In all other cases it seems to me that there are too many practical difficulties in the way of framing satisfactory legislation. The suggestions that euthanasia should be carried out after a petition to a judge, or that it should be authorized by a board of referees after application to them seem unworkable, and I doubt whether any doctors would

care to be charged with the responsibility of painlessly killing those who asked for euthanasia in circumstances other than the extreme ones I have just mentioned.

Abortion

Abortion differs from the other crimes I have discussed in that it is reasonably certain that there would be a considerable increase in the number of abortions if it were legalized. I also believe that if abortion were to cease to be a crime, the moral condemnation of such conduct would weaken in the course of time. People's views on the question whether abortions are harmful to individuals or society are bound to be greatly affected by their answer to the question, 'When does life begin?' If life begins at conception it is arguable that it is thereupon entitled to the full protection of the law, and those who take this view would advocate something like the existing English law under which abortion is a crime to which the only defence relevant to the present discussion is necessity. The operation would be legal if performed in order to preserve the life of the mother, and in this context 'life' means a reasonably healthy life.[13]

It is, however, possible to argue that, although life begins at conception, it is not entitled to the full protection of the law until birth. This would allow the possibility of other defences such as the eugenic defence based on the danger that the child would be likely to be born with a serious physical deformity or handicap, the social defence based on the fact that, owing to her physical condition or the number of her family, it would be difficult for the mother to bring the child up properly, and the psychological defence under which an abortion would be legal if the mother had been raped, without any regard to the question whether her life would be endangered by the continuance of the pregnancy. Many draft Statutes covering these defences are already in existence, and there would be no difficulty in framing the necessary legislation.

For those who take the view that life begins at birth, abortion is not harmful to any individual because the woman consents to its performance, and it is no more harmful to society than contraception, which few would wish to bring within the ban of the criminal law. I am aware that there is some evidence that a woman who has had an abortion is adversely affected psychologically, but I do not think that there is sufficient evidence of this sort to render the practice objectionable on that score.

This brings me to the question of the present state of public opinion with regard to abortion, and I must admit that I am reminded of Stephen's words which I have already quoted: 'we cannot

[13] *Rex v. Bourne* [1939] 1 K.B. 687.

punish anything which public opinion, as expressed in the common practice of society, does not strenuously and unequivocally condemn'. As an academic lawyer I regard myself as a poor assessor of public opinion, but I confess to the gravest doubts whether abortion is strenuously and unequivocally condemned in England or Australia, and these doubts are shared by Lord Devlin, who said that he believed that a great many people nowadays do not understand that abortion is wrong. According to Lord Devlin:

> Many people regard abortion as the next step when by accident birth control has failed; and many more people are deterred from abortion not because they think it sinful or illegal, but because of the difficulty which illegality puts in the way of obtaining it.

Lord Devlin was not advocating any change in the law, but he went on to point out that abortions are rarely detected unless a tragedy occurs, or unless a professional abortionist is involved, and that the present law tends to encourage the professional abortionist, although he is punished most severely if detected.

For my part I admit to repeated changes of opinion on the subject of the present English abortion laws. I do not see how such questions as when does life begin can be decided by anything short of elaborate theological argument, which I probably would not accept, even if I could understand. Accordingly I am prepared to take the view that abortions are harmful to other individuals—the unborn children—and to society. I am also unconvinced by arguments according to which the criminal law must abstain from punishing abortions because the birth of unwanted children is a social evil. It may well be that the remedy is a change in society's attitude towards illegitimacy and adoption. But I am in favour of the total legalization of abortion, when properly performed by a doctor, on account of what I believe to be the present state of public opinion on the subject, the impossibility of prosecuting anything but an infinitesimal proportion of the number of abortions which are performed, and the danger created by the professional abortionist. I am opposed to the continued existence of a crime which, on the comparatively rare occasions when it is prosecuted, can only be prosecuted satisfactorily with the aid of the participants—the woman and, as often as not, the man responsible for her condition. I am opposed to the continued existence of a crime which, owing to the fact that it is condoned by public opinion and practised by the unskilled, condemns a number of women to death. Although statistics are difficult to obtain, the number of inquests following abortions shows that the tragedy mentioned by Lord Devlin is not such an infrequent occurrence that it can be ignored, and it is reasonable to suppose that the tragedy is often due to negligence on the part of an unskilled abortionist.

Shaw v. Director of Public Prosecutions

I have contemplated the legalization of certain kinds of homosexuality, suicide, euthanasia and abortion. What about ancillary actions and secondary parties? For example, if private homosexuality between consenting male adults is to go unpunished, can the punishment of those who solicit or otherwise encourage such conduct be justified? As I have already observed, Mill expressed some concern about this kind of problem. His view was that, whatever it is permitted to do, it is in general permitted to advise to do, but he recognized two possible qualifications of this general principle. In the first place, the liberty of the individual must be limited to the extent that he may not make a nuisance of himself to other people.[14] Secondly, Mill recognized that, where a practice is condemned without being punished by society, the encouragement of that practice by someone with an interested financial motive may perhaps be punished.[15] I think that principles such as these would be adequate to solve most of the problems that are likely to arise when conduct considered by many to be sinful is declared no longer to be criminal.

The principles in question lie at the root of the present law with regard to prostitution. Prostitution is not illegal, but solicitation in public is punished, and it is a serious crime to live on the immoral earnings of a prostitute. The justification for punishing public solicitation is that it is commonly regarded as an affront to public decency, and this is certainly a matter concerning which the views of the majority should prevail. The justification for punishing those who live on immoral earnings may be the danger that the ponce will exploit the prostitute, although the Wolfenden Committee found little evidence that this actually happens.[16] But it may also be based on the law's right to discourage organized prostitution. I see no objection to the law's discouraging that which it does not actually punish, and every lawyer is familiar with cases in which this is done. Examples are provided by the invalidity of contracts for future immoral cohabitation, and the invalidity of leases of premises for the purpose of prostitution. Resort to the criminal law to discourage those who encourage unpunished sin is, however, a very drastic remedy. I have no particular objection to it in the case of those who aid and abet suicide, although I sometimes doubt its necessity in that case. If homosexual behaviour between consenting male adults was to be legalized, I would have no objection to the punishment of those living on the earnings of a male prostitute, and of all forms of public solicitation to homosexuality. These acts are punished under the present law, and no change was recommended by the Wolfenden Committee. But I think that, if ever there was a case in which the

[14] Mill, *op. cit.* 101. [15] Mill, *op. cit.* 179. [16] See Cmd 247, Ch. 10.

punishment of secondary parties should be the concern of the legislature and not that of the common law, it is the case of the unpunished sin, and that is why I count myself among those who are perturbed by the breadth of the statements in the speeches of the majority of the House of Lords in *Shaw v. Director of Public Prosecutions*.[17]

In consequence of the sharp increase in the penalties for solicitation imposed by the Street Offences Act 1959, prostitutes have ceased to parade the streets of London and the larger English towns. In order to assist prostitutes to get custom, Shaw published a 'ladies' directory' containing the names, addresses, and telephone numbers of a number of prostitutes, together with photographs and, in some cases, an indication of the type of perversion which would be indulged. Shaw was prosecuted for an offence under the Obscene Publications Act 1959, living on the immoral earnings of those who paid for the insertions in the directory, and conspiring to corrupt public morals. He was convicted on all three counts, and his appeal to the Court of Criminal Appeal was wholly unsuccessful. He was given leave to appeal to the House of Lords on the counts concerning the immoral earnings and the criminal conspiracy. Subject, in the case of the conspiracy count, to a vigorous dissent from Lord Reid, the appeal was dismissed on both issues. To establish the charge under the Obscene Publications Act, it was necessary to show that the directory would tend to deprave and corrupt persons likely to use it, and it was contended that such persons would be corrupted already. To this the rejoinder was that it is possible to be corrupted more than once. On the charge concerning the immoral earnings, the majority held that someone who receives money from a woman in consideration of services rendered for the avowed purpose of facilitating prostitution may be said to be living wholly or in part on her immoral earnings. Though he concurred in dismissing the appeal on this count, Lord Reid did so on the ground that, in this context, 'live' means to live parasitically on the earnings, and not in the ordinary course of trade, as where a grocer supplies food to a known prostitute.

The convictions on the counts which have so far been discussed can be justified according to principles which I have already considered. In the case of the obscenity charge the directory might have had the effect of encouraging people to resort to prostitution who would not have done so without reading it and, in the case of the charge concerning the immoral earnings, the conviction was a manifestation of the law's endeavour to suppress organized prostitution. Even so, I find it hard to justify the sentence of nine months' im-

[17] [1961] 2 W.L.R. 897; (1961) 45 Cr. App. R. 113.

prisonment, particularly as Shaw showed the magazine to the police before proceeding with the publication; but the sentence may have been based on considerations which are not made apparent in the report.

It was contended that there is no such offence known to our law as a conspiracy to corrupt public morals. The basis of the judgment of the Court of Criminal Appeal was that acts tending to the corruption of public morals constitute a common law misdemeanour, with the result that the conspiracy charged was one to commit a crime and, as such, amounted to an offence well known to the common law. In the House of Lords, Viscount Simonds supported this view, Lord Tucker considered the matter exclusively from the point of view of the law relating to criminal conspiracy, while Lords Morris and Hodson expressed opinions substantially in accord with those of Viscount Simonds. The pith of Viscount Simonds' opinion is contained in the following extract from his speech:

> In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental principles of the law, to conserve not only the safety and order, but also the moral well-being of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for.[18]

Viscount Simonds treated this residual power as based on public policy and observed that '[t]here are still, as has recently been said, "unravished remnants of the common law" '.[19] The reference was to Lord Radcliffe's recent book,[20] but Lord Radcliffe was canvassing the desirability of the courts' appealing to the doctrine of public policy in favour of the liberty of the individual in certain branches of the civil law. It seems to me that the fallacy underlying the views of the majority is the assumption that it is possible to draw a close analogy between civil and criminal law. For example, in recognizing that the question whether an act or agreement tends to corrupt public morals has to be decided by the morality of the man in the jury box, Viscount Simonds and Lord Hodson both mentioned the analogy of the role played by the reasonable man in the tort of negligence; but this branch of the law of tort is not concerned with the liberty of the subject. If their lordships had considered criminal negligence they might have been less complacent about the role of the jury in the sphere of public morals. When, at a trial for motor-manslaughter, the jury are told that they must decide whether the

[18] [1961] 2 W.L.R. 897, 917; (1961) 45 Cr. App. R. 113, 148. The similarity of this passage with Lord Devlin's analogy between immorality and treason is striking.
[19] [1961] 2 W.L.R. 897, 919. [20] Radcliffe, *The Law and its Compass* (1960) 53.

accused's negligence was sufficiently gross to merit punishment, they are notoriously loth to convict. Presumably this is because many members of the jury are motorists themselves. Is there not a danger that a jury composed of men and women whose taste is very properly disgusted by the salubrious, will be all too ready to convict someone of conduct tending to corrupt public morals merely because he shocks them?

The antithesis of Viscount Simonds' view is contained in the following extract from Lord Reid's speech in *Shaw's Case*:

> Public mischief is the criminal counterpart of public policy, and the criminal law ought to be even more hesitant than the civil law in founding on it some new aspect.[21]

It seems to me that this provides the answer to the first of the two major questions raised by *Shaw's Case,* namely, have the courts still got power to create what are in effect new common law misdemeanours on the ground that the acts charged tend to the public mischief. Like Lord Reid, I should have thought that the answer was 'no', for the reason stated in the storm of criticism which followed the decision in *Rex v. Manley*[22] and by Lord Goddard in *Regina v. Newland.*[23] Lord Goddard recognized that, in days when Parliament met seldom or at least only after long intervals, it may have been beneficial for the judges to declare anything to be a misdemeanour which they considered prejudicial to the community. But he concluded that 'it surely is now the province of the legislature and not of the judiciary to create new criminal offences'.

The second major question raised by *Shaw's Case* is whether it is right that the judges should retain their power of punishing as a criminal conspiracy an agreement to do that which, if done by one, would not be criminal. Here again I can see that this power may have been beneficial when there were serious gaps in our criminal law. In the eighteenth century, for example, there was something to be said for punishing a conspiracy to obtain by false pretences before the creation of the crime of that name, but I have always been at a loss to understand why conspiracies to do that which, if done by one, would not be a crime or even a tort or breach of contract should be punishable.

It follows from what I have said about *Shaw's Case* that I would like to found a society for the abolition in the sphere of the criminal law of the 'unravished remnants' of the common law mentioned by Viscount Simonds. In saying this I am most anxious not to give the impression that I am a lawyer fouling his own nest. I yield to none in my admiration of the achievements of the common law in many

[21] [1961] 2 W.L.R. 897, 924. [22] [1933] 1 K.B. 529. [23] [1954] 1 Q.B. 158.

spheres, but the substantive criminal law is not one of them. After all, it is the common law which has saddled us with such things as the definition of larceny and the concept of malice aforethought. The basic trouble is, I believe, the complete unsuitability of the substantive criminal law as a subject for development, either by way of addition, alteration, or abrogation, through the medium of case law. But that is not a theme upon which to enlarge this afternoon.

Conclusion

If anything as disjointed as this lecture can be said to have a message, it is a three-fold message. First, in deciding whether to unmake a criminal law, it is necessary to apply a multiplicity of criteria; it is not enough merely to enquire whether the change would augment sin. Second, judged by a number of different criteria, there is a strong, if not overwhelming, case for the removal of several crimes from the current criminal calendar. Finally, Mill's essay on liberty ought to be made compulsory reading for all those who are in any way concerned with the formulation of the policy of the criminal law.