The Enforcement of Morality

Rolf E. Sartorius†

Originally published in 1859, Mill's essay *On Liberty* is devoted to the defense of

> one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . . That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[1]

Over a hundred years of controversy have surrounded this principle, for there are difficulties in interpreting it, in reconciling it with Mill's general utilitarian position, and in defending it under any particular interpretation. These problems are given an increased urgency by the recent surge of interest in, and heated controversy over, specific instances of the legal enforcement of morality. Although it would be folly to believe that Mill might provide us with the final word on all the moral questions raised by such issues, one would hope that he would at least provide us with a place to begin.

In this article, I shall seek to clarify Mill's principle primarily through a discussion of the position which Lord Patrick Devlin has taken on the enforcement of morality, with particular attention to the critical reaction which Devlin has provoked from H.L.A. Hart and Ronald Dworkin. An examination of the exchange amongst them will reveal that what is by far the most significant source of controversy over the enforcement of morality has come to be progressively concealed from view.

Although I shall focus on the enforcement of sexual morality by the criminal law, the issues are much broader than this. First, it is

† Associate Professor of Philosophy, University of Minnesota. B.A. 1961, University of Pennsylvania; Ph.D. 1965, Princeton University.

1. J.S. MILL, ON LIBERTY 13 (Bobbs-Merrill ed. 1956).

clear that the law is concerned with much more than *sexual* morality, and that it is not only the criminal law which manifests such a concern. Second, it is obvious that many, although not all, of the issues which emerge arise in contexts other than the legal, such as the question of what role a system of public education ought to play with respect to the inculcation of moral and political principles.

One further caveat is in order before turning to Lord Devlin. We are concerned here with the question of what critical principles, if any, ought to limit a society's right to enforce its positive morality through the vehicle of the criminal law regardless of the costs or constitutional consequences of so doing. All of the parties to the dispute, in other words, recognize that there might be constitutional barriers to the legal enforcement of a particular moral prohibition, or that the costs of enforcement in any given case might outweigh the benefits.[2]

I

In recommending that private homosexual acts between consenting adults no longer be made criminal, and in endorsing the existing law under which acts of prostitution were not in themselves punishable, the 1957 Report of the Wolfenden Committee in England asserted that unless crime is to be equated with sin, the law should not attempt to regulate all private morality.[3] Two years later, Lord (then Justice) Devlin delivered his now famous Maccabaean lecture in jurisprudence, "The Enforcement of Morals."[4] In this lecture, and in a variety of other publications,[5] he has taken strong exception to the Millian stand taken in the Wolfenden report, and countered with his own view that society has a prima facie right—perhaps even a duty—to enforce its positive morality through the vehicle of the criminal law.

As both Hart and Dworkin have noted, there are two independent arguments which may be identified in Devlin's writings.[6] Briefly, they are: (1) A shared morality is as necessary to a given society's continued existence as is a stable government; society thus has just as

2. For a good treatment of this issue, see Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967).

3. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION ¶ 62 (Stern & Day ed. 1963) (Wolfenden Report).

4. Reprinted as *Morals in the Criminal Law*, in P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

5. A number of Devlin's essays are reprinted in DEVLIN, *id.*

6. H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); R. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

much of a right to penalize deviations from its common morality as it does to prohibit treason—in either instance it is simply asserting its right to prevent its own social disintegration. (2) The bare fact that a great majority of the members of any given community believe that a certain kind of act is immoral is in itself a reason for a member of that majority to view its legal prohibition as prima facie right (or obligatory). The first argument, which Hart calls the "disintegration thesis," rests on certain empirical assumptions about the effects on a society of a failure to enforce its positive morality through the criminal law. The second argument does not rest upon a consideration of the consequences to society of the enforcement of morality, but rather asserts a direct moral right on the part of society to "follow its own lights," as Dworkin puts it. I would like to consider certain features of these arguments, and the replies which have been made to them by Hart and Dworkin respectively, in turn.

The first argument—the disintegration thesis—need not detain us long. Surely Lord Devlin is correct in maintaining that there is at least some sense in which "society may use the law to . . . safeguard anything . . . that is *essential* to its existence."[7] But as Hart has convincingly argued on a number of separate occasions,[8] the empirical assumption that it must legislate sexual morality in order to avoid disintegration is simply without foundation. Although there may be what Hart has called a "natural necessity" for society to provide some minimal protection for persons, property, and promises in order to continue in existence,[9] there is no evidence whatsoever that there is any similar need to prohibit homosexuality, prostitution, etc.

It is Devlin's second argument, asserting the right of society to follow its own moral lights, which to my mind is of the greatest interest. As Dworkin notes, one has to some degree to read between the lines to find it in Devlin,[10] and it is not clear that Devlin himself would view it as separable from the disintegration argument. Indeed, Dworkin's own description of the argument does not square very well with the understanding which he seems to have of it when he is concerned with criticizing it. As *described* by Dworkin the thesis is that society has a right to prohibit those acts the performance of which would bring about significant changes in those social institutions

7. DEVLIN, *supra* note 4, at 11 (emphasis added).
8. In addition to the works cited in note 6 *supra*, see Hart, *Immorality and Treason*, 62 THE LISTENER 162 (1959).
9. H.L.A. HART, THE CONCEPT OF LAW ch. ix (1961).
10. R. Dworkin, *supra* note 6, at 992.

upon which the society's positive morality places a high value. Understood in this way, the argument "does not claim that immorality is sufficient to make conduct criminal."[11] But as *analyzed* by Dworkin, the argument seems to be that the principled belief that a certain kind of conduct is immoral *is* a sufficient ground, other things being equal, for seeking to have it made illegal. If I can convince you that my belief that homosexuality is immoral is based upon moral principle, rather than mere prejudice, emotional reaction, or mistaken conception of fact, writes Dworkin, "[y]ou will admit that so long as I hold my moral position, I have a moral right to vote against the homosexual, because I have a right (indeed a duty) to vote my own convictions."[12]

Now although I may not be fully fair in representing the views of either Dworkin or Lord Devlin as to what Devlin's argument really is, it seems to me that some such principle is the ground upon which most proponents of the legal enforcement of certain moral prohibitions would rest their case. If one sincerely believes that the performance of a certain kind of act is wrong, what better reason could he have for seeking (through the vehicle of the criminal law, if that is necessary, and the costs aren't excessive) to prevent it? Indeed, even Mill wrote that "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."[13]

Recent discussions of the enforcement of morality, taking place in a climate where the virtues of religious and to some degree moral tolerance are at least paid lip service, have generally concealed the real roots of controversy by typically concentrating upon what are at best only secondary considerations. Writers such as Lord Devlin and Norman St. John-Stevas,[14] writing under the heavy and frankly acknowledged influence of a religious morality, sincerely believe that certain kinds of behavior are immoral or sinful which others, particularly those with a utilitarian perspective, find either unobjectionable or at worst pathetic. No wonder they differ as to what ought to be prohibited by the criminal law. Their real differences are on the moral merits; talk of the disintegration of society, tolerance, the costs

11. *Id.* at 993.
12. *Id.* at 995.
13. J.S. MILL, UTILITARIANISM 60 (Bobbs-Merrill ed. 1957).
14. *See* NORMAN ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW (1961).

of enforcement, and so on, represents secondary considerations which, although sometimes quite relevant, are *only* secondary.[15]

Ronald Dworkin's attack on Devlin is quite different from Hart's attack on the disintegration thesis, for Dworkin is quite clear that his difference with Devlin is on the moral merits. "What is shocking and wrong," writes Dworkin, "is not his [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality."[16] As this passage indicates, although Dworkin casts the dispute between Lord Devlin and himself in terms of the moral merits, the difference is framed in terms of what counts as the positive morality of a community, not in terms of a difference in personal views of what qualifies as an acceptable set of principles of critical morality. Although there is little doubt that Dworkin's view of substantive harm or immorality is different from that of Devlin, it is not his strategy to appeal to it. Rather, agreeing with Lord Devlin that a man has not only the right but the duty to vote his moral convictions, Dworkin attempts to argue that most opposition to homosexuality, pornography, and so on, cannot be *defended* as a matter of *principled moral conviction.* It is only those moral convictions which can be defended in terms of consistent reasons and principles which one is entitled to impose upon others, Dworkin argues, and *this* principle of entitlement is itself relevant because it is part of the positive morality of the community of which both he and Lord Devlin are members.

> Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalization (based on assumptions of fact so unsupported that they challenge the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reason for his view, but would simply parrot his neighbor who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of

15. This has been noted before. *See* Louch, *Sins and Crimes,* 43 PHILOSOPHY 38, 47-48 (1968).
16. R. Dworkin, *supra* note 6, at 1001.

> the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality. Nor would the bulk of the community then be entitled to follow its own lights, for the community does not extend that privilege to one who acts on the basis of prejudice, rationalization, or personal aversion. Indeed, the distinction between these and moral convictions, in the discriminatory sense, exists largely to mark off the former as the sort of positions one is not entitled to pursue.[17]

Dworkin's argument is a significant and novel attempt to defend a libertarian position in terms which the legal moralist is himself constrained to accept, and he does this without taking joinder directly on the issue of the substantive moral merits of homosexuality, prostitution, or other practices. I agree with Dworkin that the principle of political morality to which he calls our attention would be widely accepted by reflective citizens and legislators in our community, and I also believe that there are at least *some* instances in which an appeal to it would be sufficient to defend a libertarian position. I, for one, find his brief "Postscript on Pornography" quite convincing. But the view has its difficulties.

First, it is not clear how Dworkin's principle of entitlement is to be interpreted. Two interpretations suggest themselves, neither of which would seem to yield the desired result. Perhaps all that is demanded is that there exist *some* reasoned principle in support of a widespread belief that a certain kind of conduct is wrong; it need not matter whether most people would appeal to that principle to support their beliefs, all that need be required is that the principle in question be consistent with whatever other moral principles are attributed to them. But this interpretation is surely too weak; unless one wishes to dismiss belief in God and an afterlife as irrational as such, which Dworkin surely does not, it will not be difficult to concoct religious arguments to support the position of the legal moralist. Now many of the arguments of the legal moralist will fail to impress a substantial number of us, and we might even be inclined to label them irrational; but they are not of the sort to be disqualified by Dworkin's notions of arbitrariness, prejudice, irrationally mistaken conceptions of fact, rationalization, pure emotive reaction, and so on.

17. *Id.* at 1000-01.

The second possible interpretation would demand not only that there exist a principled basis for the conviction that a certain kind of conduct is wrong, but that the majority of those who believe it to be wrong do so because they in fact consciously hold to the principle in question. But this interpretation is clearly too strong. As Dean Rostow has convincingly argued,[18] the moral convictions of most men are at best only partly based on explicit principles; for the most part they represent the uncritically accepted results of processes of acculturation little understood by those who hold them. Were Dworkin's principle to demand that it be anything more than this, it would, I suspect, completely deny the community's positive morality any real role at all.

Indeed, when pushed for an interpretation of the notion of a reasoned or principled basis for a moral conviction which would at least be sufficient to exclude such things as pure "gut reaction" and rationalization, it seems that it is difficult to go far beyond the views of Lord Devlin himself. For although Devlin has been taken to task by Hart, Dworkin and others for taking the widespread existence of *feelings* of "reprobation" and "disgust" toward certain kinds of behavior as sufficient warrant for prohibiting it, his view is in fact more complicated, and more plausible, than this. Such feelings are at best merely necessary, and not sufficient, for Devlin,[19] presumably because they are only *evidence* of the *depth* of conviction that a certain kind of conduct is wrong. And they must be present after calm discussion and deliberation on the issue of immorality, since such deliberation has to yield a judgment of unanimity among "reasonable" men.[20] Suffice it to say that I see no reason to believe that the libertarian will receive much solace from the contention that it is only a community's *principled* moral convictions that it is entitled to enforce through the criminal law on any plausible interpretation of "principled" that would entitle it to enforce anything.

There is a second difficulty having to do with the *status* of Dworkin's principle of entitlement. It is relevant, he claims, because it is a recognized element of *our* shared positive political morality. But suppose a community failed to recognize such a restrictive principle, and rather put a premium upon individuals acting on their own lights

18. Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174, 197, reprinted in ROSTOW, THE SOVEREIGN PREROGATIVE 45, 78 (1962).
19. DEVLIN, *supra* note 4, at 17.
20. *Id.* at 17-22.

as determined by their spontaneous reactions of the moment? Would such a society on Dworkin's view be entitled—indeed, even have a duty—to enforce its shared morality whenever a consensus existed, regardless of how arbitrary or unreasonable their convictions might be? Here again Dworkin's concession to the legal moralist must be simply too great for the libertarian to tolerate.

It would appear, then, that the libertarian has no resort but to appeal to his own substantive views of what is right and wrong, and seek to convince his opponent either that certain kinds of conduct are really not immoral, or else that they are not harmful enough to warrant the high costs of making them illegal. The remaining question, then, is whether or not there are any *critical* principles to which he might appeal which would delimit some sphere of human conduct as absolutely outside of the legitimate range of coercive social control. In short, can Mill's principle, or something like it, be given a reasonable defense?

II

One looks here, not to Hart's criticism of Devlin's dubious disintegration thesis, but to his discussion of Mill's principle in *Law, Liberty, and Morality*. What one finds is, I am afraid, quite disappointing.

Hart writes that Mill's protests against paternalism were excessive, and argues that his principle must be modified so as to permit interference with individual liberty on frankly paternalistic grounds.[21] Legal interference, he concedes, may be warranted either to protect others from harm, or to prevent the agent from harming himself. However, Hart claims that such modified principles would not be inconsistent with opposition to the use of the criminal law for the enforcement of morality.[22]

It is here that Lord Devlin has had a field day with Hart's views.[23] If it is right to protect an individual from inflicting a physical harm upon himself, or to prevent him from consenting to the infliction of such a harm, how can it be wrong to prevent him from inflicting moral harm upon himself? Does Hart mean to distinguish physical from moral paternalism? Or is there a distinction to be made between moral paternalism and the enforcement of morality? Lord Devlin is

21. HART, LAW, LIBERTY, AND MORALITY, *supra* note 6, at 32.
22. *Id.* at 33.
23. Devlin, *Morals and Contemporary Social Reality*, in DEVLIN, *supra* note 4, at 124, 132-39.

at his best in pointing out the obvious reasons why Hart is in no position to give affirmative answers to the latter two questions, and his discussion makes it quite clear that, as suggested earlier, he believes that society has a right to prevent harms and immorality, whether physical or not, just because they are wrongs. Once one amends Mill's principle in the manner suggested by Hart, the only grounds upon which a controversy over a specific prohibition may be fought out are in terms of the nature and magnitude of the putative harm. Given the fact that Hart does not challenge the view that homosexuality is immoral, only upon arbitrary grounds could he protest against making it illegal while countenancing the enforcement of laws designed to protect people from harming themselves physically. Specific qualms about difficulty of enforcement he could appeal to; the great value of the freedom being encroached upon is open to him to emphasize; but he cannot appeal to a principled basis for rejecting it as a species of legal moralism. Hart is most effective in criticizing overdrawn and often silly arguments presented by the legal moralist. But we have seen that these arguments are only of secondary concern, the primary argument being one which he never confronts, yet must face in view of his modification of Mill's principle. What one suspects is that, if pushed, Hart would in fact retreat to a utilitarian position and challenge the view that homosexuality *is* immoral. But as Devlin suggests, that is not to defend any form of an anti-paternalistic principle, it is simply to differ, on a principled basis, as to whether or not homosexuality is actually harmful.

Hart's emendation of Mill, then, which admits that *some* instances of legal paternalism are justified, deprives the libertarian of any *principled basis* for denying that *all* wrongful acts, other things being equal, ought to be prevented, if necessary through the vehicle of the criminal law. In any given case where the legal status of an act is in dispute, it would seem that all the libertarian can do is to call the legal moralist's attention to the value of human freedom, the costs of enforcement, and, perhaps, the controversial nature of the claim that the act in question is immoral or harmful at all. This seems to be the conclusion reached by those who feel that they must follow Hart in admitting that Mill's absolute stance against paternalism is unsupportable.

I would like to suggest, though, that such a conclusion is far from necessary.

III

It has been the argument of this paper that both the legal moralist and the libertarian must agree that an individual or a community is entitled to seek to prevent that which is sincerely believed to be immoral. The suggestion has therefore been that specific disputes between them can only be resolved by taking a stand on the moral merits. This demands that the libertarian put forward some substantive conception of what in principle determines the moral merits, and argue in terms of it with respect to specific kinds of acts. But this is just what writers such as Dworkin and Hart have conspicuously failed to do. It is therefore no surprise that they fail to support satisfactorily the libertarian position of the *utilitarian* J.S. Mill. In the remainder of this paper, I shall seek to indicate what I take the implications of act utilitarianism[24] to be with respect to the enforcement of morality. Specifically, the paradigms which I have in mind are homosexuality, prostitution, contraception, and pornography. With respect to all of these, there are certain things which must be given special emphasis by the utilitarian, not the least of which, we shall see, is an emended version of Mill's absolute prohibition on legal paternalism.

In the first place, it is clear that the utilitarian holds a theory of value quite different from that implicitly or explicitly assumed by those who take a traditional religious perspective on such matters as sexual morality and birth control. The utilitarian will view questions of morality and immorality only in terms of ascertainable harms and benefits as reflected in the desires and aversions, satisfactions and dissatisfactions, pleasures and pains, of sentient creatures. Where many find immorality and sin, the utilitarian will often find little, if anything, to complain about. In some instances, such as birth control, he will view as positively desirable what others may find morally objectionable. To conceal such differences in substantive moral viewpoints is only to court confusion.

Secondly, it is clear that the utilitarian must place a very high value upon human freedom. It has instrumental value in that it permits people to choose that which they desire, the satisfaction of such desires being the sole intrinsic value for the utilitarian. And insofar as most people *prefer* to be free to choose, not being interferred with

24. For a discussion of the distinction between act and rule utilitarianism closely related to the theme of this paper, see Sartorius, *Individual Conduct and Social Norms: A Utilitarian Account,* 82 ETHICS, No. 3 (1972).

has intrinsic value as well. Now I do not mean to claim that the non-utilitarian cannot place a high value upon human freedom; Devlin, for instance, clearly has considerable regard for its importance. What I do mean to point out is that the utilitarian is directly and clearly committed to demanding a justification, in terms of harm to be prevented or benefits to be won, for any interference with human freedom because on his theory there is the presumption that it is wrong.

In *On Liberty,* Mill emphasized the great instrumental value of individual liberty for society at large. Many libertarians obviously share Mill's sentiments, but the question remains as to how the act utilitarian could without inconsistency propose an *absolute* prohibition upon paternalistic legislation. In attacking Mill's principle in his *Liberty, Equality, and Fraternity* in 1882, James Fitzjames Stephen concluded that this question simply could not be answered. His quite plausible suggestion is that no matter how great the value of freedom, the utilitarian is committed by the very nature of his position to deciding each case (of putatively justified paternalism) on its individual merits.

> If . . . 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, no good object can be attained by any compulsion which is not itself a greater evil than the absence of the object which the compulsion obtains.[25]

Contemporary writers such as Hart,[26] believing that there are at least some instances in which the law is justified in protecting individuals against themselves, have not even attempted to answer Stephen's objections. They have followed him in rejecting Mill's principle, and have thus deprived themselves of the one argument which they might bring against the legal moralist which would transcend substantive disputes concerning the morality or immorality of a given kind of act.

Now is Hart so obviously correct in suggesting that we have a more realistic conception of human nature than did Mill,[27] and that it is

25. Stephen, *Liberty, Equality, Fraternity,* reprinted in part in LIMITS OF LIBERTY 43, 51 (P. Radcliff ed. 1966).
26. *See also* Dworkin, *Paternalism,* in MORALITY AND THE LAW 107-26 (R. Wasserstrom ed. 1971).
27. HART, LAW, LIBERTY, AND MORALITY, *supra* note 6, at 32-33.

thus obvious to us that paternalistic legislation will sometimes be justified on utilitarian grounds, where Mill mistakenly believed that it never was? Optimism with respect to human knowledge is admirable, but it simply does not ring true to suggest that a mere century could, in this context, make that much difference. If it is obvious to us that paternalistic legislation is sometimes warranted on utilitarian grounds, it must have been so to Mill as well.

I believe that it was, and that close attention to Mill's argument for his famous principle will reveal that that argument is not only consistent with, but retains at least some plausibility in spite of, the frank admission that there are specific instances in which paternalistic legislation is justified on utilitarian grounds. The point, in brief, is that with respect to positive law Mill must be taken to be arguing on something like the constitutional level. Just as one might argue in favor of First Amendment freedoms while acknowledging that without such constitutional barriers to legislation there are *instances* in which legal interference with the press, say, would be clearly desirable, so one may advocate a constitutional barrier to legal paternalism while at the same time admitting that in its absence specific bits of paternalistic legislation might be justified.

How might one so argue? Assume: (1) that *most* acts of kind K are, on utilitarian grounds, wrong, although (2) some acts of kind K are, on utilitarian grounds, right, but that (3) most attempts to identify exceptions to the rule of thumb "Acts of kind K are wrong" are mistaken because there is no reliable criterion by means of which exceptions to the rule may be identified. Where these conditions are satisfied, the act utilitarian has good reason, other things being equal, for acting so as to prevent anyone from *ever* performing an act of kind K.

One would be inclined to argue this way with respect to First Amendment freedoms. (1) Most governmental attempts at legal interference with, *e.g.*, freedom of the press, have had bad consequences and are thus wrong on utilitarian grounds. (2) But one can of course think of specific instances in which legal interference with a given publication would have good consequences. (3) On the other hand, were government to have the legal power to decide that something was a genuine exception to the hands-off policy indicated by (1), more often than not decisions to interfere would be mistaken, with bad consequences in specific cases, and a "chilling effect" in general on the press stemming from fears that the power would be abused. Therefore, an *absolute prohibition* on legal interference with the press is

the choice which will have the best consequences in the long run. Although this may not be very elegant as a piece of constitutional analysis, it should suffice to remind us of what is a familiar and totally reasonable pattern of argument totally consistent with an act utilitarian position. That the *act* in question is one of choice of a general constitutional *rule* makes it no less an act.

Although Mill has not to the best of my knowledge been explicitly interpreted in this manner,[28] there is little doubt that he is to be taken as arguing in favor of his principle in just this way. For the utilitarian, what is right and wrong is directly linked to the experienced satisfactions and dissatisfactions of those affected by any act, and the individual is the best judge of what is in his own interest. Mill's argument against paternalism is that even where it is motivated by good intentions, it is more often than not misguided, with resultant harm rather than benefit to the individuals concerned, and the further harm to society at large which stems from its failure to profit by what might have been in any case an instructive "experiment in living."

> [T]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place. On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still oftener right, because on such questions they are only required to judge of their own interests, of the manner in which some mode of conduct, if allowed to be practiced, would affect themselves. 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 opinion of what is good or bad for other people . . . .[29]

What Mill here identifies as "the strongest of all . . . arguments" in favor of his principle has been systematically ignored in recent discussions. But it is a strong argument, and in fact appears to be the only one to which the utilitarian could consistently appeal in an attempt to give Mill's principle the absolute status that Mill quite rightly required for it. In addition, it would seem to be the only *kind* of argument which is not damaged by the claim that there are *specific in-*

28. But Devlin at least realizes that Mill's principle is to be understood at something like the constitutional level. *See* his *Mill on Liberty in Morals*, in DEVLIN, *supra* note 4, at 102, 103.

29. MILL, *supra* note 1, at 102.

stances in which paternalistic legislation would be justified on utilitarian grounds.

I have suggested that Mill can be interpreted as arguing at the constitutional level for the adoption of a legal barrier to paternalistic legislation. So he might. But in the context of current controversy concerning homosexuality, and so on, it is clear that the libertarian must appeal to the principle rather as one of political morality, similar in status, but obviously opposed to, Dworkin's principle that a man is only entitled to attempt to impose his *principled* moral convictions upon others.

It is interesting to note that Mill understood quite well the position of the legal moralist whom in terms of his principle he was attempting to counter. "Nine-tenths of all moralists and speculative writers," he notes,

> teach that things are right because they are right; because we feel them to be so. They tell us to search in our own minds and hearts for laws of conduct binding on ourselves and on all others. What can the poor public do but apply these instructions and make their own personal feelings of good and evil, if they are tolerably unanimous in them, obligatory on all the world? . . .[30]
>
> . . . [W]ho can blame people for desiring to suppress what they regard as a scandal in the sight of God and man?[31]

"The only tenable ground of condemnation" of those who would enforce their moral views on others, Mill concludes, "would be that with the personal tastes and self-regarding concerns of individuals the public has no business to interfere."[32]

I believe history bears Mill out in his claim that paternalistic legislation will in any given instance likely be misguided, but this, as Mill apparently failed to realize, is not sufficient justification for an absolute barrier to paternalism. As explicitly noted above, it also is required that there be no reliable criterion in terms of which exceptions to the general rule—which are admitted to exist—can be identified. Many, I suspect, would claim that Mill's principle must be modified in light of the fact that there are certain limited classes of exceptions which *can* be reliably identified, and I am inclined to agree with them.

Mill himself admitted that children and the "uncivilized" were to

30. *Id.* at 103.
31. *Id.* at 105.
32. *Id.* at 104-05.

be exempted from the application of his principle, and there is little doubt that he would have been willing to add the senile and mentally infirm as well. Why should we have *these* exceptions? Clearly they are not ad hoc, but are rather all instances of kinds of persons whose capacity to make choices which will lead to the satisfaction of their actual needs and desires is limited or not fully developed. In such instances, the utilitarian can justify interference in terms of either the individual's existing needs and desires as the individual himself perceives them, or else in terms of needs and desires which it can with great plausibility be argued that the individual will eventually come to recognize. Thus the familiar, but cogent, argument for compulsory education. But if such is the principle upon which such exceptions may be based, it would appear that it would license other forms of interference as well. For there are instances where it is empirically demonstrable that people will act against their own interests if not coerced into acting otherwise, and this again in terms of the individual's interests as he himself perceives them; thus statutes making compulsory the wearing of protective helmets by motorcycle riders, and others prohibiting swimming after dark at unguarded beaches.[33]

Mill quite rightly sought to guard against the moral zealot who is prone to claim that the individual may be a very bad judge of what constitutes his own good, and may thus justifiably be "forced to be free," as Rousseau expressed it and Plato implied. But although the utilitarian is committed to equating value with utility as revealed in an individual's choice behavior, the *stable preferences* revealed are not identical with the *choice behavior,* and may consistently be argued to be out of kilter with it in specific instances. Where identifiable classes of individuals can be shown to be likely to manifest choice behavior inconsistent with their preferences as these preferences can be unproblematically attributed to them, the odds change in favor of interfering with their personal liberty, if necessary, in order to protect them against themselves. Mill's principle can and should be modified accordingly.

Although the suggested emendation is in line with our perhaps more enlightened views about the fallibility of human judgment, as Hart suggests, it will not compromise the usefulness of Mill's principle to the libertarian. For the striking fact about the views of the legal moralist is that, in urging that homosexual acts, and so on, be

33. These examples are from Dworkin, *supra* note 26.

prohibited, he must employ a concept of harm and immorality that bears no significant relation whatsoever to the needs and desires of those individuals whom he would seek to protect against themselves, *as those individuals quite consistently perceive their needs and desires.*[34]

IV

I have identified three closely related features of a utilitarian defense of libertarianism: (1) A conception of value closely tied to the interests of individuals as they themselves perceive them; (2) an especially strong conception of the value of individual freedom of choice; (3) a principled objection to interferences with self-regarding conduct. We have seen that (3), as does (2), rests largely upon (1). And it has been admitted that the real basis of the controversy between the utilitarian (who is also a libertarian) and the legal moralist lies in their quite different conceptions of what is of value and moral significance. Is there, then, any reason to believe that the legal moralist would accept an emended version of Mill's principle, the argument for which rests upon a conception of human well-being which he clearly rejects?

The utilitarian relies upon his own conception of value in arguing that the individual is usually the best judge of what is for his own good, and Mill's argument would be cogent even within a society of avowed utilitarians. Those who base their moral views on religious authority of course believe that they know the moral truth, and are thus not likely to be impressed by the claim that they may be mistaken in imposing their views of human goodness and well-being on others. Were *they* members of a community of morally like minded individuals, they would find Mill's principle unacceptable. But as a member of a morally heterogeneous community, the legal moralist might indeed agree that legal interference with self-regarding conduct is more often than not misguided, and thus accept Mill's principle. Especially in a pluralistic democratic society, where one day's majority may be the next day's minority, the legal moralist may urge the adoption of principles of tolerance simply as a matter of self-protection. He may view it as a positive evil that he is not able to prevent others from acting in certain ways that he believes immoral, but he will view

34. So Hart is right in claiming that Mill's principle may be amended so as to permit paternalism without countenancing the enforcement of morality as such. HART, LAW, LIBERTY, AND MORALITY, *supra* note 6, at 33.

as an even greater evil his being forced by others with different moral views to act in ways which he views as immoral. Within a pluralistic society such as our own, it is thus to be hoped that the libertarian has available to him, in an emended version of Mill's principle, a principle of tolerance which might actually be used to persuade others with substantially different views on issues such as homosexuality to abstain from legal interference. The reaction of church leaders to Supreme Court school prayer decisions surely suggests that broad principles of the kind in question can win shared agreement among those who hold widely divergent views about the substantive merits of their application in specific instances.[35]

But the virtues of the non-utilitarian's acceptance of a Millian principle of tolerance reveal its defects. The principle that error knows no rights continues to lurk in the background; as suggested above, it is only the utilitarian who is willing to accord error some rights in terms of a principle of tolerance even when he finds himself among those who are morally like minded. Insofar as the non-utilitarian's acceptance of a principle of tolerance is a form of self-protection, he has no reason to accept it in a morally homogeneous community. Neither does he have any reason to extend the protections it affords to those who are too weak to represent a real threat to him within a pluralistic society. And in spite of the great extent to which the virtues of tolerance are extolled in our society, many would claim that as a matter of fact tolerance is extended only to those groups which are strong enough to represent a genuine political or economic threat.[36]

In another vein, it might be argued that a pluralistic society requires observance of principles of tolerance in order to avoid the breakdown of law and order. The enforcement of legal prohibitions which a substantial proportion of the community believe are lacking in moral foundation may not only be very costly, but is likely to weaken respect for the legal system among those who view themselves as being repressed rather than benefited. But this argument is no better than the last, and in fact has the same implications. For we know all too well that the majority can usually succeed in enforcing its views upon even a substantial minority, and where the minority in question is insubstantial the significance of its level of respect for the legal system in general is also often insubstantial.

35. *See* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 205-06 (1968).
36. *See generally* Wolff, *Beyond Tolerance*, in A CRITIQUE OF PURE TOLERANCE (1965).

Such defenses of tolerance in terms of political expediency carry weight in a pluralistic society, and are surely relevant. But the danger in them lies in the fact that if they are taken to be the *only* defenses, tolerance may come to be viewed as increasingly dispensable as society becomes increasingly homogeneous, each increase in legal moralism itself playing a causal role in increasing the level of homogeneity over time, this in turn justifying further repression. As Mill perceived, a society would result which, lacking the experience of a variety of instructive experiments in living, would itself be the eventual loser. The utilitarian argument for Mill's principle of tolerance is therefore anything but superfluous, for it would appear to be the only argument which finds a firmer foundation for that principle than political expediency.

The legal moralist will, of course, be quick to point out that he would not view himself as being treated with excessive tolerance should the law be radically changed overnight so as to reflect the utilitarian's view of what morality, tempered by Mill's principle of tolerance, demands. As far as he would be concerned, a world in which homosexuality, prostitution, pornography, and so on were legally permitted would be a world changed much for the worse, and it surely could not be said to be a world which showed much respect for or toleration of his moral views. For his views demand that such activities be legally prohibited. All of this must be admitted. As has been emphasized throughout, the root of the controversy between the legal moralist and the utilitarian lies in their quite different conceptions of what constitutes the right and the good. Since they both share the view that wrong ought, other things being equal, to be prevented, they cannot both be equally satisfied.

There is, though, a form of tolerance which the utilitarian will extend to the legal moralist, one which the legal moralist has seldom been kind enough to extend to his opponents in return. This form of tolerance has little to do with Mill's principle, but is simply an extension of the general utilitarian concern with avoiding preventable human suffering and dissatisfaction. For, again given the principle that wrong ought to be avoided, the legal moralist will be quite understandably dissatisfied at knowing that what he believes to be immoral acts are not being deterred by force of law; if he is a retributivist, he will be further disturbed by the fact that immorality is being permitted to go unpunished. Such dissatisfactions will be given consideration by the utilitarian, and although it is perhaps unlikely that

they will ever lead him to change his position on any substantive issue with respect to the enforcement of morality, they surely may lead him to temper the manner in which he will present his case, and are likely to influence the nature of the legislation which he will advocate. This sort of tolerance is most significant as it operates outside of the law, however, and may strongly influence the nature of interpersonal relations among those who hold divergent moral views on admittedly sensitive subjects.

Hart has taken such strong exception to the above claim that he is worth quoting at length:

> a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value. For the extension of the utilitarian principle that coercion may be used to protect men from harm, so as to include their protection from this form of distress, cannot stop there. If distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does—unless, of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.[37]

This is surely one of the strongest, and most puzzling, statements that can be found in Hart's voluminous and valuable writings. In giving consideration to such distress, the utilitarian is surely not suggesting that anyone has an *absolute right* not to be subjected to it, but merely that it is a relevant consideration which ought to be given due weight. And it is hard to believe that there are any instances in which giving it heed would lead to strong legal prohibitions that would not have been otherwise justified on utilitarian grounds. For, as Mill attempted to make quite clear, it is future generations whose interests often

37. HART, LAW, LIBERTY, AND MORALITY, *supra* note 6, at 46-47.

ought to guide legislation, and with a view to mores changing as a result of legislation, the distress of those who would be displeased or even anguished by legislative repeal of specific legal prohibitions is not likely to count for much. Consider, for instance, homosexuality. Some would, of course, be distressed if the law were to become more permissive with respect to it. But it is not likely that future generations will hold such views, and even if they do, what about the distress caused to homosexuals who find themselves heavily penalized for their peculiar way of expressing what are among the most basic of human desires? Certainly any reasonable balancing of satisfactions and dissatisfactions would at best justify little more than protecting the legal moralist (and others) from homosexuals flaunting their idiosyncrasies upon the public in the same manner and to the same degree to which heterosexuality is promoted through such means as advertising.

Respect for the distress that may be caused to those who hold deep moral convictions that one is in disagreement with can be a rationalization for opposing change, but seldom a good reason. It can, though, and should be, a reason for dealing with those with whom one differs in certain ways. Any moral view which ignored this under the banner of the slogan that "error has no rights" would surely be objectionable. Utilitarianism, fortunately, seems to me to give the proper moral perspective on this score. Indeed, it has been the argument of this article that it provides an adequate ground for dealing with the issue of the enforcement of morality, and thus all aspects of the general theme that error has some rights but not others.

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