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## LAW, DEMOCRACY, AND MORALITY \*

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When a state recognizes freedom of worship and of conscience, it sets a problem for jurists which they have not yet entirely succeeded in solving. Now, when the law divides right from wrong, it cannot appeal to any absolute authority outside itself as justifying the division. All the questions which before were settled by divine law as pronounced by the churches are thrown open to debate when the decision is taken to admit freedom of conscience.<sup>1</sup>

The nineteenth century English philosophers drew what appeared to be the logical conclusion from the change. While the political scientists and constitution-makers of the age were engaged in separating church and state, the philosophers came near to separating law and morality. Austin taught that the only force behind the law was physical force, and Mill declared that the only purpose for which that force could rightfully be used against any member of the community was to prevent harm to others; his own good, physical or moral, was not sufficient warrant.

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† Lord of Appeal in Ordinary.

<sup>1</sup> This decision, and not the separation of church from state, is crucial. In England, the church has never been formally separated from the state, but by the beginning of the nineteenth century an Englishman was effectively set free to worship or not as he chose. It was freedom not to worship at all and to disbelieve in revelation that was important, for it deprived the law of spiritual sustenance. In the eyes of the law the only judgment upon right and wrong which a man could be expected to follow was that of his own conscience, and it did not matter whether he taught himself on matters of morals or was taught by others.

But this sort of thinking made no impact at all upon the development or administration of the English criminal law. This was doubtless because no practical problems arose. If there had been a deep division in the country on matters of morals—if there had been, for example, a large minority who wished to practice polygamy—the theoretical basis for legislation on morals would have had to have been scrutinized. But the Englishman's hundred religions about which Voltaire made his jibe gave rise to no differences on morals grave enough to affect the criminal law. Parliament added incest and homosexual offenses to the list of crimes without inquiring what harm they did to the community if they were committed in private; it was enough that they were morally wrong. The judges continued to administer the law on the footing that England was a Christian country. Reluctantly they recognized respectful criticism of Christian doctrine as permissible, and the crime of blasphemy virtually disappeared. But Christian morals remained embedded in the law.<sup>2</sup>

#### I. EMERGENCE OF A PRACTICAL PROBLEM

It is only recently that there has emerged a moral problem needing a practical solution. There have long been cases in which men have violated various precepts of moral law, but there has been no body of men who asserted that the law ought not to interfere with immoral behavior. But there is now in England, and I daresay in other countries, a body of men who see nothing wrong with the homosexual relationship. There are others, to be found mainly among the educated classes, who, while not themselves practicing homosexuality, are not repelled by it, think it a permissible way of life for those so constituted as to enjoy it, and deplore the misery the law inflicts on the comparatively few victims it detects. In September 1957 the Wolfenden Committee of thirteen distinguished men and women appointed by the Home Secretary recommended with only one dissenter that homosexual behaviour between consenting adults in private should no longer be a criminal offense; and they based their recommendation on the ground that such offenses were within "a realm of private morality and immorality which is, in brief and crude terms, not the law's business."<sup>3</sup> The Home Secretary did not accept this recommendation; nevertheless, the report, in addition to its sociological value, is an im-

<sup>2</sup> The change is described by Lord Radcliffe in his 1960 Rosenthal Lectures, *Law and Its Compass*. Mr. Justice Phillimore put the point broadly when he said: "A man is free to think, to speak and to teach what he pleases as to religious matters, though not as to morals." *Rex v. Boulter*, 72 J.P. 188 (1908).

<sup>3</sup> Homosexual Offenses and Prostitution Committee, *Report*, CMD. No. 247, at 24 (1957).

portant statement on the relationship between the criminal and the moral law.

Another landmark was made in May of last year by the decision of the House of Lords in *Shaw v. Director of Public Prosecutions*.<sup>4</sup> This case arose indirectly out of another recommendation by the Wolfenden Committee. They were asked to report also upon offenses in connection with prostitution; and as a result the Street Offences Act, 1959,<sup>5</sup> which made it impossible for prostitutes to continue soliciting in the streets, was passed. Mr. Shaw naively considered that since Parliament had not prohibited the trade of prostitution, there could be nothing objectionable or illegal about his supplying for prostitutes some means of advertisement in place of that which Parliament had denied them. So he published a magazine, which he called "The Ladies' Directory," containing the names, addresses, and telephone numbers of prostitutes. If that were all that he had done and if he had been content to remunerate himself simply by the proceeds from the sale of the magazine, he would have committed no specific offense. But the magazine contained additional matter which made it an obscene libel; and by taking payment from the prostitutes themselves the defendant had committed the statutory offense of living "wholly or in part on the earnings of prostitution."<sup>6</sup> The importance of the case comes from the first count in the indictment, which was independent of the two statutory offenses and alleged a conspiracy at common law to corrupt public morals, the particulars being that the defendant and the prostitutes who advertised themselves in his magazine conspired "to induce readers thereof to resort to the said advertisers for the purposes of fornication."<sup>7</sup> The defense argued that there was no such general offense known to the law as a conspiracy to corrupt public morals, but the House of Lords held by a majority of four to one that there was and that the accused was rightly found guilty of it. Viscount Simonds said: "There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State";<sup>8</sup> and he approved the assertion of Lord Mansfield two centuries before that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offenses *contra bonos mores*.<sup>9</sup>

<sup>4</sup> [1961] 2 Weekly L.R. 897 (H.L.).

<sup>5</sup> 7 & 8 Eliz. 2, c. 57.

<sup>6</sup> Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69, § 30(1).

<sup>7</sup> The particulars also specified an invitation to indulge in certain perversions. The House of Lords did not treat this as making much—if any—difference.

<sup>8</sup> *Shaw v. Director of Pub. Prosecutions*, [1961] 2 Weekly L.R. 897, 917 (H.L.).

<sup>9</sup> *Rex v. Delaval*, 3 Burr. 1434, 1438-39, 97 Eng. Rep. 913, 915 (K.B. 1763).

With this cardinal enunciation of principle the courts rejected the teaching of John Stuart Mill and proclaimed themselves keepers of the nation's morals. From what source do they draw that power and how do they ascertain the moral standards they enforce?

## II. THE BASIS OF MORALS LEGISLATION

The state may claim on two grounds to legislate on matters of morals. The Platonic ideal is that the state exists to promote virtue among its citizens. If that is its function, then whatever power is sovereign in the state—an autocrat, if there be one, or in a democracy the majority—must have the right and duty to declare what standards of morality are to be observed as virtuous and must ascertain them as it thinks best. This is not acceptable to Anglo-American thought. It invests the state with power of determination between good and evil, destroys freedom of conscience, and is the paved road to tyranny. It is against this concept of the state's power that Mill's words are chiefly directed.

The alternative ground is that society may legislate to preserve itself. This is the ground, I think, taken by Lord Simonds when he says that the purpose of the law is to conserve the moral welfare of the state; and all the speeches in the House show, especially when they are laying down the part to be played by the jury, that the work of the courts is to be the guarding of a heritage and not the creation of a system. "The ultimate foundation of a free society is the binding tie of cohesive sentiment."<sup>10</sup> What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives.

If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.<sup>11</sup>

A law that enforces moral standards must like any other law be enacted by the appropriate constitutional organ, the monarch or the

<sup>10</sup> *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1940) (Frankfurter, J.).

<sup>11</sup> I have taken the liberty of repeating what I said in 1959 in a lecture entitled *The Enforcement of Morals*, published in 45 *Proc. of BRITISH ACADEMY* 129, 138 (1960).

legislative majority as the case may be. The essential difference between the two theories is that under the first the lawmaker must determine for himself what is good for his subjects. He may be expected to do so not arbitrarily but to the best of his understanding; but it is his decision, based on his judgment of what is best, from which alone the law derives authority. The democratic system of government goes some way—not all the way, for no representative can be the mirror of the voters' thoughts—to insure that the decision of the lawmaker will be acceptable to the majority, but the majority is not the whole. A written constitution may safeguard to a great extent and for a long time the conscience of a minority, but not entirely and forever; for a written constitution is only a fundamental enactment that is difficult to alter.

But under the second theory the lawmaker is not required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about right and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity. He has not to argue with himself about the merits of monogamy and polygamy; he has merely to observe that monogamy is an essential part of the structure of the society to which he belongs. Naturally he will assume that the morals of his society are good and true; if he does not, he should not be playing an active part in government. But he has not to vouch for their goodness and truth. His mandate is to preserve the essentials of his society, not to reconstruct them according to his own ideas.

How does the lawmaker ascertain the moral principles that are accepted by the society to which he belongs? He is concerned only with the fundament that is surely accepted, for legal sanctions are inappropriate for the enforcement of moral standards that are in dispute. He does not therefore need the assistance of moral philosophers, nor does he have to study the arguments upon peripheral questions. He is concerned with what is acceptable to the ordinary man, the man in the jury box, who might also be called the reasonable man or the right-minded man. When I call him the man in the jury box, I do not mean to imply that the ordinary citizen when he enters the jury box is invested with some peculiar quality that enables him to pronounce *ex cathedra* on morals. I still think of him simply as the ordinary reasonable man, but by placing him in the jury box I call attention to three points. First, the verdict of a jury must be unanimous; so a moral principle, if it is to be given the force of law, should be one which twelve men and women drawn at random from the community can be expected not only to approve but to take so seriously that they re-

gard a breach of it as fit for punishment. Second, the man in the jury box does not give a snap judgment but returns his verdict after argument, instruction, and deliberation. Third, the jury box is a place in which the ordinary man's views on morals become directly effective. The lawmaker who makes the mistake of thinking that what he has to preserve is not the health of society but a particular regimen, will find that particular laws wither away. An important part of the machinery for hastening obsolescence is the lay element in the administration of English justice, the man in the jury box and the lay magistrate. The magistrates can act by the imposition of nominal penalties; the jurymen act by acquittal. If he gravely dislikes a law or thinks its application too harsh, he has the power, which from time immemorial he has exercised, to return a verdict of acquittal that is unassailable; and of its unassailability in English law William Penn and Bushell the juror stand as immortal witnesses.<sup>12</sup>

### III. THE VIEW OF THE PHILOSOPHERS

What I want to discuss immediately is the reaction that many philosophers and academic lawyers have to the doctrine I have just outlined. They dislike it very much. It reduces morality, they feel, to the level of a question of fact. What Professor H. L. A. Hart calls rationalist morality,<sup>13</sup> which I take to be morality embodied in the rational judgment of men who have studied moral questions and pondered long on what the answers ought to be, will be blown aside by a gust of popular morality compounded of all the irrational prejudices and emotions of the man-in-the-street. Societies in the past have tolerated witch-hunting and burnt heretics: was that done in the name of morality? There are societies today whose moral standards permit them to discriminate against men because of their color: have we to accept that? Is reason to play no part in the separation of right from wrong?

The most significant thing about questions of this type is that none of the questioners would think them worth asking if the point at issue had nothing in it of the spiritual. It is a commonplace that in

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<sup>12</sup> See *Bushell's Case*, Jones 1, at 13, 84 Eng. Rep. 1123 (K.B. 1670). This gives the common man, when sitting in the jury box, a sort of veto upon the enforcement of morals. One of the most interesting features of *Shaw's case* is that (in respect to uncategorized immorality contrary to common law as distinct from offenses defined by statute) it confers on the jury a right and duty more potent than an unofficial veto; it makes the jury a constitutional organ for determining what amounts to immorality and when the law should be enforced.

<sup>13</sup> Hart, *Immorality and Treason*, 62 THE LISTENER 162, 163 (1959). Professor Hart's views on this point have been considered by Dean Rostow in *The Enforcement of Morals*, 1960 C.A.M.B. L.J. 174, 184-92. I cannot improve on what the Dean has said; I merely elaborate it in my own words.

our sort of society questions of great moment are settled in accordance with the opinion of the ordinary citizen who acts no more and no less rationally in matters of policy than in matters of morals. Such is the consequence of democracy and universal suffrage. Those who have had the benefit of a higher education and feel themselves better equipped to solve the nation's problems than the average may find it distasteful to submit to herd opinion. History tells them that democracies are far from perfect and have in the past done many foolish and even wicked things. But they do not dispute that in the end the will of the people must prevail, nor do they seek to appeal from it to the throne of reason.

But when it comes to a pure point of morals—for example, is homosexuality immoral and sinful—the first reaction of most of us is different. That reaction illustrates vividly the vacuum that is created when a society no longer acknowledges a supreme spiritual authority. For most of the history of mankind this sort of question has been settled, for men in society as well as for men as individuals, by priests claiming to speak with the voice of God. Today a man's own conscience is for him the final arbiter: but what for society?<sup>14</sup>

This question, it seems to me, has received less study than it ought to have. The lawyers have evaded it by means of the assumption, substantially justifiable in fact though not in theory, that Christian morality remains just as valid for the purposes of the law as it was in the days of a universal church. The philosophers seem to have assumed that because a man's conscience could do for him, if he so chose, all that in the age of faith the priest had done, it could likewise do for society all that the priest had done; it cannot, unless some way be found of making up a collective conscience.

It is said or implied that this can be done by accepting the sovereignty of reason which will direct the conscience of every man to the same conclusion. The humbler way of using the power of reason is to hold, as Aquinas did, that through it it is possible to ascertain the law as God ordered it, the natural law, the law as it ought to be; the prouder is to assert that the reason of man unaided can construct the law as it ought to be. If the latter view is right,

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<sup>14</sup> This problem does not arise for one who takes the extreme view that society and the law have no concern at all with morals and that a man may behave as he wishes so long as he respects another's physical person and property. But I believe that there is general agreement that that is not enough and that the law should prevent a man from, for example, corrupting the morals of youth or offending the moral standards of others by a public display of what they regard as vice. The law cannot interfere in these ways except from the basis of a common or public morality. Whatever view one takes of the law's right of intervention—whether it should be no wider than is necessary to protect youth or as wide as may be desirable to conserve the moral health of the whole community—one still has to answer the question: "How are moral standards to be ascertained in the absence of a spiritual authority?"

then one must ask: As men of reason are all men equal? If they are, if every man has equivalent power of reasoning and strength of mind to subdue the baser faculties of feeling and emotion, there can be no objection to morality being a matter for the popular vote. The objection is sustainable only upon the view that the opinion of the trained and educated mind, reached as its owner believes by an unimpassioned rational process, is as a source of morals superior to the opinion of ordinary men.<sup>15</sup>

To the whole of this thesis, however it be put and whether or not it is valid for the individual mind that is governed by philosophy or faith, the lawmaker in a democratic society must advance insuperable objections, both practical and theoretical. The practical objection is that after centuries of debate men of undoubted reasoning power and honesty of purpose have shown themselves unable to agree on what the moral law should be, differing sometimes upon the answer to the simplest moral problem. To say this is not to deny the value of discussion among moral philosophers or to overlook the possibility that sometime between now and the end of the world universal agreement may be reached, but it is to say that as a guide to the degree of definition required by the lawmaker the method is valueless. Theoretically the method is inadmissible. If what the reason has to discover is the law of God, it is inadmissible because it assumes, as of course Aquinas did, belief in God as a lawgiver. If it is the law of man and if a common opinion on any point is held by the educated elite, what is obtained except to substitute for the voice of God the voice of the Superior Person? A free society is as much offended by the dictates of an intellectual oligarchy as by those of an autocrat.

#### IV. THE TASK OF THE LAWMAKER

For myself I have found no satisfactory alternative to the thesis I have proposed. The opposition to it, I cannot help thinking, has not rid itself of the idea, natural to a philosopher, that a man who is seeking a moral law ought also to be in pursuit of absolute truth. If he were, they would think it surprising if he found truth at the bottom of the popular vote. I do not think it as far from this as some learned people suppose, and I have known them to search for it in what seem to me to be odder places. But that is a subject outside the scope of this paper, which is not concerned with absolute truth. I have said

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<sup>15</sup> In a letter published in *The Times* (London), March 22, 1961, p. 13 col. 5, a distinguished historian wrote that what clinched the issue in the relationship between morality and the law was "simply that it is impossible to administer justice on a law as to which there is a fundamental disagreement among *educated* opinion." (Emphasis added.)



that a sense of right and wrong is necessary for the life of a community. It is not necessary that their appreciation of right and wrong, tested in the light of one set or another of those abstract propositions about which men forever dispute, should be correct. If it were, only one society at most could survive. What the lawmaker has to ascertain is not the true belief but the common belief.

When I talk of the lawmaker I mean a man whose business it is to make the law whether it takes the form of a legislative enactment or of a judicial decision, as contrasted with the lawyer whose business is to interpret and apply the law as it is. Of course the two functions often overlap; judges especially are thought of as performing both. No one now is shocked by the idea that the lawyer is concerned simply with the law as it is and not as he thinks it ought to be. No one need be shocked by the idea that the lawmaker is concerned with morality as it is. There are, have been, and will be bad laws, bad morals, and bad societies. Probably no lawmaker believes that the morality he is enacting is false, but that does not make it true. Unfortunately bad societies can live on bad morals just as well as good societies on good ones.

In a democracy educated men cannot be put into a separate category for the decision of moral questions. But that does not mean that in a free society they cannot enjoy and exploit the advantage of the superior mind. The lawmaker's task, even in a democracy, is not the drab one of counting heads or of synthesizing answers to moral questions set up in a Gallup poll. In theory a sharp line can be drawn between law and morality as they are—positive law and positive morality—and as they ought to be; but in practice no such line can be drawn, because positive morality, like every other basis for the law, is subject to change, and consequently the law has to be developed. A judge is tethered to the positive law but not tied to it. So long as he does not break away from the positive law, that is, from the precedents which are set for him or the clear language of the statute which he is applying, he can determine for himself the distance and direction of his advance. Naturally he will move towards the law as he thinks it ought to be. If he has moved in the right direction, along the way his society would wish to go, there will come a time when the tethering-point is uprooted and moved nearer to the position he has taken; if he has moved in the wrong direction, he or his successors will be pulled back.

The legislator as an enforcer of morals has far greater latitude than the modern judge. Legislation of that sort is not usually made an election issue but is left to the initiative of those who are returned

to power. In deciding whether or not to take the initiative the relevant question nearly always is not what popular morality is but whether it should be enforced by the criminal law. If there is a reasonable doubt on the first point, that doubt of itself answers the whole question in the negative. The legislator must gauge the intensity with which a popular moral conviction is held, because it is only when the obverse is generally thought to be intolerable that the criminal law can safely and properly be used. But if he decides that point in favor of the proposed legislation, there are many other factors, some of principle and some of expediency, to be weighed, and these give the legislator a very wide discretion in determining how far he will go in the direction of the law as he thinks it ought to be. The restraint upon him is that if he moves too far from the common sense of his society, he will forfeit the popular goodwill and risk seeing his work undone by his successor.

#### V. THE PLACE OF THE EDUCATED MAN

This is the method of lawmaking common to both our countries; the popular vote does not itself enact or veto; rather, the initiative is put into the hands of a very few men. Under this method the law reformer has a double opportunity. He may work upon the popular opinion which is the lawmaker's base, or he may influence the lawmaker directly. At each of these stages the educated man is at an advantage in a democratic society.

Let us consider the first stage. True it is that in the final count the word of the educated man goes for no more than that of any other sort of man. But in the making up of the tally he has or should have the advantage of powers of persuasion above the ordinary. I do not mean by that simply powers of reasoning. If he is to be effective he must be ready to persuade and not just to teach, and he must accept that reason is not the plain man's only guide. "The common morality of a society at any time," says Dean Rostow, "is a blend of custom and conviction, of reason and feeling, of experience and prejudice."<sup>16</sup> If an educated man is armed only with reason, if he is disdainful of custom and ignores strength of feeling, if he thinks of "prejudice" and "intolerance" as words with no connotations that are not disgraceful and is blind to religious conviction, he had better not venture outside his academy, for if he does he will have to deal with forces he cannot understand. Not all learned men are prepared like Bertrand Russell to sit on the pavement outside No. 10 Downing Street. Not all are

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<sup>16</sup> Rostow, *supra* note 13, at 197.

lucid as well as erudite. Many a man will find satisfaction in teaching others to do what he is not equipped to do himself; but it is naive for such a man to reproach judges and legislators for making what he deems to be irrational law, as if in a democratic society they were the agents only of reason and the controllers of a nation's thought.

The other advantage which the educated man possesses is that he has easier access to the ear of the lawmaker. I do not mean merely by lobbying. When—with such latitude as our democratic and judicial system allows—the lawmaker is determining the pace and direction of his advance from the law that is towards the law that ought to be, he does and should inform himself of the views of wise and experienced men and pay extra attention to them.

These are the ways by which well-informed and articulate men can play a part in the shaping of the law quite disproportionate to their numbers. Under a system in which no single question is submitted to the electorate for direct decision, an ardent minority for or against a particular measure may often count for more than an apathetic majority. Recently in England in the reform of the criminal law a minority has had some remarkable successes. In 1948 flogging was abolished as a judicial punishment;<sup>17</sup> it is doubtful whether that would have been the result of a majority vote, and it is still uncertain whether the gain will be held. Some years later much the same body of opinion was very nearly successful in abolishing capital punishment; I do not believe that in the country as a whole there is a majority against capital punishment. In 1959 the common law on obscenity was altered by statute.<sup>18</sup> Notwithstanding that the tendency of a book is to deprave and corrupt, it is a good defense if its publication is in the interests of some "object of general concern," such as literature or art; and the opinion of experts is made admissible on the merits of the work. Under this latter provision in the recent case of *Lady Chatterley's Lover*,<sup>19</sup> thirty-five witnesses distinguished in the fields of literature and morals were permitted to discuss at large the merits of the book, and thus a specially qualified body of opinion was brought into direct communication with the jury. On the other hand there has so far been a failure to reform the law against homosexuality. The conclusion of the Wolfenden Committee is an indication—I believe a correct one—that a substantial majority of "educated opinion" is in favor of some modification; but I believe also that the Home Secretary

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<sup>17</sup> Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 2.

<sup>18</sup> Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4.

<sup>19</sup> The transcript of the trial, somewhat abridged, has been published as *THE TRIAL OF LADY CHATTERLEY: REGINA V. PENGUIN BOOKS LIMITED* (Rolph ed. 1961).

was right in his conclusion that public opinion as a whole was too strongly against the proposed amendments to permit legislation.

I have been considering this subject on the assumption that the extent to which the moral law is translated into the law of the land is determined chiefly by the legislature. In England that has appeared to be so at any rate during the last hundred years. The law that is now consolidated in the Sexual Offences Act of 1956<sup>20</sup> is mainly the creation of statute. Incest, for example, all homosexual offenses, and carnal knowledge of girls under the age of sixteen were never crimes at common law. Parliament in a series of statutes felt its way cautiously towards the curbing of prostitution, approaching the situation obliquely and at several different angles. The second cardinal enunciation of principle in *Shaw's* case, to which I must now return, is that in matters of morals the common law has abandoned none of its rights and duties; and the third relates to the function of the jury.

## VI. THE JURY AS THE DECIDER OF MORAL QUESTIONS

What exactly is meant by a conspiracy to corrupt public morals? We all know what a conspiracy is in law. Since acts of immorality are rarely committed by one person only, it is not in this branch of the law an element of much importance; indeed, it is uncertain whether it is a necessary ingredient in the crime.<sup>21</sup> What limits, if any, are implicit in the words "public" and "corrupt"? Is it corruption to offer an adult an opportunity of committing, not for the first time, an immoral act? If so, what element of publicity has there to be about it? In the course of a very strong dissenting speech Lord Reid reached the conclusion that the successful argument by the Crown made "unlawful every act which tends to lead a single individual morally astray."<sup>22</sup> Their lordships in the majority refrained—I think, deliberately—from defining their terms. They left the work to the jury. Lord Simonds said: "The uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women."<sup>23</sup> On the question of what was meant by the words in the indictment Lord Tucker said: "It is for the jury to construe and apply these words to the facts proved in evidence and reach their own decision . . ."<sup>24</sup> Lord Morris said: "Even if accepted public standards may to some extent vary from generation to gen-

<sup>20</sup> 4 & 5 Eliz. 2, c. 69.

<sup>21</sup> *Shaw v. Director of Pub. Prosecutions*, [1961] 2 Weekly L.R. 897, 937 (H.L.) (Lord Tucker).

<sup>22</sup> *Id.* at 926 (Lord Reid).

<sup>23</sup> *Id.* at 919.

<sup>24</sup> *Id.* at 937.

eration, current standards are in the keeping of juries, who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved.”<sup>25</sup> Lord Hodson said that the function of *custos morum* would ultimately be performed by the jury: “[I]n the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused . . . .”<sup>26</sup>

The opinions in *Shaw's* case will certainly give rise to much debate. Critics of the majority view complain that it removes from the criminal law on morals the element of reasonable certainty. The relationship between statute and common law surely needs further elucidation. In this respect the immediate impact of the case is sharp. The legislators in Whitehall, inching forward clause by clause towards their moral objectives, topped a rise only to find the flag of their ally, the common law, whom they erroneously believed to be comatose (the Crown cited only three reported cases of conspiracy to corrupt public morals since Lord Mansfield's dictum in 1763), flying over the whole territory, a small part of which they had laboriously occupied.

There is another important aspect of the case, and that is whether, in placing so heavy a burden on the jury, it has brought about a shift of responsibility for decisions in the moral field that affects the democratic process I have endeavoured to describe.

If the only question the jury had to decide was whether or not a moral belief was generally held in the community, the jury would, I think, be an excellent tribunal. It will be objected that the decision would not be that of a jury alone but of a jury assisted by a judge; and in the minds of many reformers, some of whom identify liberalism with relaxation, the views of a judge on what is immoral are suspect. It is true that on this question a judge usually takes the conservative view, but then, so does the British public.

This is, however, as I have now stressed several times, unlikely to be the issue. The argument will not usually be about the immorality of the act but about whether the arm of the law should be used to suppress it. Hitherto the role of the jury has been negative and never formally recognized. The jury resists the enforcement of laws which

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<sup>25</sup> *Id.* at 938.

<sup>26</sup> *Id.* at 940. The opinions in *Shaw's* case were considered by the Court of Criminal Appeal in July of last year, and, with the aid of them, the court approved a definition of what was meant by a “disorderly house,” the premises in question being private premises in which strip-tease performances were exhibited. To constitute an offence, the court held, the exhibition must amount to an outrage of public decency or tend to corrupt or deprave, or be “otherwise calculated to injure the public interest so as to call for condemnation and punishment.” *Regina v. Quinn*, [1961] 3 Weekly L.R. 611, 615 (C.A.). These tests are alternative, and the last of them shows the width of the discretion that is given to the jury.

it thinks to be too harsh. The law has never conceded that it has the right to do that, but it has been accepted that in practice it will exercise its power in that way. The novelty in the dicta in *Shaw's* case is that they formally confer on the jury a positive function in law enforcement. It cannot be intended that the jury's only duty is to draw the line between public morality and immorality. If, for example, a man and a woman were charged with conspiring to corrupt public morals by openly living in sin, a jury today might be expected to acquit. If homosexuality were to cease to be per se criminal and two men were to be similarly charged with flaunting their relationship in public, a jury today might be expected—I think that this is what Lord Simonds and Lord Tucker would contemplate<sup>27</sup>—to convict. The distinction can be made only on the basis that one sort of immorality ought to be condemned and punished and the other not. That is a matter on which many people besides lawyers are qualified to speak and would desire to be heard before a decision is reached. When a minister submits the issue to Parliament, they can be heard; when a judge submits it to a jury, they cannot. The main burden of Lord Reid's trenchant criticism of the majority opinion is that it allows and requires the jury to perform the function of the legislator.

Of course the courts would never deny the supremacy of Parliament. If Parliament dislikes the fruits of the legal process, it can say so; frequently in the past it has altered the law declared by the courts. But in the legislative process the forces of inertia are considerable; and in matters of morals negative legislation is especially difficult, because relaxation is thought to imply approval. So whoever has the initiative has the advantage. For the moment it appears that the common law has regained the initiative.

## VII. MORALITY AS A QUESTION OF FACT

Whether it retains it or not, *Shaw's* case settles for the purposes of the law that morality in England means what twelve men and women think it means—in other words, it is to be ascertained as a question of fact. I am not repelled by that phrase, nor do I resent in such a matter submission to the mentality of the common man. Those who believe in God and that He made man in His image will believe also that He gave to each in equal measure the knowledge of good and evil, placing it not in the intellect wherein His grant to some was more bountiful than to others, but in the heart and understanding, building there in each man the temple of the Holy Ghost. Those who

<sup>27</sup> *Shaw v. Director of Pub. Prosecutions*, [1961] 2 Weekly L.R. 897, 918, 932 (H.L.).

do not believe in God must ask themselves what they *mean* when they say that they believe in democracy. Not that all men are born with equal brains—we cannot believe that; but that they have at their command—and that in this they are all born in the same degree—the faculty of telling right from wrong: this is the whole meaning of democracy, for if in this endowment men were not equal, it would be pernicious that in the government of any society they should have equal rights.

To hold that morality is a question of fact is not to deify the *status quo* or to deny the perfectibility of man. The unending search for truth goes on and so does the struggle towards the perfect society. It is our common creed that no society can be perfect unless it is a free society; and a free society is one that is created not as an end in itself but as a means of securing and advancing the bounds of freedom for the individuals who live within it. This is not the creed of all mankind. In this world as it is no man can be free unless he lives within the protection of a free society; if a free man needed society for no other reason, he would need it for this, that if he stood alone his freedom would be in peril. In the free society there are men, fighters for freedom, who strain at the bonds of their society, having a vision of life as they feel it ought to be. They live gloriously, and many of them die gloriously, and in life and death they magnify freedom. What they gain and as they gain it becomes the property of their society and is to be kept: the law is its keeper. So there are others, defenders and not attackers, but also fighters for freedom, for those who defend a free society defend freedom. These others are those who serve the law. They do not look up too often to the heights of what ought to be lest they lose sight of the ground on which they stand and which it is their duty to defend—the law as it is, morality as it is, freedom as it is—none of them perfect but the things that their society has got and must not let go. It is the faith of the English lawyer, as it is of all those other lawyers who took and enriched the law that Englishmen first made, that most of what their societies have got is good. With that faith they serve the law, saying as Cicero said, "*Legum denique . . . omnes servi sumus ut liberi esse possimus.*" In the end we are all of us slaves to the law, for that is the condition of our freedom.