MILL ON LIBERTY IN MORALS

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John Stuart Mill thought to resolve the struggle between liberty and authority that is inherent in every society. We who belong to the societies of the United States or of the British Commonwealth or of other like-minded peoples say that we belong to a free society. By this I think we mean no more than that we strike a balance in favour of individual freedom. The law is the boundary that marks the limit of authority and it is not drawn in a straight line. As it traverses the field of human activities it inclines from side to side, in some allowing much more freedom than in others. At each point we try to strike the right balance. What I mean by striking it in favour of freedom is that the question to be asked in each case is: "How much authority is needed?" and not: "How much liberty is to be conceded?" That the question should be put in that form, that authority should be a grant and liberty not a privilege, is I think the true mark of a free society.

Is it possible to drive a straight line across the field running from one end to the other, marking out for all time the private domain on one side and the public on the other? If it is, the value to the individual in the minority would be immense. As things are, in the constant struggle between liberty and authority the individual is at a disadvantage. Each time the Government, backed by the power of the majority, brings forward some new piece of legislation designed to benefit the majority and involving some further invasions of the private domain, the minority can only appeal to an undefined concept of liberty. Lack of definition

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suits the stronger party. What is wanted, if it can be got, is a comprehen-
sive principle, clear and precise, by which any proposed law can be tested.

This sort of thing, the idea of formulating a law above ordinary law
and by which ordinary law may be tested, is attempted on a grand scale
in the Constitution of the United States. The scale was not grand
enough for Mill. The Constitution was built to be permanent: Mill's
doctrine was designed as perdurable. The Articles of the Constitution
were made difficult to alter, but Mill dealt in immutabilities. No society,
he said, in which the liberties which he prescribed were not on the whole
respected was free, whatever might be its form of government; and none
was completely free in which they did not exist absolutely and unquali-
fied. Again, where the Constitution protects only specific freedoms, such
as the freedom to exercise religion, freedom of speech and of the press
and so forth, Mill induced from the specific freedoms he enumerated a
definition wide enough to cover all freedom. He regarded the Constitu-
tion as inadequate. The fact that in his day "nearly half the United States
have been interdicted by law from making any use whatever of fermented
drinks, except for medical purposes" was placed first in his list of "gross
usurpations upon the liberty of private life." What Mill declared was a
fundamental doctrine, to be kept as in a tabernacle in the hearts of men,
to which all law, including the law that makes and amends constitutions,
should be subject.

Mill therefore set out to define once and for all "the nature and
limits of the power which can be legitimately exercised by society over
the individual." He did this by asserting "one very simple principle, as
titled 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 civilised community, against his will, is to
prevent harm to others. His own good, either physical or moral,
is not a sufficient warrant. He cannot rightfully be compelled to
do or forbear because it will be better for him to do so, because
it will make him happier, because, in the opinions of others, to
do so would be wise, or even right.

1 Mill, On Liberty, in Utilitarianism, Liberty and Representative Government
ch. I, 75 (Everyman's Library 1910).
2 Id. at ch. IV, 144.
3 Id. at ch. I, 65.
4 Id. at ch. I, 72.
5 Ibid.
The core of this principle is that a man must be allowed to pursue his own good in his own way. Its opposite has come to be identified as paternalism. But an identifying mark is not a line. To secure the citadel of freedom Mill flung a line beyond which the law must not trespass. The law was not to interfere with a man unless what he did caused harm to others. What Mill included in "harm to others" was chiefly physical harm to other individuals.

Now if a man lives in society it is not simply his own concern whether or not he keeps himself physically, mentally and morally fit. He owes in these respects a duty to others as well as to himself. Mill accepted the duty as owing to "assignable individuals,"\(^6\) such as a man's family or his creditors. He did not see it as a debt due to society at large. The only right he allowed to society as a collective entity, \(i.e.,\) to the State, and which it might enforce by law, was the right to exact contributions to common defence and protection. "But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom."\(^7\)

Yet if apart from his assignable duties a man does not observe some standard of health and morality, society as a whole is impoverished, for such a man puts less than his share into the common well-being. The enforcement of an obligation of this sort can be distinguished from paternalism. The motive of paternalism is to do good to the individual; the motive of the other is to prevent the harm that would be done to society by the weakness or vice of too many of its members. Mill did not overlook the distinction; he overrode it in the interests of individual freedom. If a man knew his own true interest and pursued it as he ought to, he would make himself as virtuous as he could and by so doing make his contribution to society's well-being. The right to exact such a contribution must be sacrificed on the altar of freedom. If Mill had said otherwise, his doctrine would have lost its definition. It is one thing to distinguish between the duty a man owes to himself to keep fit and the like duty which he owes to society and it is another thing to define the borderline between them. Grant to society the right in its own interest to tell individuals how they should behave and at once the citadel is under attack. You cannot draw a line which keeps the intervention of the State to the minimum; you can only beg it to remember why it is there and urge it not to go too far.

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\(^6\) Id. at ch. IV, 188.  
\(^7\) Ibid.
As Mill noted, this conception of liberty was not accepted in his own time, which we now look back upon as an age of individualism triumphant. In the hundred years that have passed since then it has over and over again been decisively rejected in economic matters. Its weakness in practice is that it enables one man in a hundred to hold up indefinitely projects which would benefit the other ninety-nine. So we have laws that allow the compulsory acquisition of property. We have also social schemes that an individual is not allowed to contract out of because he cannot be excluded from the benefits of the scheme without wrecking it. Contracting out may be an expression of individuality and proceed from the pure desire for liberty, but we have come to think that it proceeds from selfishness or laziness, indifference to the common good or a desire to get something for nothing. So we have health laws, thinking it wrong that a man should receive the benefit of modern sanitation in the town in which he lives and keep his own home as a pigsty.

In short, the great majority of our fellow citizens may be as high-minded as Mill expected them to be but we have not yet got rid of the troublesome minority who will yield only to compulsion. Perhaps in the course of several centuries teaching and example will lift the minority to the common level and in the end it might have been better for us all if we had waited for that to happen. But social reformers are not as patient as philosophers and we have not waited.

This does not mean that necessarily we have witnessed the triumph of paternalism. Most of us would still, I think, deeply resent a law that was passed avowedly for our own good and treated us as if we were in need of care and protection. What it means is that the citadel has not been secured from attack in the way in which Mill proposed. His outer line enclosed territory which has had to be yielded and authority has not decisively, as he hoped, been kept at bay.

The incident in England which has recently revived interest in Mill's doctrine is the publication of the Wolfenden Report in 1957. The Report based its proposals for the reform of criminal law on homosexuality upon the principle that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." This dictum is, as Professor Hart observed "strikingly similar" to Mill's doctrine. Professor Hart immediately conferred upon the dictum his full approval with all the authority which that carries and in 1963 devoted a series of comprehensive and penetrating lectures to expounding it. The idea that in a free society a man's morals should be

8 *Id.* at ch. I, 76.

his own affair is superficially at least an attractive one. We have built a society in which a man’s religion is his own affair; can we not go a step further and build one in which his morals are his own affair too? The law knows nothing of any religion. Is there any need for it to know anything of morals?

Let me for a moment stop talking about society as an abstract conception and talk instead about a hundred men and women. Ninety are virtuous and ten are vicious. Are the virtuous to be compelled to associate with the vicious? The natural answer is, certainly not. For even granted that the vicious do no physical harm to others against their will, association with them may cause the vice to be spread. Moreover, the object of the association being to share the burdens and benefits of life among the community as a whole, it is likely that the vicious will be more benefited than burdened; men who are constantly drunk, drugged or debauched are not likely to be useful members of the community.

What then are the ninety to do about it? If all that was involved was the membership of a social club, the situation would be simple. The vicious ten would be expelled and no one would think the expulsion harsh. But a society in which a man has his whole social life is something more than a club. Men can no longer be driven into the desert; outlawry and banishment are things of the past. Even when in use they were as punishments so severe that mercy enjoined at least at first a lesser penalty. Is it therefore permissible for the ninety to deprive the ten of their liberty for the purpose at best of reformation and at worst of restraint? Or must they in the name of freedom leave the ten at large, relying on the strength of their own virtue to resist contamination and in time to convert the vicious?

I do not suppose that any secular society has ever existed which sought to control vice simply by passive resistance and good works. But this is what Mill’s conception of a free society demands. Mill’s opinion of what was virtuous did not substantially differ from that of his contemporaries. But no one, he felt, could be sure. In a free society full scope must be given to individuality as one of the elements of well-being and the individual must be free to question, challenge, and experiment.

The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible; that their truths, for the
most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognising all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when anyone thinks fit to try them.\(^{10}\)

It is with freedom of opinion and discussion that Mill is primarily concerned. Freedom of action follows naturally on that; men must be allowed to do what they are allowed to talk about doing. Evidently what Mill visualizes is a number of people doing things he himself would disapprove of, but doing them earnestly and openly and after thought and discussion in an endeavour to find the way of life best suited to them as individuals. This seems to me on the whole an idealistic picture. It has happened to some extent in the growth of free love. Although for many it is just the indulgence of the flesh, for some it is a serious decision to break the constraint of chastity outside marriage. In the area of morals touched by the law I find it difficult to think of any other example of high-mindedness. A man does not as a rule commit bigamy because he wants to experiment with two wives instead of one. He does not as a rule lie with his daughter or sister because he thinks that an incestuous relationship can be a good one, but because he finds in it a way of satisfying his lust in the home. He does not keep a brothel so as to prove the value of promiscuity but so as to make money. There must be some homosexuals who believe theirs to be a good way of life but many more who would like to get free of it if only they could. Certainly no one in his senses can think that habitual drunkenness or drugging leads to any good at all.

Such are the vices that the law seeks to control. If the ninety men who sincerely believe all this to be depravity are to be convinced that they must put up with it in their society because after all they are not infallible, their truths may be only half-truths and that it is only by diversity of precept and practice that the whole truth can be found, surely they must be persuaded that there is at least one man among the ten who seeks after the truth and proclaims that what is commonly received as a vice is in truth a virtue. Freedom is not a good in itself.

\(^{10}\) \textit{Mill, op. cit. supra} note 1, at ch. III, 114.
We believe it to be good because out of freedom there comes more good than bad. If a free society is better than a disciplined one, it is because—and this certainly was Mill’s view—it is better for a man himself that he should be free to seek his own good in his own way and better too for the society to which he belongs, since thereby a way may be found to a greater good for all. But no good can come from a man doing what he acknowledges to be evil. The freedom that is worth having is freedom to do what you think to be good notwithstanding that others think it to be bad. Freedom to do what you know to be bad is worthless.

Mill believed that diversity in morals and the removal of restraint on what was traditionally held to be immorality would liberate men to prove what they thought to be good. He would have been the last man to have advocated the removal of restraint so as to permit self-indulgence. He conceived of an old morality being replaced by a new and perhaps better morality; he would not have approved of those who did not care whether there was any morality at all. But he did not really grapple with the fact that along the paths that depart from traditional morals pimps leading the weak astray far outnumber spiritual explorers at the head of the strong. It is significant that when Mill touched on this problem (the commercialization of vice) his teaching wavered.

Should a person, he asked, 11 be free to be a pimp or to keep a gambling-house? Against the affirmative answer which flows logically from his doctrine, Mill put the following argument. If society believes conduct to be bad, it must be at least a disputable question whether it is good or bad: that being so, society is entitled to exclude the influence of solicitations which are not disinterested. There was, he thought, considerable force in this argument and he would not venture to decide the point.

But there are other reasons than a desire to make money which may make a person indulge in vice and solicit others to join with him. Disinterestedness is not proved because money is not demanded. Mill’s doctrine caters bountifully for good men who are unorthodox. The only bad men he sees at his table are those who are trading in vice and then he does not quite know what to do with them. I think that the true distinction does not lie between those who trade in vice and those who do not, but between those who practice what they know to be vice and those who practice what they believe to be virtue. Only the latter are truly disinterested.

Let us suppose that in the mass of the iniquitous there are some righteous and disinterested men. If then the law is used to suppress immorality, it may suppress also new morality which its advocates sincerely claim to be better than the old. The suppression of any new beliefs

11 Id. at ch. V, 154.
sincerely held and purposefully translated into action is injurious to a free society. On this two questions arise. First, can the wheat be separated from the chaff, the chaff burnt and the wheat made into bread? If not, how is the injury done to society by the suppression of a new morality to be balanced against the injury done by the toleration of acknowledged vice?

I shall begin with the second question because Mill's disciples think that they have an easy answer to it which will make it unnecessary to trouble about the first. Their answer is that the toleration of acknowledged vice, provided that it is confined to private immorality, does not injure society at all; or that if it does, the law is useless as an instrument for suppression. So that there is no need for separation and nothing to balance. It may be disagreeable for the ninety virtuous men to have to associate with the vicious ones, or at least to have to extend the benefit and protection of their society to those who are undeserving of it; but that, as Mill says in the passage I have quoted, is an inconvenience which society can afford to bear for the sake of the greater good of human freedom.

The twin arguments that the law is useless against private immorality and that the damage done by private immorality to society is insignificant have much in common. One thing that they have in common is that their supporters tend, consciously or unconsciously, to apply them in particular to one sort of private immorality which is now much in the public notice, namely, homosexuality between consenting adults. It is argued that the enforcement of the laws against homosexuals causes great misery to men who are morally incapable of changing their way of life. The argument has in this instance an appeal which it altogether lacks when applied to pimps and brothel-keepers. Their supporters tend also, consciously or unconsciously, to forget that what is in dispute is not whether a particular law should be on the statute book but whether it is a condition of a free society that private immorality should altogether and always be immune from interference by the law. No one suggests that all private immorality should be punished by the law as a matter of course. You can grant that private immorality is within the competence of the legislature in a free society and still advance many powerful arguments why the law should not try to punish particular vices in particular circumstances. But if you want to sustain your arguments for reform in a particular case by invoking a principle that exempts all private immorality always from the operation of the law, you put yourself at a disadvantage in two respects. First, it is for your opponents and not for you to select examples by which to test the validity of the principle. You have undertaken to show that it is good for all private immorality.
Secondly, even when you are dealing with a particular vice, it is not enough for you to show that in a given society at a given time it is not practiced extensively enough to do appreciable injury. You have to show that the vice is not of its nature one that is capable of injuring society. Only then can society safely sign away its power of control.

If these considerations are kept clearly in mind, I think that the arguments I am about to examine will lose much of their superficial attractiveness. Indeed, I think that I can dispose of one of them very shortly. It is true that, as Professor Hart says, morality is not best taught by fear of legal punishment, and it may be that a conformity, which is motivated mainly by that fear, is not a value worth pursuing. But the law does not intervene merely to punish or to deter but also to give opportunity for reform; and it is not concerned simply with the good of the individual who is being punished. It is concerned as much or more with the good of those who might be led into evil by example or temptation. If the evildoer himself is beyond reform, the threat of punishment may deter and to that extent prevent the spread of the vice; or if beyond deterrence, imprisonment can at least put him out of the way of others he might influence.

I do not understand the distinction in this respect between crimes of private immorality and other crimes. If it is useless to fine or imprison people for peddling pornography, why is it sensible to punish them for burglary or rape? Certainly it is right to weigh the advantages which imprisonment may be expected to achieve, not only for the criminal but also and primarily for those who might otherwise suffer from him, against the misery it inflicts. But that is a consideration going to the weight with which the law should come down upon the criminal; it is not an argument for its exclusion. The misery of an incurable homosexual imprisoned because he cannot keep away from small boys is no less than that of one (there may still be a few in England) who are imprisoned for offences with adults; and if the law is useless in the latter case, what is its value in the former in which it is admitted that it can properly be employed? Then if one turns to the grosser forms of vice, it appears to me to be contrary to common sense to assert that fines and imprisonment are useless weapons against those whose only interest in the vice racket is for what they can get out of it.

Granted then that the law can play some part in the war against vice, ought it to be excluded for the reason that private vice cannot do any harm to society? I think that it is capable of doing both physical harm and spiritual harm. Tangible and intangible may be better words, body and soul a better simile.

12 Hart, op. cit. supra note 9, at 57-58.
Let me consider first the tangible harm. It is obvious that an individual may by unrestricted indulgence in vice so weaken himself that he ceases to be a useful member of society. It is obvious also that if a sufficient number of individuals so weaken themselves, society will thereby be weakened. That is what I mean by tangible harm to society. If the proportion grows sufficiently large, society will succumb either to its own disease or to external pressure. A nation of debauchees would not in 1940 have responded satisfactorily to Winston Churchill's call to blood and toil and sweat and tears. I doubt if any of this would be denied. The answer that is made to it is that the danger, if private immorality were tolerated, of vice spreading to such an extent as to affect society as a whole is negligible and in a free society ought to be ignored.

There is here a distinction to be made. As I have said, the question is not whether at any given time the spread of a particular vice has reached such proportions as to constitute a danger, but whether all vice that can be committed in private is of its nature harmless to society. It is therefore proper to distinguish between natural and unnatural vice; and it is usually an example, such as homosexuality, selected from unnatural vice that is taken to illustrate the absurdity of supposing that private immorality could ever develop into a menace to society. Of course, looking at the thing in the crudest way, a completely homosexual society would, unless continuously reinforced from outside, soon cease to exist because it would not breed. But, as has been pointed out, the same might be said of a completely celibate society, yet no one regards celibacy as injurious to society. The natural demand for heterosexual intercourse, it is argued, will always be strong enough to ensure that homosexuality is kept to a harmless minority.

This, within the limits which it comprises, is a formidable argument and I shall return to consider the curious results which flow from it. It does not however apply to natural vice where the pressure is the other way. There may be those who argue that men and women are inherently virtuous so that the vicious few, even if allowed free rein, will always be in a harmless and unattractive minority. This seems to me like arguing that the vast majority of men and women in society are inherently loyal so that it would be quite safe to ignore the treacherous few. No doubt traitors, as also vice-mongers, are often in it only for money and no one would applaud that. But there are noble as well as ignoble traitors; and it might well be argued that it is worth putting up with the almost negligible harm that is caused by treachery as it is ordinarily practised so as to make sure that we do not stifle some new political conception, which although now regarded with abhorrence by all right-minded

people, may in the end, because we are all fallible, turn out to be a great improvement. The danger that some traitors or spies may deliver up to the enemy some vital secrets is, it can be urged, an imaginary one existing only in story books. In real life the damage they do, at any rate in peacetime, is hardly likely to do more than dent the structure of a strong society.

But this is not the way in which treachery is considered. We do not estimate the achievements of treason over the last century and ask what they have amounted to. So with incitement to mutiny; we do not ask how much can safely be permitted without seriously endangering the discipline of the armed forces. So with sedition. We do not argue that the loyalty of the robust majority and its belief in the merits of our polity is all that is necessary for the safety of the realm. When we are constitution-making—whether what is being formulated is a clause in writing or a principle supported by tacit consent—it is the nature of the subject matter that is the determinant. Whether society should have the power to restrain any activity depends on the nature of the activity. Whether it should exercise the power at any given time in its history depends on the situation at that time and requires a balance to be struck between the foreseeable danger to society and the foreseeable damage to the freedom and happiness of the individual.

This distinction, which one might with some exaggeration call a distinction between eternity and time, is the answer to a modified and more attractive way of putting the argument I have just been considering.\[1\] Granted that society cannot allow private vice to rampage, ought not its power of interference be confined to the excess? It is, it can be urged, only the excess that is dangerous. It is indeed with this in mind that anti-vice laws are generally framed, that is, to contain rather than to eliminate the vice. It is considered impracticable to use the law to eliminate fornication or even prostitution; the criminal law against soliciting, procuring, living on immoral earnings and running brothels is designed to keep the vice within limits. But there is no Plimsoll line which can define the safety level.

In the same way, while a few people getting drunk in private cause no problem at all, widespread drunkenness, whether in private or public, would create a social problem. The line between drunkenness that creates a social problem of sufficient magnitude to justify the intervention of the law cannot be drawn on the distinction between private indulgence and public sobriety. It is a practical one, based on an estimate of what can safely be tolerated whether in public or in private, and shifting from time to time as circumstances change. The licensing laws coupled

\[1\] Ibid.
with high taxation may be all that is needed. But if more be needed there is no doctrinal answer even to complete prohibition. It cannot be said that so much is the law's business but more is not.

When considering tangible damage to society we are concerned chiefly with immoral activity. Moral belief is relevant only in so far as the lack of it contributes to immoral activity. A vicious minority diminishes the physical strength of society even if all its members believe themselves to be sinning. But if they all believed that, they would not diminish the common belief in right and wrong which is the intangible property of society. When considering intangible injury to society it is moral belief that matters; immoral activity is relevant only in so far as it promotes disbelief.

It is generally accepted that some shared morality, that is, some common agreement about what is right and what is wrong, is an essential element in the constitution of any society. Without it there would be no cohesion. But polygamy can be as cohesive as monogamy and I am prepared to believe that a society based on free love and a community of children could be just as strong (though according to our ideas it could not be as good) as one based on the family. What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference.

On this reasoning there is nothing inherently objectionable about the change of an old morality for a new one. Why then is the law used to guard existing moral beliefs? It is because an old morality cannot be changed for a new morality as an old coat for a new one. The old belief must be driven out by disbelief. Polygamy could not be established in England or in the United States unless there was first created a disbelief in the value of monogamy. If change is in progress there will for a long period be no common belief in the value of either institution. Disbelief in the virtue of chastity is not confined to those who from the purest motives would like to help spinsters to lead a fuller life; and through the breach in the walls made by the new moralist there will come pouring a horde which he would loathe and despise. Whether the new belief is better or worse than the old, it is the interregnum of disbelief that is perilous. During the interregnum society will be attacked by forces which those, who in the course of their rational discussions have generated the disbelief, will have no power to control and which will be as hostile to the new belief as to the old.

But no one, it will be said, wants to subvert a whole morality. All that is sought is freedom to make peripheral changes or, if not quite peripheral, changes that will leave the bulk of morality intact; nothing will

15 Hart, op. cit. supra note 9, at 51.
be done that will seriously diminish the cohesive force of a common morality. That brings us back to the old difficulty: how much can be allowed and how can it be measured? If it is proper and indeed necessary for the law to guard some part of public morality, how shall we determine what part to leave unguarded? There is in this respect a special difficulty due to the nature of moral belief. It is not for most men based on a number of separate rational judgements arrived at after weighing the arguments for and against chastity, for and against honesty, for and against homosexuality and so on. Most men take their morality as a whole and in fact derive it, though this is irrelevant, from some religious doctrine. To destroy the belief in one part of it will probably result in weakening the belief in the whole. Professor Hart says that to argue in this way is to treat morality as if it "forms a single seamless web" which he finds unconvincing. Seamlessness presses the simile rather hard but, apart from that, I should say that for most people morality is a web of beliefs rather than a number of unconnected ones. This may or may not be the most rational way of arriving at a moral code. But when considering the degree of injury to a public morality, what has to be considered is how the morality is in fact made up and not how in the opinion of rational philosophers it ought to be made up.

But then if the law is required to guard the whole of public morality, is that not, as Professor Hart puts it graphically, using "legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence" I do not see why it should have that effect. As the worst it leaves morality as mobile as the law; and though it may not be easy to change the law, it is far easier than to change a moral belief of a community. In fact for practical reasons the law never attempts to cover the whole of public morality and the area left uncovered is naturally that which is most susceptible to change. But assume that it did cover the whole of public morality, its effect would be not to freeze but to regulate the process of liquefaction and to help distinguish the changes which are motivated by a genuine search after moral improvement from those which are relaxation into vice. It is in this way that the law acts as a winnower, if I may return to the metaphor of the wheat and the chaff. Admittedly it is an unscientific way. There is no phased programme, no planners to say that if free love is let in in the 60's the homosexualist must wait until the 70's. But relaxation, if it seems to be going too far, sets off a movement for tightening up what is left. The law is brought in to do the tightening as well as to hold off the evildoers who flourish whenever moral principle is uncertain. A detached observer, who

16 Ibid.
17 Id. at 72.
favoured neither the old nor the new morality, would see this as a natural, albeit a rough and ready, method of regulation.

In any society in which the members have a deeply rooted desire for individual freedom—and where there is not that desire, it is useless to devise methods for securing it—there is also a natural respect for opinions that are sincerely held. When such opinions accumulate enough weight, the law must either yield or it is broken. In a democratic society, especially one like ours in which laymen play a conspicuous part in the enforcement of the law, there will be a strong tendency for it to yield; not to abandon all defences so as to let in the horde, but to give ground to those who are prepared to fight for something that they prize. To fight may be to suffer. A willingness to suffer is the most convincing proof of sincerity. Without the law there would be no proof. The law is the anvil on which the hammer strikes.

Much of what I have just said is more appropriate to a society in which freedom is still young than to ours. In England today there is no question of the law being used to suppress any activity which is not generally thought to be immoral. The climate of a free society is naturally clement to individuality of any sort and uncongenial to compulsion, so that the criminal law will withdraw its support, if it has ever given it, from a moral belief which is seriously challenged.

It may be that in the case of homosexuality this is too sweeping a statement. I do not think that there is anyone who asserts vocally that homosexuality is a good way of life but there may be those who believe it to be so. This brings me back to the point where I left that subject when distinguishing between natural and unnatural vice. That distinction does not affect the intangible harm that immorality does to society but it is relevant, I suggested, to assessing the likelihood of tangible injury. If the intangible harm is ignored, there is a strong case for arguing that homosexuality between adults should be excluded altogether from the ambit of the law on the ground that as a practice it is incapable of causing appreciable injury to society. I cannot say more than that there is a strong case, for many would argue that homosexuality if tolerated would spread to significant proportions. If one ignores that argument as well, the result would be that the charter of freedom should not encompass the whole of morality but only so much of it as is concerned with unnatural vice—freedom of morality in matters unnatural.

Is this the sort of result that is really worth striving for on a high theoretical plane? Any law reformer who raises this sort of issue must be the sort of man who likes to bang his head against a brick wall in the hope that he will be able to get through on his own terms and so avoid a little argument at the gate. It will not improve his chances of getting
through the gate if he tells the janitor that there ought not to be a wall there at all. So it is much easier to obtain the repeal of a law by persuading the lawmaker that on balance it is doing more harm than good then by denouncing him as a meddler who ought to be minding his own business.

Whether or not I am right in thinking that this is the only way in which the case for reform can be put, it is certainly the most attractive way. It is put thus cogently by Professor Hart in the preface to his book where after mentioning proposals for the reform of the law on abortion, homosexuality, and euthanasia, he refers to them as cases where “the misery caused directly and indirectly by legal punishment outweighs any conceivable harm these practices may do.”¹⁸ This is the balancing process. There are other factors besides human misery, which inevitably accompanies any serious punishment for any breach of the law, to be taken into account; and in my first lecture¹⁹ I enumerated some which it seemed to me the lawmaker, whether it be a parliamentary majority or a monarch, ought to weigh before it uses its powers. This applies to every exercise of the criminal law. If the law on abortion causes unnecessary misery, let it be amended, not abolished on the ground that abortion is not the law’s business. So with obscenity. It is one thing to amend the law, if we can, so that it will distinguish more effectively between art and obscenity and another thing to remove altogether the restraint of the law admitting a flood of pornography so as to make quite sure that no creative work is left outside. In all these cases the appointed lawmakers of society have the duty to balance conflicting values (the value of diversity against the value of conformity) and to form a judgment according to the merits of each case. They cannot be constrained by rule. They cannot suffer a definite limitation on their powers. They cannot be denied entry into some private realm.

It can be said in general terms, and often is, that lawmakers are bound to legislate for the common good.²⁰ The common good is perhaps a useful and compendious, if vague, description of all the things lawmakers should have in mind when they legislate. But it does not constitute a clear limitation on the right to legislate. There may be a difference of opinion about what is for the common good which can be solved only by a judgment upon the conflicting values. Society alone can make that judgment and if it makes it honestly, it is a judgment that cannot be impugned.

Can then the judgment of society sanction every invasion of a man’s

¹⁸ Id., Preface.
privacy, however extreme? Theoretically that must be so; there is no theoretical limitation. Society must be the judge of what is necessary to its own integrity if only because there is no other tribunal to which the question can be submitted. In a free society the understanding that men have with each other is that each shall retain for himself the greatest measure of personal freedom that is compatible with the integrity and good government of his society. In a free society men must trust each other and each man must put his trust in his fellows that they will not interfere with him unless in their honest judgement it is necessary to do so. Furthermore, in a free society checks are usually put upon the government, both the executive and the legislature, so that it is difficult for them to enact and enforce a law that takes away another's freedom unless in the honest judgment of society it is necessary to do so. One sort of check consists in the safeguarding of certain specific freedoms by the articles of a constitution; another consists in trial by jury. But the only certain security is the understanding in the heart of every man that he must not condemn what another does unless he honestly considers that it is a threat to the integrity or good government of their society.

If one man practises what he calls virtue and the others call vice and if he fails to convince the others that they are wrong, he has the right to make a further appeal. He has in a free society a right to claim that however much the others dislike and deplore what he does, they should allow him to do it unless they are genuinely convinced that it threatens the integrity of society. If the others reject that appeal, constitutionally that is the end. He must either submit or reject society.

But suppose he cannot bring himself to believe that the others have formed an honest judgment and holds that as lawmakers they have abused their power. He can then in the last resort transfer the issue from the field of law to that great battlefield on which the struggle for human freedom has so often in the past been fought out, a field in which man-made law is overridden and mastery is gained by strength of spirit and depth of conviction. "An imperium there always must be in the State's imperio so long as a man retains a conscience and free will."

But when a man proclaims his own imperium, he rebels. The law knows nothing of the right (and it may be the duty) to rebel and cannot recognize it. And since I am talking only about the relationship between law and morals I cannot here concern myself with it. What I have said I say to show that I am not under the delusion that the law has the ultimate answer to every moral problem and I am not asserting that there is in all circumstances a moral obligation to obey the law. There may be times in the future, as there have been in the past, when a man

has to set himself up against society. But if he does so, he must expect to find the law on the side of society. If in his struggle he is armed with a good conscience, he must put his trust, first, in the rightness of his conviction, secondly, in the knowledge that nothing that lawmakers and lawyers can do can fetter the mind of man, only his body; and last but not least, in the certainty that law can be made effective only through human agents and that a law that is truly tyrannical will not for long command the services of free men.

It was in this way in the past that our ancestors established freedom of religion. To do that they had to destroy the web of medieval thought and that was accomplished no more easily than the triumph of Christianity over paganism. Mill records how the Emperor Marcus Aurelius, whom he considered to be one of the best and greatest of world rulers, tender, enlightened and humane, persecuted Christianity because existing society, as he saw it, was held together by belief in and reverence of the received divinities. The struggle in the 16th century between revealed religion and freedom of conscience was of the same order and entailed as much suffering. How could it be otherwise? Men could not tolerate a heretic so long as they believed that he and all those whom he perverted were doomed to an eternity of Hell. Those societies such as ours which are now founded upon freedom in religious belief are viable because we accept that there is more than one way to the goodness that many call God. Diversity in religious belief and practice is no longer injurious to a society that is so constituted.

But the removal of religion from the structure of society does not mean that a society can exist without faith. There is faith in moral belief as well as in religious belief. Though it is less precise and less demanding, it is not necessarily less intense. In our societies we believe in the advance of man towards a goal and this belief is the mainspring of our morals. We believe that at some time in the history of mankind, whether suddenly by a divine stroke or imperceptibly in evolution over millennia, there was extracted from the chaos of the primeval mind concepts of justice, benevolence, mercy, continence and others of that ilk which we call virtues. The distinction between virtue and vice, between good and evil so far as it affects our actions, is what morals is about. A common religious faith means that there is common agreement about the end of man. A common moral faith means that there is common agreement about the way he should go. A band of travellers can go forward together without knowing what they will find at the end of the journey but they cannot keep in company if they do not journey in the same direction.

Diversity in moral belief and practice would be no more injurious to

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22 Mill, op. cit. supra note 1, at ch. II, 87.
a society which had no common morality than the like diversity in religious matters is to a society with no common religion. But Mill and his disciples do not conceive of a society without common morality, if indeed it is conceivable. If they did, if they wanted a society in which morality is as free as religion, they would be faint-hearted in what they preached. They could not then sensibly permit the law, as they do, to punish the corruption of youth or public acts of indecency. Where there is freedom of religion, the conversion of a youth is not thought of as corruption; men would have thought of it as that in the Middle Ages just as we now think of the introduction of a youth to homosexual practices as corruption and not as conversion. Where there is truly freedom of religion, it would be thought intolerant to object to a religious ceremony in a public place on the ground that it was offensive to have brought to one’s attention the exhibition of a faith which one thought false and pernicious. Why then do we object to the public exhibition of a false morality and call it indecency? If we thought that unrestricted indulgence in the sexual passions was as good a way of life as any other for those who liked it, we should find nothing indecent in the practice of it either in public or in private. It would become no more indecent than kissing in public. Decency as an objective depends on the belief in continence as a virtue which requires sexual activity to be kept within prescribed bounds.

These reflections show the gulf that separates the religious toleration we have achieved from the moral toleration that Mill wanted. The former is practicable because, while each man believes that his own religion, or the lack of it, is the truth or nearest to the truth, he looks upon the alternatives as lesser good and not as evil. What Mill demands is that we must tolerate what we know to be evil and what no one asserts to be good. He does not ask that in particular cases we should extend tolerance out of pity: he demands that we should cede it forever as a right. Because it is evil we may protect youth from corruption by it, but save for that we must allow it to spread unhindered by the law and infect the minds of all those who are not strong enough to resist it. Why do ninety of us have to grant this licence to the other ten or, it would be truer to say, ninety-nine to the other one? Because, the answer is, we are fallible. We are all quite convinced that what we call vice is evil but we may be mistaken. Although no one asserts that it is not evil, yet we may be mistaken. True it is that if the waters of toleration are poured upon the muck bad men will wallow in the bog; but it may be—how can we tell otherwise?—that it is only under such conditions that seed may flourish which some day some good man may bring to fruit and that otherwise the world would lose and be the poorer for it.
This is the kernel of Mill’s freedom. This is why we must not suppress vice. It is not because it is not evil; Mill thought that it was. It is not because legal suppression would be futile; this argument, favoured by some of Mill’s followers, is not one that he advanced. Nor because Mill thought that in the battle between virtue and vice virtue would be bound to triumph without the aid of the law. In some cogent passages he refuted the argument that in spite of persecution truth would always prevail against error; and if truth can be suppressed, so can error and so can vice. When all this is stripped away, the kernel of Mill is just this, that he beseeches us to think it possible that we may be mistaken. Because of this possibility, Mill demanded almost absolute freedom for the individual to go his own way, the only function of society being to provide for him an ordered framework within which he might experiment in thought and in action secure from physical harm.

There is here, I believe, a flaw in Mill’s thinking which, even assuming that we accept his ideal, renders it unacceptable to the lawmaker as a basis for action. It lies in the failure to distinguish sufficiently between freedom of thought and freedom of action. It may be a good thing for a man to keep an open mind about all his beliefs so that he will never claim for them absolute certainty and never dismiss entirely from his mind the thought that he may be wrong. But where there is a call for action, he must act on what he believes to be true. The lawyer, who in this respect stands midway between the philosopher and the man of action, does not allow himself to act on any sort of belief. He requires to be satisfied beyond reasonable doubt. If he is so satisfied he would then think it right to punish a man for a breach of the law while acknowledging the possibility that he may be mistaken. Is there any difference, so far as the freedom of the individual is concerned, between punishing a man for an act which admittedly he did and which we believe, but perhaps erroneously, to be wrong, he denying that it is wrong; and punishing him for an act that is admittedly wrong and which we honestly, but perhaps erroneously believe that he did, he denying that he did it?

Philosophers may philosophize under the shadow of perpetual doubt but the governors of society cannot do their duty if they are not permitted to act upon what they believe. Here we may perhaps usefully return to what Mill said about Marcus Aurelius. He cited him as an example of the fallibility of even the best and wisest of men. Marcus Aurelius thought Christianity wholly unbelievable and could see in it only a force that would cause the society he governed to fall into pieces. Mill did not regard Christianity as an unmixed blessing, but it might have been a different thing, he thought, if adopted under Marcus Aurelius instead

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23 Id. at ch. II, 89.
of under Constantine. So, Mill urged, unless a man flatters himself that he is wiser and better than Marcus Aurelius, let him abstain from that assumption of joint infallibility of himself and the multitude which the great man made with such unfortunate results.

The example is a fair one on the point of fallibility. If we were to be confronted with a creed which taught that constraint was the only vice and the unlimited indulgence of the appetites of all sorts the only virtue worth cultivating, we should look at it without any comprehension at all. But I dare say that our contempt would not be greater than that of Marcus Aurelius for Christianity or that of a mediaeval philosopher for the notion that heresy should be tolerated.

But the example is a fair one also on the point that I am making. What else, one may ask, did Mill expect Marcus Aurelius to do? It is idle to lament that he did not foretell Constantine in accepting Christianity, for he could not accept what he disbelieved. In Mill's view and probably in that of most of his disciples Marcus Aurelius was right in rejecting the claims of Christianity. On this view the Emperor's mistake lay in his failure to realize that, if he permitted the destruction of his society through the agency of a religion which he rightly concluded to be false, the successor civilization would be an improvement upon his.

To put Mill's question again but in this other context, can anyone putting himself in the position of the great Emperor flatter himself that he would have acted more wisely? It is not feasible to require of any society that it should permit its own destruction by that which, whether rightly or wrongly, it honestly believes to be error, in case it may be mistaken. To admit that we are not infallible is not to admit that we are always wrong. What we believe to be evil may indeed be evil and we cannot forever condemn ourselves to inactivity against evil because of the chance that we may by mistake destroy good. For better or worse the lawmaker must act according to his lights and he cannot therefore accept Mill's doctrine as practicable even if as an ideal he thought it to be desirable.

But I must say for my part that I do not accept it as an ideal. I accept it as an inspiration. What Mill taught about the value of freedom of enquiry and the dangers of intolerance has placed all free men forever in his debt. His admonitions were addressed to a society that was secure and strong and hidebound. Their repetition today is to a society much less solid. As a tract for the times what Mill wrote was superb, but as dogma it has lost much of its appeal. For Mill's doctrine is just as dogmatic as any of those he repudiates. It is dogmatic to say that if only we were all allowed to behave just as we liked so long as we did not injure each other, the world would become a better place for all of us.
There is no more evidence for this sort of Utopia than there is for the existence of Heaven and there is nothing to show that the one is any more easily attained than the other. We must not be bemused by words. If we are not entitled to call our society "free" unless we pursue freedom to an extremity that would make society intolerable for most of us, then let us stop short of the extreme and be content with some other name. The result may not be freedom unalloyed, but there are alloys which strengthen without corrupting.