

# LAW AND MORALITY

LORD PATRICK DEVLIN\*

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The relationship between law and morals has recently, in England and in the United States and also in Canada, received quite a considerable degree of interest. Of course, if one wants to go back to the very beginning, one must begin with John Stuart Mill in 1859 and the publication of his essay *On Liberty*, and his announcement of the famous principle which should govern, in his view, all law-making in relation to all subjects. That principle is, he said:

. . . the sole end for which mankind are warranted, individually or collectively, in interfering in the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it 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.<sup>1</sup>

This principle was attacked by Mr. Justice Stephen in the celebrated book, *Liberty, Equality, Fraternity*,<sup>2</sup> which he wrote in the 1870's. I think it is fair to say that the principle never got beyond academic discussion; nor had it ever been translated into practice. However, it was resurrected and translated into practice in 1957 in the report of the committee that was presided over by Sir John Wolfenden on the amendment of the laws on homosexuality and prostitution. There the principle was stated in this way:

There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.<sup>3</sup>

In 1959, two years later, I received the honour of an invitation to deliver a lecture, the Maccabean Lecture, before the British Academy, and casting about, as is my custom to do on these occasions, for some subject which would not expose my ignorance too greatly to the audience, I thought that this statement of principle would suit me down to the ground, because I entirely agreed with it and I thought that I could very well discuss its application to other branches of criminal law besides those to which the Wolfenden Committee has applied it. But, unfortunately, in the course of the preparation for my lecture I found myself converted

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1. *On Liberty*, London, 1859. Introduction.

2. Second edition, London, 1874.

3. *Report of the Committee on Homosexual Offences and Prostitution*, 1957, Cind. 247, para. 62.

to the opposite point of view. The reasons which converted me are set out in the Maccabaeian Lecture.<sup>4</sup> Professor Hart, who holds the chair of Jurisprudence at Oxford, immediately denounced that lecture. Fortunately, by then I had retreated to Africa to deal with the affairs of Nyasaland, so that the first force of the blow was taken by the empty air. But Professor Hart followed up his denunciation with a series of lectures, ending up with the Harry Kemp Memorial Lectures at Stanford University, which have now been published.<sup>5</sup> I, in the meanwhile, of course, had not been idle. I, also, had been lecturing, and in February, 1965 my lectures will be published by the Oxford University Press.<sup>6</sup>

In this lecture I shall endeavour to outline three things which have been brought to light by the controversy, and which need further serious study.

The first thing that the controversy has shown is that there is a need for defining the source of morality that is adopted by the law. You may say that Mill's statement avoids that, because what he says in effect is that the law must only intervene to the extent that it is necessary to protect other people from physical harm, and therefore, the moral content, if any, of the law is irrelevant. But the fact is that neither Mill nor his disciples carried the doctrine quite to that rigid extent. They allow exceptions, one of the most important of them being that it is the duty of the state to intervene in order to protect youth from corruption. That is why the recommendation of the Wolfenden Committee was simply that homosexual offences *between adults* should no longer be contrary to the law. But once you make that distinction, it means that you have a moral principle. You cannot preserve youths from corruption unless you are saying that there is a moral principle, the breach of which would corrupt them. So the Mill doctrine does not escape the necessity of finding out where, in a pluralist society and a secular state, the law should seek its source of morality.

It is impossible that the source of morals for a secular society should be the same as the obvious source of morals for most of us individually, or for many of us individually: a religion in which we believe. I quote Lord Justice Scrutton in 1931:

It is, I hope, unnecessary to say that the court is perfectly impartial in matters of religion, for the reason that it has as a court no evidence, no knowledge, no views as to respective merits of the religious views of various denominations.<sup>7</sup>

That is the attitude which any court must take up in a secular society, where no one is compelled to believe in any particular religion. But if

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4. "The Enforcement of Morals", 1959, *Proceedings of the British Academy*, Vol. xlv; reprinted under the title of "Morals and the Criminal Law" in *The Enforcement of Morals*, 1965, London, Oxford University Press, p. 1.

5. H. L. A. Hart, *Law, Liberty and Morality*, 1963, Stanford University Press.

6. *The Enforcement of Morals*, 1965, London, Oxford University Press.

7. *In Re Carroll* [1931] 1 K.B. 317, at p. 336.

morality does not come from religion, from whence should it come? Some would say that it should come from rational discussion, but philosophers rarely agree as a result of rational discussion, and the law maker who has to make laws must have something from which he can take his source with certainty. Should it then come from something that we could say commands universal assent? But what is the test for commanding universal assent? I can do no more than throw this out, since I have a large area to cover in quite a brief time, as one of the interesting topics that I think has resulted from this controversy.

The next two points will probably take me the rest of my time. The first is that I think there is need for the restatement of Mill's doctrine, that is, the doctrine to which I am opposed. If any further controversy is to be fruitful, the principle must be stated more clearly than it has been. My second point is that there is a need for a re-examination, more thorough than has yet been undertaken, of the basis of Mill's doctrine and its applicability a hundred years later.

I approach the first point by the road which caused my own conversion, which was an examination of the principles of the criminal law which the doctrine, if it were to be applied, would require to be altered. It seemed to me, when I submitted the doctrine to that test, that the amendments were so wide that they could not commend themselves to me. Mr. Justice Stephen, being also a judge, and therefore having perhaps a more practical approach to the law than the academics who surrounded Mill, tested it in the same way. And when he did so, his objections were dismissed by Morley, one of Mill's disciples, as "bustling ponderosity". Mr. Mill said that the question was not what the laws were but what they ought to be. Well, that is fair enough, but nevertheless the question is not irrelevant. It brings theory into the laboratory and tests it by its practical results. There's never any harm in that. Indeed it was, as I think, the results of this test that led Professor Hart to make the modifications which he says must be made to the doctrine.

In the English criminal law (and I have no doubt, because I am dealing with fundamentals, it is the same or substantially the same, in Canada) there are two fundamental principles and eight specific crimes which *prima facie* are inconsistent with the principles that the criminal law should be used only to protect others from harm to which they do not consent. Accordingly, those two fundamental principles would have to be overturned and the eight specific crimes would have to be stricken from the calendar if Mill did indeed truly lay down the principle upon which the criminal law ought to be made. Now Professor Hart drafts his modifications so that he retains the two principles (as interpreted by himself) and two out of the eight specific crimes, namely bigamy and cruelty to animals. One of the crimes, homosexuality, he would abolish. You appreciate that I am speaking throughout of crimes as between consenting adults. That leaves five other crimes, namely abortion, buggery in the form of bestiality, incest, obscenity (that is to say pornography), and offences connected with

prostitution, such as pimping and brothel-keeping, which perhaps can all be conveniently categorized as the commercialization of vice. Professor Hart is silent about all of these, although there are indications that he would grant neither to abortion nor to the commercialization of vice the full protection afforded by the private realm. It would, I hope, not be too uncharitable to suppose that Professor Hart has selected these examples which he finds it most convenient to deal with. But it would also be churlish not to acknowledge that he is, as I believe, the first high authority to condescend so far. It is a curious thing that it is still not possible to tell with any exactitude what amendments to the criminal law would flow from the application of the doctrine. There is only one crime, that of homosexuality, that is known with certainty to lie within the private realm.

But first I will deal with the two principles because they are of fundamental importance. The first concerns the assessment of punishment. The bulk of the criminal law is taken up with offences which both contravene moral law and cause physical harm to the persons or property of other individuals. That is why Mill's principle does not require the bulk of the criminal law to be altered. Murder is an offence against morals and it also causes harm to other persons. The same is true of theft. It is only the second characteristic, that it causes harm to other persons, that in the eyes of Mill and his disciples justifies the existence of the law. But if what justifies the making of the law is simply the prevention of injury to others, then surely the offender must be punished accordingly. He must be punished for theft as he would be, for example, for a parking offence, more seriously, no doubt, but not with the view that one is more wicked than the other. The penalty must be calculated to prevent the repetition of the offence by him and to deter others from committing it, but the offender's moral guilt should not be a matter with which the law is concerned in the assessment of punishment any more than it is in the making of the law. Now that is the attitude that is adopted, for example, by Lady Wootton in the latest series of the Hamlyn lectures, *Crime and the Criminal Law*.<sup>8</sup> She goes the whole way, and it seems to me to follow logically from Mill's doctrine that one must do so. But of course it would cause an upheaval in the administration of the law which is not, it appears, acceptable to Professor Hart. He does not advocate the exclusion of morality from the assessment of punishment. Professor Hart says:

There are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice or fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike.<sup>9</sup>

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8. 1963, London, Stevens & Sons.

9. *Supra*, note 5, at p. 36-7.

Well, that, if I may say so, is excellent sense but it seems to me to be an emasculation of Mill's doctrine to say that it is to apply only to the making of the law and not to the administration of it.

The second fundamental principle is concerned with the function of consent in the criminal law. Mill's doctrine should make consent always a good defence because the law, according to him, should be concerned only with harming another against his will. But in general, consent is no defence. There are crimes such as rape, of course, in which the absence of consent is an ingredient of the charge, but in most cases, such as assault, duelling, suicide pacts, etc., consent is no defence. The conclusion which I drew from this in the Maccabaeian Lecture was that a breach of the criminal law was regarded as an offence not merely against the person injured, so that he had not the right to waive it, but against society as a whole and that an act done by consent, such as euthanasia, could be prohibited only as a breach of a moral principle which society requires to be observed. Professor Hart says that this is simply not true. The emphasis suggested to me that I had overlooked the obvious, but when I read a little further, I found that what, alas, I had not foreseen, was that some of the crew who sail under Mill's flag of liberty would mutiny and run paternalism up the mast. "The rules excluding the victim's consent as a defence to charges of murder or assault," Professor Hart says, "may perfectly well be explained as a piece of paternalism designed to protect individuals against themselves". He goes on to say that Mill, no doubt, might have protested. I should think he would. It tears the heart out of his doctrine.

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.<sup>10</sup>

To say that Mill might have protested against paternalism is an understatement that deserves to be commemorated for its moderation.

I have left myself time to take only one example of a specific crime. Bigamy is one of the crimes which Professor Hart is prepared to accept, and he accepts it on the ground that it is a public act, offensive to religious feelings. It is doubtful whether Mill would have allowed the punishment of bigamy on this ground. Mill's own exception in respect of public acts was expressed as covering those which are a violation of good manners, in which category he placed offences against decency. Bigamy, however, reprehensible though it may be, violates neither good manners nor decency. It is therefore a difficult crime for Mill's disciples to deal with. When it is committed without deception it harms no one. Yet in these days of easy divorce, bigamists don't arouse sympathy as homosexuals do, and nobody is very enthusiastic about altering the law in their favor. A variety of reasons for leaving the law as it is have been put forward, but

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10. *Supra*, note 1.

the one selected by Professor Hart seems to me to wound Mill's doctrine more sharply than any other. A marriage in a Registry Office is only in form a public act, and Mill's exception is grounded not upon a formal distinction between public and private, but upon the right of society not to have obnoxious conduct forced upon it. But no one with deep religious feelings is likely to attend in the Registry Office, and the chance of the happy couple, as they emerge from it, running into a man who happens to combine deep religious feelings with the knowledge that one of the parties has been married before is really very remote.

So we have now reached a position in which the exception to Mill's doctrine must be expanded to cover the whole field of criminal punishment, some form of paternalism, and offences against religious susceptibilities, and we are still left with five crimes about which Professor Hart says nothing. It is not, I think, pedantic to insist that if this new principle, this neo-Millian principle, is to win any degree of acceptance or understanding, it must be stated with a much higher degree of exactness than just to say it is Mill with modifications. After all, Mill's doctrine of liberty, be it right or wrong, was formulated carefully, comprehensively and with exemplary clarity. It deserves the compliment of more precise treatment than it has received at the hands of his modern disciples, and indeed until there has been a satisfactory restatement of it or a replacement of it by some other statement of comparable merit it does not seem to me that there is much room for further academic discussion.

Well, then, what follows from that is this: Is the task which you, or those of you who are disposed to agree with what is undoubtedly the superficially attractive idea that there is a private realm of morality which is solely a man's own concern, merely to restate the doctrine or has one to get away from it altogether? Is the basis of Mill's doctrine really no longer applicable? That is what I now want to examine.

Mill, of course, wasn't dealing simply with morals, but mainly with economic life, and there is no doubt that on that his theory has been largely discarded. But there has been a revival of his doctrine in its application to morals. It is rather the reverse of what it was a hundred years ago. A hundred years ago there was a much greater tendency than there is today to believe in *laissez-faire* in economic matters, and that was the attractive part of the doctrine in Mill's day. Today there is a much greater tendency to believe in *laissez-faire* in matters of morality than there was in Mill's time.

The attraction of the doctrine, for undoubtedly it is attractive, to me lies in this: that it seems to be a logical extension from freedom of religion. We have now achieved, not without a great struggle, the sort of society in which a man's religion is his own affair. Ought not his morals to be his own affair too? Is there any greater need, we may ask ourselves, for a common morality than there is for a common religion? However, there is a distinction. The ordinary free thinker has no religion. He can doubt

the existence of God as he does the existence of the Devil, and if society can accommodate people who have no personal religion and yet reckon them as good citizens, as so many of them are, then there is no need for a common religion. But it is one thing to doubt the existence of God and the Devil and another thing to doubt the existence of good and evil. God and the Devil is what religion is about; good and evil is what morals are about. Whether good and evil are properly personified in God and the Devil is a theological question upon which the man of faith, and the free thinker, can disagree, but there will be no disagreement, and can be no disagreement about whether good and evil exist.

Thus, while Mill, in common with most free thinkers, both of his century and of the present one, had no personal religion, and would deny the need for a common religion, he had a personal morality and he accepted the need for a common morality. Indeed, his 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, to challenge, and to experiment. "The liberty of the individual", he wrote:

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 is not infallible; that his 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 is much more capable than at present of recognizing 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 is 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.<sup>11</sup>

You see, 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 after thought and discussion in an endeavour to find a way of life best suited to them as individuals.

This seems to me on the whole to be an idealistic picture. It has happened to some extent, say in the last couple of generations in the growth of free love outside marriage. 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. But in the area of morals that is

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11. *Ibid.*, chapter III.

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. And certainly no one in his senses can think that habitual drunkenness or drugging leads to any good at all. But Mill believed, you see, that diversity in morals and the removal of restraint on what was traditionally held to be immorality (and held by him 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 old morality being replaced by a new and perhaps better morality. He would not have approved of those who did not care whether there is any morality at all, but he never really grappled 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.

But let me return to the distinction I was drawing between freedom of religion and freedom in morals. The abolition of established religion is a relatively recent development. It is a feature of modern thought. It came with the Reformation, which is comparatively late in the history of civilization. Before that it would have been thought that a society could not exist without a common religion. The pluralist society in which we now live was not achieved without the complete destruction of medieval thought, and it involved a change of civilization which was comparable with the triumphs of Christianity over paganism. Mill records how the Emperor Marcus Aurelius, whom he considered to be one of the 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 more recently between received religion and freedom of conscience was of the same order, and entailed as much suffering.

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, and although it is less precise and less demanding, moral belief is not necessarily less intense. In our society 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 on a sudden by divine stroke, or imperceptibly in evolutionary millennia, there was extracted from the chaos of the primeval mind, concepts of justice, benevolence, mercy, continence and others, that we call virtues. The distinction between virtue and vice, between good and evil 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.

Keeping in company is what society is about.

Diversity in moral belief and practice would be no more injurious to a society which had no common morality than the like diversity in religious matters is to a society without a common religion. However, as I have said, Mill and his disciples do not conceive of a society without a common morality. If they did, if they wanted a society in which morality is as free as religion, they would indeed 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 true 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 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, a virtue which requires sexual activity to be kept within prescribed bounds.

These reflections show the gulf which 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 can 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 those who are not strong enough to resist it. Why do ninety-nine of us have to grant this license to the other one? Because, the answer is, we are fallible; are all quite convinced that what we call vice is evil, but 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 in such a bog that seed may flourish that some day some good

man may bring to fruit, and that otherwise the world would lose and be the poorer for it. That is the kernel of Mill's freedom; that 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; some of Mill's followers advanced this argument, but he did not. Nor is it because Mill thought that virtue would be bound to triumph over vice without the aid of the law; in some cogent passages he refuted that argument. 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 he demands 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. Even assuming that we accept Mill's ideal, it is unacceptable to the lawmaker as a basis for action because it fails to distinguish sufficiently between freedom of thought and freedom of action. It may be a good thing for the 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 somewhere midway between the philosopher and the man of action, requires to be satisfied beyond a reasonable doubt. If he is so satisfied, he would then think it right to punish a man for 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, 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? Suppose you prosecute a man for bigamy. His defence might be, "I honestly believed that my first wife was dead". If that defence is rejected, it is rejected because there is no reasonable doubt in the minds of the jury that he did not honestly believe it. And yet they must say, "We might be mistaken; we are not required to have absolute certainty, but we must act on what we reasonably believe to be true". Well, then, if his defence were simply that: "I admit I married a second time but I honestly believe that bigamy is a good thing", must we not act in the same way? We must say, "Well, we have no reasonable doubt that bigamy is a bad thing; we can't be certain, we may be mistaken, but we must act upon our belief". Philosophers, after all, 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.

I might now<sup>1</sup> 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 certainly did not regard Christianity as an unmixed blessing, but it might have been a different thing, he thought, if it had been adopted under Marcus Aurelius instead of under Constantine. So, Mill urged, unless a man flatters himself that he is wiser 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 perfectly fair one on the point of fallibility. If we were to be confronted with the creed today 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 medieval philosopher for the notion that heresy was something to be tolerated. The example is also a fair one on the point I am making. What else, one may ask, did Mill expect Marcus Aurelius to do? It is idle to lament that he did not forestall 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 him. To put Mill's question again in another context, can any man, 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 in 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 for 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 desirable. But I must say that for my part I do not accept it even as an ideal. I accept it as an inspiration. What Mill taught about the value of freedom of inquiry 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 of the times, what Mill wrote was superb, but as dogma it has lost much of its appeal. I say dogma, for Mill's doctrine is just as dogmatic as any of those he repudiates. It is dogmatic to say that if only we were 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 evidence of 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.

