THE ROLE OF FREEDOMS: AN INTRODUCTION TO THE SYMPOSIUM

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The title of this symposium, *The Role of Freedoms*, only thinly disguises the fact that the papers presented here discuss the issues raised in John Garvey's recent book, *What Are Freedoms For?*[1] In that book, Professor Garvey attacks the fundamental principle of classical liberalism, that government must leave individuals free to choose what paths to follow in their lives, so long as their choices do not harm others. As stated by John Stuart Mill in *On Liberty*,[2]

> 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. . . . [T]he 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.[3]

Mill goes on to explain that the position is meant to apply only to "human beings in the maturity of their faculties."[4] He further explains that "from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals."[5] Mill, thus, takes the position that each of us should be free to make self-regarding choices, and that faced with such a choice, the government should not push us in either direction.[6]

In contrast to Mill, Professor Garvey argues that not all choices are equal.[7] One of two paths may be worth protecting, and individuals should have a right or freedom to follow that path.[8] The opposite path may not lead to any societal good worth protection.[9] Thus, rights or freedoms are not goods in themselves.[10] Instead,

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1. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996).
2. JOHN STUART MILL, ON LIBERTY (John Gray ed., Oxford Univ. Press 1991) (1859).
3. *Id.* at 14.
4. *Id.*
5. *Id.* at 17.
6. *Id.* at 17-19.
7. *See* GARVEY, *supra* note 1, at 5-19.
8. *See id.*
9. *See id.*
10. *See id.*

they serve to protect other social goods.[11]

Professor Garvey is, of course, not the first to criticize Mill's conclusion. Shortly after Mill published *On Liberty*, Sir James Fitzjames Stephen responded, in his book *Liberty, Equality, Fraternity.*[12] Stephen asserted that English criminal law

> affirms in a singularly emphatic manner a principle which is absolutely inconsistent with and contradictory to Mr. Mill's—the principle, namely, that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.[13]

Stephen did not accept Mill's distinction between solely self-regarding acts and acts affecting others. He found it impossible to determine how much influence the acts of an individual may have, and felt that it was, at times, a proper objective of criminal law to make people better human beings.[14]

The Mill-Fitzjames Stephen debate was reprised as the Hart-Devlin debate, after the 1957 issuance of what became known as the *Wolfenden Report.*[15] That report, on homosexuality, prostitution, and the criminal law, draws its unofficial name from the chairman of the committee that drafted the report, Sir John Wolfenden.[16] The committee's analysis, in large part, followed Mill's thinking. Among the committee's recommendations was that "homosexual behaviour between consenting adults in private should no longer be a criminal offence."[17]

Lord Patrick Devlin, then a judge of the Queen's Bench, responded to the *Wolfenden Report* in the 1958 *Maccabaen Lecture* of the British Academy.[18] Lord Devlin, following Stephen, argued that society does have the right to enforce its morality.[19] He attempted, however, to provide additional reasons for the position, beyond the simple recognition that British law had always enforced morality.[20] He asserted that a society is a community of ideas, and that the ideas that make up the community are not solely political ideas but include ideas as to how people should behave.[21] "Every society has a moral structure as well as a political one: or rather,

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11. *See id.*
12. JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873), *reprinted in* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS (1991).
13. *Id.* at 162.
14. *Id.* at 151.
15. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957.
16. *See id.* at 2.
17. *Id.* Cmnd. 62, at 25.
18. LORD PATRICK DEVLIN, MACCABAEAN LECTURE IN JURISPRUDENCE READ AT THE BRITISH ACADEMY (1959), *reprinted in* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).
19. *Id.* at 1-20.
20. *Id.*
21. *Id.* at 9.

since that might suggest two independent systems, I should say that the structure of every society is made up of both politics and morals."[22] Society has the right to protect itself from dangers, including protecting its political system from external attack or internal sedition. From that right, Devlin finds a parallel for society's morality.[23]

> [A]n established morality is as necessary as good government to the welfare of society. Societies are disintegrated from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. . . . There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.[24]

As to how the moral judgments of society are to be identified, Devlin tells us to look to the views of the man on the street, "the man in the Clapham omnibus."[25]

Oxford professor H.L.A. Hart responded to Devlin's *Maccabaen Lecture* in a 1959 article titled *Immorality and Treason*[26] and in a later book titled *Law, Liberty and Morality*.[27] Hart's central criticism of Devlin's argument was that

> [Devlin] appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us from saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. . . . [E]ven if the conventional morality did so change, the society in question would not have been destroyed or "subverted." We should compare such a development not to the violent overthrow of government but to a peaceful constitutional

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22. *Id.*
23. *Id.* at 13.
24. *Id.* at 13-14 (citations omitted).
25. *Id.* at 15.
26. H.L.A. Hart, *Immorality and Treason*, *in* THE LAW AS LITERATURE 220 (Louis Blom-Cooper ed., 1961).
27. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

> change in its form, consistent not only with the preservation of a society but with its advance.[28]

Hart's position that society's morality may evolve implies that changes are not necessarily destructive and certainly do not reach the level of destructiveness that would be analogous to a forceful attempt to overthrow the political structure of that society. Devlin is then left with the position that, once a society reaches a moral consensus on some position, that position is so worth retaining that it may be enforced by the criminal law. His appeal to self-preservation does not provide the strength necessary to support such a claim.

Professor Garvey has attempted to provide the justification Lord Devlin fails to establish. While Professor Garvey does not contend that the destruction of society is always at issue, some paths lead to a better society than do the paths leading in the opposite direction. As will be explained in his paper, it is those paths that lead to the good of society that are protected by rights or freedoms, while the government may be free to restrict travel on the opposing path. The papers that follow respond to the position taken by Professor Garvey.

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28. *Id.* at 51-52 (footnote omitted).