tomed. I have always thought of Pius XI as prophetic in his insistence on the creation of native priesthoods and hierarchies. But these cannot be improvised all in a moment: any considerable change, if abrupt, would be extremely perilous: the Holy See cannot be hustled: a loyal Catholic will need courage both to wait, and when the times comes, obediently and energetically to act.

## THE CRIMINATION OF SIN

THOMAS GILBY, O.P.

TWO traditions, of the 'necessary evil' and of the 'noble city', contend in the Christian attitude towards the State. Augustinist and Aristotelean alike profess the duty of obedience to the secular power, yet while to the former this is virtue there encountering its occasion to the latter this is virtue there findiug its proper object. Both agree that all power descends from God; the difference arises from how we conceive a causal order of subordinate agents and purposes. Here, as we shall see presently, a scholastic distinction, between instruments and means on one hand and principal, if secondary causes and intermediate ends on the other, is relevant to the contemporary debate about treating sins as crimes. For if the State is no more than a useful convenience then its rule, though providentially ordained to prevent anarchy, is devoid of moral value within itself. If, on the other hand, the State is endowed with a moral authority of its own then virtue and vice as such can be its concern.

You would not expect men of the Augustinist tradition to bow before the powers that be, nor men of the Aristotelean to warn off the government for not minding its own business. History however does not always follow a thin logic of ideas; those who have believed that true religion is other-worldly and not committed to politics have been left most defenceless before the encroachments of temporal power, while a strong thread runs from St Thomas to the sturdy radicalism, and perhaps some of the pressure-groups, of later centuries. Catholic moralists shade off to both sides, and the muddle increases because it is the Thomists who are the more uneasy about the notion of laws we are not bound to observe so long as we are prepared to pay the penalty.[1] Yet we can

[1] J. Tonneau: *Les lois purement pénales et la morale d'obligation.* Revue des Sciences Philosophiques et Théologiques, xxxvi, pp. 30-51. Paris, 1952.

assume here that, to the extent that legal command sets up an obligation in conscience, crime is sin. But is sin crime, in the sense that can the State suppress certain practices because they are wrong in themselves and not merely because they threaten the integrity of the group or the safety of the individual?

A live question on account of the Wolfenden Report, it spreads past homosexual offences and prostitution to such topics as artificial insemination, abortion, divorce by mutual consent, obscene literature, and euthanasia. So then the reflections of a distinguished judge on the jurisprudence of morality will be studied with particular interest. And here again, in this lecture and some criticism it has met, we shall be jolted if we expect that jurists will deprecate and moralists will urge the concern of the law with ethics.[2] Let us consider the three interrogatories it frames.

## I

*Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?*

Sir Patrick is convinced that not only may the community pass moral judgments, but that it must if it is to survive. Some ideas on how we ought to behave are organic parts and essential characteristics of its identity. The law itself would function uneasily without pre-legal unanimity, a fact emphasized by Aristotle, the Stoics, and St Thomas, and he confesses that 'as a judge who administers the criminal law and who has often to pass sentence in a criminal court, I should feel handicapped in my task if I thought I was addressing an audience which had no sense of sin or which thought of crime as something quite different. Ought one, for instance, in passing sentence upon a female abortionist to treat her simply as if she were an unlicensed midwife?' There are some fundamental laws which need the backing of a sense of sin; so much so that if it did not exist it would be necessary to invent it, for the health both of the individual and the group, as is indicated by the psychological illness of guilt which feeds on a man when deprived of an appropriate object and the social failure to teach decent manners merely with a set of regulations.

A certain practice is held to be against public morality not because most people disapprove of it, for they may rightly reckon

[2] The Hon. Sir Patrick Devlin: *The Enforcement of Morals*. Maccabaean Lecture in Jurisprudence of the British Academy, 1959. Oxford University Press; 3s. 6d.

Richard Wollheim: Crime, Sin, and Mr Justice Devlin. *Encounter*, xiii, 5. November, 1959.

that it is not for them to interfere, but because it threatens the sort of community in which they want to live. Whether this be inspired by the precepts of revealed religion or by the ideals of humanist liberalism makes no difference; indeed political liberalism, whose pride it is to tolerate different moralities, works best where non-legal forces of cohesion are strongest, and of all social causes needs to be most implacable against the enemies of free intercourse—it can admit the difference of contraries, but not of contradictories. Moreover, although the original impulse which formed their sort of community may have died out and its religious presuppositions may no longer be currently accepted, people may still have to rally in support of the effects. Take, for instance, the Christian institution of marriage which survives as part of our social structure. 'It is there not because it is Christian. It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down.'

That a country's moral sentiment and legislation are mutually engaged will not be disputed except by those who think that laws are no more than pieces of social engineering; even they will catch themselves slipping into ethical statement on the subject. Now we set off on the wrong foot when we put the whole weight of morals on the private conscience. It is worth noting that the jurisprudence of St Thomas, influenced more by the Greeks than the Romans, makes little play with the division between private and public, and prefers the distinction, which is not quite the same, between personal and social, the *monastikon* and the *politikon*, the *singulare* and the *commune*, which represent not so much different spheres as different phases in and different abstractions from one single course of activity. Sir Patrick seems of the same advice though his terminology is different; he does not think 'that one can talk sensibly of a public and private morality any more than one can talk of a public or private highway. Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two.'

All morality is private in that it springs from personal responsibility, yet its proper field is not restricted to the recesses of individual mind and heart.[3] At the same time morality is public in that all the moral virtues should be governed by community service, and the ruler with virtue can summon the virtue of the citizens with precepts derivative from and supplementary to the

[3] *Summa Theologica.* 1a-2ae. xviii, 5, 6, 9; xix, 5, 6; xx, 1-4.

Natural Law.[4] No poise is more personal than that of courage and temperance, yet Aristotle's statement that the law can bid us to the acts of both, for instance, not to desert our post or gratify our lust, is allowed by St Thomas, if somewhat grudgingly.[5]

Another false start is made when might and right are set in profound opposition. Of course men cannot be driven to morality; the inner act of the will cannot be coerced and behaviour cannot be forced and remain voluntary. Yet within limits what we do under the threat of what will happen if we act otherwise must be counted as what we do freely. The merchant who jettisons his goods to lighten the ship is in fact choosing his own safety: that is his *voluntarium simpliciter*. So also with sin: few seek to disown God but, in preferring an attraction which cannot be reconciled with his friendship, that in fact is our choice, however reluctant.[6] The man who avoids crime because of the penalty attached may not be 'lawful' in the noblest sense of the term, but at least he is law-abiding, which is not for a moralist to sneeze at. The law has been a success and the man himself deserves some credit, for a healthy fear of the consequences belongs to virtue and only abjectly servile fear is vice.[7]

## II

We pass now from the personal equilibrium of freedom in the face of fears to the powers of the community to engender them. *If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?*

Obedience is the response to a command, not a counsel. Law commands; it does not submit recommendations.[8] Consequently it must be able to see that they are carried out. If its authority is to be effective human law must be able to enforce its object on the spot, for its time is short and it cannot aspire to the patience of eternal providence. Nor is its operation so pervasive, for it can judge only according to the outward appearance. *Only God trieth the hearts and the reins*, and his law alone can make the final adjustment of justice—if it is justice we want, not mercy.[9] Happily for us the Gospel Law sweeps past all codes and all renderings of what is due.[10]

[4] 2a-2ae. lviii, 5, 6; xlvii, 10-12; xlvii, 1; 1, 1-2; 1a-2ae. xcv, 1, 2.
[5] *Nicomachean Ethics*, 1129b19; 2a-2ae. xlvii, 10 3*d a*; 1a-2ae. xcvi, 3.
[6] 1a-2ae. vi, 5, 6; lxxv, 3; lxxviii, 1.
[7] 1a-2ae. xcii, 1 *ad* 3; 2a-2ae. xix, 4.
[8] 2a-2ae. civ, 2, 5; 1a-2ae. xcii, 2 *ad* 2.
[9] 1a-2ae. c, 9.
[10] 1a-2ae. cvi, 1, 2; cviii, 1, 2; la. xxi, 4.

We cannot make windows into men's souls, said Queen Elizabeth, though some of her Catholic subjects may have felt that she tried to knock a few squints. Human law does not reach the profundities. Though its procedure is properly invested with solemnity and some of its occasions are sufficiently harrowing, it is well to keep a sense of proportion; neither guilty nor not guilty are verdicts for or against a stain on the soul, imprisonment is not an excommunication from the City of God, the capital penalty is not a final doom. The dignity of human law is that of the plain life of men in this world; it deals with ordinary morals between ordinary birth and ordinary death; its features are those not of a goddess but a composite of those of the jury. In the words of the expressive bull, deep down it is shallow. We can learn from the men of the Middle Ages, about whom it is difficult to decide which was the stronger, their feeling for legality or their resilience against the armour of temporal and spiritual power. St Thomas's reverence for law is manifest; so too is his care to keep it to the maintenance of a workaday social decency, without intrusion into personal privacy. Later centuries went further; at first rather bluntly—Spanish inquisitors with their formal documents of recantation, Puritan divines with their badgerings for repentance on the scaffold—and later more insidiously by brainwashing and injecting more remorse for failure to toe the party-line than the most thunderous Christian missioner ever demanded for sin.

So then the economy of law is not unbounded. It can ensure that we pay our debts of justice; it cannot turn us into upright characters. This does not mean that it calls merely for a show of conformity, a sort of hypocrisy, for, like education and medicine, it is charged with purpose beyond its ability to establish, namely the good life in the full sense of the term. Yet its immediate task is fulfilled when certain preliminaries are observed, *prima initia*, St Thomas calls them. These are what it prescribes, the seeding rather than the flowering of virtue. *Finis praecepti non cadit sub lege*, so runs the adage, the purpose of a precept is not enclosed in the law. Hence the legislator should not push the prohibition of every vice or prescribe the full performance of every virtue.[11]

It does not follow that the content of the law is non-moral. Certainly morality turns on what lies deep within our minds and will, our relationships to the ends of life, but it is not confined there but flows into our external behaviour. And, what is more,

[11] 1a-2ae. xcii, 1; xcvi, 2, 3. Commentary *III Sentences*, xxxvii, 1-3. T. Gilby, *Principality and Polity*. London, 1958. *The Political Thought of Thomas Aquinas*. Chicago, 1959, vi, 2. The Limits to Legalism.

our external behaviour enters into its composition.[12] One wonders where the disjunction of the outward man from the inward has done most harm, in mysticism with the dualism of spirit and body, in metaphysics with the barrier between intelligence and sense or noumenon and phenomenon, or in the social disciplines with the split between the moral and the legal. Of course there is a valid formal distinction between what is commanded by human law and higher ideals, but it is not as though they were things apart; they represent different moments in what should be a continuous progression from initial to perfect virtue.[13] Sir Patrick remarks that a complete separation of crime from sin would not be good for the moral law and might be disastrous for the criminal law: one recalls the insouciance of people otherwise devout with regard to civil decencies, and the contempt which law incurs when it tries to maintain and enlarge itself merely from its own resources.

## III

The community, then, arms itself with law to protect its moral judgments. *Ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?* The answer to the first part of the question has already been anticipated; it remains to consider why the criminal law should confine itself to some offences against good morals while leaving others untouched.

The simplest reply is that the State proceeds against certain acts not because they are morally wrong but because they strike at the integrity of the community and the safety of its members. Its instinct of self-preservation cannot tolerate rebellion, though afterwards men of good will may pronounce that the grounds for it were justified. Or, on less revolutionary occasions, it will react energetically to threats against property or the current economic organization without entering into the profounder proprieties. All of which goes to show, it is urged, that the modern State as conceived by the liberal culture of the West is unconcerned with ethics as such, but merely with those fringes of it which touch the protection of the community and its individual members.

But is this true, either in fact or in theory? Do morals occupy a private enclosure within the scene of politics, and can they be treated as what a man does with his solitariness while for the rest he renders to Caesar the things that are Caesar's? High moralists

[12] 1a-2ae. xx, 1-4, 6.
[13] 1a-2ae. lxiii, 1; lxvi, 1, 2.

and Christians alike may have beaten the retreat before the growing might of Leviathan, yet it is significant that on the religious wing of Liberalism the Evangelical Movement pressed successfully forward for social reforms and the Nonconformist Conscience did more than make empty gestures of defiance at the weight of legislation opposed to it. St Thomas allowed that to some extent politics proceeded autonomously according to its own needs and that the civil law was not simply an extension or explication of the moral law; all the same it was no part of his intention that either religion or morals should vacate the ground of public life to secularism.[14] Whatever a man does he is always *aliquid civitatis et aliquid Dei*, and the two cannot be separated as though they were of quite different categories, like chalk and cheese.[15]

Sir Patrick, too, is critical of attempts to define the function of the criminal law with no reference to the moral law and merely in terms of the smooth running of the community and of shielding those who are specially vulnerable against exploitation and corruption. He cites instances where it condemns acts done in private and against the will of nobody concerned; it does not permit the consent or even the request of the victim of an assault to be used as a defence; it treats euthanasia, attempted suicide, abortion, and incest between brother and sister as specific crimes, and though some of us may hold that on these points it should be reformed, it is not necessarily because we hold that the law can make no stand on moral rights. The community requires certain standards to be upheld, and there are many cases where the main function of its criminal law is to enforce the maintenance of principles regarded as essential, for instance, the sanctity of human life, and not to promote the welfare of the people involved.

He remembers also that although there is much immorality which is not punished by law, there is none which is condoned. He goes so far as to say that he can set no theoretical limits to the powers of the State to legislate against immorality—presumably, that is, within the ambit of what it can see—for can we build a wall between private conduct and public interest? 'You may argue that if a man's sins affect only himself it cannot be the concern of society. If he chooses to get drunk every night in the privacy of his own house, is anyone except himself the worse for it? But suppose a quarter or a half of the population got drunk every night, what sort of society would it be?'

All the same he proposes four practical and elastic principles

[14] T. Gilby: *Op. cit.* vi, 1. 'Law-Making as Art.'
[15] 1a-2ae. xliv, 3 *ad* 2; xcii, 1 *ad* 3.

to restrain the State from trespassing. The first and chief of these is that there should be toleration of the maximum individual freedom consistent with the integrity of the community: it cannot be said, he adds, that it runs all through the criminal law. There is no illogicality here, for *rights* in theory are not always *oughts* in practice. Aristotle and St Thomas recognized that half the dialectic of morals and politics was an improvisation in a world of contingent facts, and that its conclusions could not be wholly resolved into a fixed pattern: where law seems to conflict with freedom there freedom should be given the benefit of the doubt.[16]

Political prudence must decide when the limit is reached of what is tolerable. The dislike of the majority is not the test; the practice must excite genuine and deeply-felt reprobation. This is a bad master but a useful guide, for not everything can be tolerated and there are quasi-instinctive motions of honour and shame which rational morals, political association, and legislation must embrace.[17] Yet emotions of disgust and moral indignation have to be governed as much by fortitude as lust by temperance. Hurting for hurting's sake is never right, even when it is hurting back; there is nothing to be said for outrage-mongering or macarthyism; to vindicate is to not be vindictive, and human punishment can be justified only by the good effects it seeks to obtain.[18]

It is a question of tolerance, not approval. Thus, except during puritanical interludes, fornication has been regarded as a weakness which the law may keep within bounds but cannot root out, whereas other practices are felt to be so abominable that their mere presence is an offence, and then by deliberate judgment the law attempts to suppress them. Toleration varies according to period and region; usury and heresy were abhorrent to the medievals, nowadays cruelty to animals is certainly beyond the limit, perhaps the daubing of swastikas on walls. The position of homosexuality is not so certain, hence the value of investigations such as those conducted by the Wolfenden Committee. To some the practice does not seem so gravely injurious as the sort of adultery that breaks up marriages. But, and this is Sir Patrick's second principle of limitation, the law should be in no hurry to follow, still less to forestall, every shift of toleration, otherwise it will lose the backing of controlled anger which it needs, however cold-blooded its own proper processes. St Thomas speaks of the

[16] 2a-2ae. lx, 4.
[17] 2a-2ae. ci, 1-3; cxliv, 1, 2; cxlv, 1. *Commentary on the Ethics*, viii, 1.
[18] 1a-2ae. xlvi, 7. 2a-2ae. cviii, 1.

law's need to maintain custom even at the cost of immediate amelioration.[19]

The third principle of limitation, that as far as possible privacy should be respected, depends more on the moderation of rulers and judges than on a written charter. When there is true *civilitas* and men are citizens rather than subjects, then the moral conviction of the community will put the right to privacy in the balance against the right of the State to enforce its laws. Telephone-tapping and interference with the mails are regarded with general disfavour; correspondingly the Home Office has formulated rules governing the exercise of its undoubted power in these matters.

Finally, and this is the fourth principle of limitation, the law should not overshoot the mark. It should not directly aim at a high ideal of perfection, but at the common ordinary decencies within reach. It tells us not how we ought to behave in all respects, but what will happen to us if we do not behave in some respects. Its level is that of the community, in which the majority of persons are far from saints, and it deals with the evil deeds from which they can be expected to abstain.[20]

Some early reports of Sir Patrick's lecture gave the impression that he had protested almost blimpishly against the current mixture of legal positivism and reforming humanism; he has been attacked for not discussing what lay outside the scope of his lecture, namely, how we can tell which group sentiments of morality are dignified or even decent. If he is read as carefully as he argues, it will be perceived that he neither sets overmuch store on moral indignation, nor equates crime and sin, nor would have the law expanded from a set of extra-legal principles. What he does in effect is to criticize some inferences drawn from an artificial separation of the legal from the moral, sometimes identified as the public and the private respectively. He is aware that without good morals good law is never safe. Possibly his feelings are stronger than St Thomas's that the criminal law should vindicate an outrage committed against the community, possibly his penological mood is less utilitarian, but they stand shoulder to shoulder in displaying the glint of nice distinctions to defend the singleness of human life, personal, social, religious, political, and legal, against compartition.

[19] 1a-2ae. xcvii, 2.
[20] 1a-2ae. xcvi, 2.