

# *From England*

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## **CRIME AND MORALITY**

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**by John Croft**

Over the last two hundred years all sorts of reasons have been advanced for the prevalence of crime. Theories and fashions have produced diverse explanations and causes for this trait in human behaviour in terms of physiological development, psychological malfunction, mental retardation, genetic inheritance, poverty, deprivation, trade cycles, weather, temptations of affluent society and opportunity, and a whole host of these and other factors taken together or singly. However, except in Victorian times, little attention seems to have been paid to morality as a determinant.

In 1993 the murder in Liverpool of a toddler, James Bulger, by two boys only a few years older than the victim engendered a moral panic. This event focused attention on the relationship of criminal law and morality.

One may distinguish between private and public, or personal and social morality. Private and personal morality is deemed to be the individual's responsibility, guided by ethical precepts and constraints by law. Public and social morality is a more elusive concept. Dr Jonathan Sacks, writing about the murder, commented "Morality begins with law, and law is predicted on individual responsibility. But, he continued, "morality does not end there. Nor does James Bulger's death end with the trial and sentencing of his murderers. Though the murder itself was a cruel aberration. it had a social context. It was this. The moral fabric with which we clothe our children has grown threadbare. The holes have begun to show." Thus are the private and public aspects of morality linked.

The relationship of law and morality has long been the subject of scrutiny. Hermann Mannheim, a distinguished lawyer and criminologist, took the view that legal and moral codes overlap. Furthermore, he added, "Law and morality should not be allowed to drift apart too often and too conspicuously, as otherwise the law

would lose one of its strongest supports.” He remarked how the natural law school had tried to uphold the strength of the moral element in the law “without, however, arriving at a clear concept of the actual relationship between the two sets of norms”. In this context he cited the controversy, stimulated by the publication of the Wolfenden report on homosexuality and prostitution in 1957, which preoccupied Devlin, Hart and other lawyers: for Mannheim, however, an even more important point was the moral/legal dilemma of injustice, that is, “what the individual citizen is entitled to do when faced with an unjust system of law and government and when the court or statute or any other lawful way out is available to help him to get what he regards as his due.” Mannheim concluded that it was “essential that crime should not be produced unnecessarily and artificially by a body of criminal law which interferes with acts not clearly anti-social.”

Hart distinguishes between the ‘classical’ thesis, derived from Aristotle and Plato, about the role of law in relation to the enforcement of morality (“the law of the city state exists not merely to secure that men have the opportunity to lead a morally good life, but to see that they do”) and the ‘disintegration’ thesis. The latter, which he saw as the central part of the case presented by Lord Devlin justifying the legal enforcement of morality, was based on the view that its maintenance is necessary to prevent the disintegration of society. A third, the ‘conservative’ thesis, rests on the claim that “society has a right to enforce its morality by law because the majority have the right to follow their own moral convictions that their moral environment is a thing of value to be defended from change.” In Hart’s view, the ‘disintegration’ thesis could not be substantiated for lack of empirical evidence. More recently Stephen Brody, in attempting to link the personal and social components of morality in relation to crime and punishment, has suggested that “the punishments designed to counteract crime remain plausible only for as long as the laws which currently define criminal behaviour embody a consensus of opinion concerning moral rights and wrongs.” This relativism led him to the bleak and controversial conclusion that “All that criminal justice policies can do is to remain sensitive to the constant modifications of the moral climate and to effect the necessary compromises with the arrangements that already exist.”

The conflict between the adherents of absolute and relative value tends, in this country at least, to become focused on sexual morality — even to the extent of dragging in the royal family and the implications for constitutional reform. Important though these arguments may be they do not seem to me to solve the central problem which is how to reconcile the paradox of free will and divine guidance, the cosmic moral pressure to do right. The shift of moral authority from church and state to the individual who has to create his own standards, led to the consequent presumption of individual responsibility. As has been pointed out by a leading historian, Sir Michael Howard, it was “The Enlightenment (that) taught us that we are free agents, endowed by reason with the capacity to understand the world around us and with the right to shape it in accordance with that understanding”. This historically has led to the erosion of traditional values and social norms, which provided a measure of social cohesion. The creation of the individual’s own standards carries with it the risk of social divisiveness, and implies the weakening of universal standards such as have been inherited from the Judaeo-Christian tradition. Of course it will be contended, and has been, that religious leaders have not surrendered their moral authority but what seems certain is that the moral authority of the modern state, at least as conceived in terms of liberal democracy, is limited to the exercise of the criminal law, the only other direct influences perhaps being the example set by standards of public life. Whatever other influences can be brought to bear are indirect — through parents, schooling, and the concomitant experiences of social life. The state, moreover, is cautious about claiming moral authority lest it lead to the counter-charge of moral manipulation and social control.

Professor Roger Hood, an eminent criminologist, points up the dilemma: “... although crime has causes; although criminologists are probably right in assuming that crime is determined by attitudes that in turn are socially derived, if not determined; although increased scientific knowledge may make it of some practical use, nevertheless the very process by which we learn to avoid crime requires that the courts act as if crime were *wholly* the result of free choice.” Hood asks us to note the word *wholly*: “This is, to be sure, a peculiar amalgam of positivist determinism and classical free will.” Hood added that while “one would surely hesitate to weaken the

presumption of individual responsibility upon which our social institutions and morality rest”, he concludes that “in the individual case ... a balance must be struck between the classical policy objectives of punishment which rest on the notion of a responsible individual ‘wholly’ expressing a free choice, and the need to do justice by adopting a ‘soft determinism’ which takes account of the facts of causation.”

That there are various strands in all this is not in dispute: the overlap between legal and moral codes; the replacement (at the end of the Victorian era) of penalties meted out according to the moral deserts of the offender by a penal policy aimed to minimise overall harm and suffering regardless of moral status, and the impact of changing values and social conditions on not so much family structure as family dynamics and family control. There seems to be something of a conflict between emphasis on individual free will, which derives from concepts originating in the eighteenth century, and determinism which owes its origin partly to a long tradition of religious thinking and partly to sociological and political theory of the late nineteenth and early twentieth centuries — a point to which I return below.

At this juncture I want to refer to claims made by Sacks in a recent book that “we can reverse the increase in crime, the failure of education and the breakdown of morality, if only we can restore the structures — the families and neighbourhoods — which were once so vital and part of our life”. He deplores the displacement of the Judaeo-Christian tradition by the scientific ethic of the Enlightenment which in his view has destroyed “the traditions to which the key terms of morality belonged and within which they had lucidity and coherence. The words survived — good, right, duty, obligation, virtue — but they were now severed from the context which gave them sense”. It is not so much classical and welfare liberalism that has brought about this state of affairs but what Sacks pillories as libertarianism “*Libertarianism is liberalism applied to the moral and civil domain.* (his italics). The connection between them is clear but so too is the fateful difference.” He traces this development back to John Stuart Mill and sees it as culminating in the report of the Wolfenden Committee which suggests that, if crime were no longer to be equated with sin “there must remain a realm of private morality

which is, in brief and crude terms, not the law's business" — hence during the nineteen sixties the liberalisation of laws relating, not only to homosexuality but also to abortion, censorship and divorce. Looking back to an earlier generation, Sacks concludes that "Their view of politics was liberal rather than libertarian. The central question was: how can we create a society in which everyone can participate, and everyone achieve the maximum possible dignity? Their answer was not to privatise morality and rule it out of order in political debate."

It seems to me, however, that as suggestive as these ideas may be in the reconstruction of the moral order they overlook in relation to crime, a fundamental issue which, although it preoccupied theologians and philosophers for much of the eighteenth and nineteenth centuries, remains unsolved. This issue relates to free will and determinism. On the one hand is the concept of mankind acting as a free agent with the responsibility of choice between good and evil, and on the other hand is the concept of mankind as constrained by inheritance and environment which circumscribe his actions. Both concepts involve freedom: freedom to and freedom from. The first involves self interest — to break rules if one chooses or to obey rules if one chooses. The second involves freedom from want, deprivation and so forth and thus, if one does break rules, absolves the actor to a degree from responsibility. These seemingly opposing concepts still condition attitudes to crime, and particularly to punishment. The first involves retribution; the second implies rehabilitation and reform. The penal history of the Victorian period is the record of 'liberal' progress from retribution and deterrence through to rehabilitation and reform. In the twentieth century both attitudes have been held in tandem although the rise of libertarianism has brought in its wake, unexpectedly perhaps, greater emphasis on retribution. However desirable on other grounds. Sacks's solution to crime — and the solutions advocated by many authors writing in a similar vein — appears therefore to be an over-simplification since it is not predicated on a resolution of the dichotomy posed by free will and determinism.

There is a further problem. Moral sense is not an inborn virtue; upbringing, education, the social and economic climate play a part in

its inculcation. If pursuit of the moral welfare of the *individual* seems, if not a dead end, then to have its limitations, perhaps it is because its elusive quality cannot be manipulated or otherwise channelled into acceptable ends. It may therefore be profitable to consider an approach from the perspective of the *group*. This can be done by examining political governance that is to say, how the state controls and even tries to prevent crime — a far-reaching subject beyond the limited scope of this article. To conclude, therefore, the Judaeo-Christian tradition, as mediated historically through the Protestant ethic, promulgated a set of rights, duties and responsibilities for living in civil society the stability of which is — in my opinion — threatened by rising crime. In both its global and domestic manifestations — which include terrorism, fraud, environmental pollution, drugs, rape, burglary (the list is interminable) — there resides a moral issue, which we neglect at our peril.

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