

BACKGROUND BOOKS

AUTONOMY AND PRIVACY

The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

This doctrine, set forth by John Stuart Mill in **ON LIBERTY** (London, 1859; Norton, paper, 1975), was, as he put it, "anything but new." But it is from Mill's stout defense of the individual's rights versus those of society, and from his concise discussion of the range of issues involved, that the modern debate over the relationship between law and morality can be seen to flow.

First to rebut Mill (with something of the same strength of argument) was Sir James Fitzjames Stephen, in **LIBERTY, EQUALITY, FRATERNITY** (London, 1873; Cambridge Univ. Press, 1968). Finding Mill's fundamental error to be "too favourable an estimate of human nature," Sir James characterizes liberty as "both good and bad according to time, place, and circumstance." He holds that the punishment of immoral behavior is an objective as legitimate as that of preventing harm to others.

A view of personal liberty developed a century after Mill is expounded in Baron Patrick Devlin's collection of essays, **THE ENFORCEMENT OF MORALS** (Oxford, 1965, cloth; 1970, paper). "The criminal law as we know it is based upon moral principle," he writes, and he emphasizes a common morality as the cement of society. Thus marriage is both part of the structure of society and the basis of a

moral code that condemns fornication and adultery.

Although he apparently leans more toward Stephen than toward Mill, Lord Devlin at the same time sees the rights of the individual as a competing interest that must be taken into account: "As far as possible, privacy should be respected."

H. L. A. Hart, in **LAW, LIBERTY, AND MORALITY** (Stanford, 1963, cloth & paper), undertakes a modified defense of Mill's position. He agrees that any restriction of freedom is an evil per se. However, there may, in his view, be grounds for justifying the legal coercion of the individual apart from the prevention of harm to others. Hart recognizes one form of paternalism—protecting people from inflicting harm upon themselves—as a permissible basis for making certain conduct illegal.

In his classic work, **THE LIMITS OF THE CRIMINAL SANCTION** (Stanford, 1968, cloth & paper), Herbert L. Packer argues that "the law's ultimate threat" should "be reserved for what really matters." Packer sees the enforcement of morals as "a costly indulgence."

A passionate plea for the invalidation of laws regulating sexual behavior—in particular, homosexuality—is made by Walter Barnett in **SEXUAL FREEDOM AND THE CONSTITUTION: An Inquiry into the Constitutionality of Repressive Sex Laws** (Univ. of New Mexico, 1973). Exploring constitutional attacks that can be made on "morals" laws, Barnett hopes to see the state "expelled from a sanctuary to which it should never have been admitted in the first place—the intimate private lives of its citizens."

Alan F. Westin's **PRIVACY AND FREEDOM** (Atheneum, 1967), considered

by many scholars to be the best general treatment of problems of privacy, is unfortunately out of print. It offers five interesting case studies on polygraphs, on personality testing, electronic eavesdropping, subliminal suggestions, and the "information revolution," as well as a 1960s status report on relevant law at the time Westin was writing.

DATABANKS IN A FREE SOCIETY: Computers, Record-Keeping and Privacy (Quadrangle, 1972, cloth; 1974, paper) by Alan Westin and Michael Baker is a careful study of the effects of computerization on privacy. The authors conclude that computers have made less difference than many Americans once feared but that modern technology nonetheless poses significant dangers. They recommend legal protections for individualized records. A related appraisal of computer technology is Arthur R. Miller's **THE ASSAULT ON PRIVACY: Computers, Data Banks, and Dossiers** (Univ. of Mich., 1971, cloth; NAL, 1972, paper). Miller describes possible protections for records systems. And James B. Rule's **PRIVATE LIVES AND PUBLIC SURVEILLANCE: Social Control in the Computer Age** (Schocken, 1974), a study of five such systems in the public and private sectors, shows how large enterprises actually handle a variety of kinds of records.

Three useful collections on privacy and autonomy for the general reader are Richard A. Wasserstrom's **MORALITY AND THE LAW** (Wadsworth, 1970, paper); **PRIVACY** (Atherton Press, 1971), edited by J. Roland Pennock and John W. Chapman; and John H. F. Shattuck's useful **RIGHTS OF PRIVACY** (National Textbook, American Civil Liberties

Union, 1977). Wasserstrom provides extracts from Mill, Devlin, and the dialogue sparked by Lord Devlin's lectures in England and the United States. Pennock and Chapman assemble essays by fellow social scientists and by philosophers, as well as lawyers.

The Shattuck textbook on problems of privacy and autonomy includes excerpts from key Supreme Court opinions. Concerning recent legal trends in abortion, homosexuality, and other issues of autonomy, little nonpolemical literature exists as yet outside the dense pages of the law reviews, and Shattuck is also a good source for these articles.

Lest the reader who chooses to browse through these pages of legalese should conclude that they raise principles not noticed by Britain's John Stuart Mill in the mid-19th century, or facts not known to every kid on the block until the 1970s, one more background book of quite a different sort is recommended: David H. Flaherty's **PRIVACY IN COLONIAL NEW ENGLAND** (Univ. Press of Va., 1972).

Under early American laws, Flaherty reminds us, informing was an integral part of the justice system. Informers got a share of the fines that were levied. "Whereas religion may have served as an incentive for the elect," he notes, "money was more stimulating to the unregenerate. Some remarkable individuals broke the liquor laws and informed on themselves in order to claim a share of the fine"—usually collecting extra money by reporting on friends as well.

All in all, Flaherty's book is a bracing study of our ambiguous Puritan heritage. It illustrates the gap between moral codes and the lasting realities of human nature.

EDITOR'S NOTE. *Most of the above titles were suggested for background reading by the authors of the preceding articles, A. E. Dick Howard and Kent Greenawalt.*