[The Report of the Wolfenden Committee on Homosexual Offences and Prostitution (1957) recommended, among other things, that "homosexual behavior between consenting adults in private should no longer be a criminal offence" in England... In the public debate that followed publication of the Report, Lord Patrick Devlin, a distinguished jurist, opposed its principles (though not all the specific recommendations) ... The following are excerpts take from Devlin's "The Enforcement of Morals" (London, 1965), "Immorality and Treason," The Listener, 62 (July 30, 1959), 162-63, "Law, Liberty and Morality" (London, 1963) and The Morality of the Criminal Law (Jerusalem, 1965).]

1. The Report of the Committee on Homosexual Offences and Prostitution, generally known as the Wolfenden Report, is recognized to be an excellent study of two very difficult legal and social problem. But it has also a particular claim to the respect of those interested in jurisprudence; it does what law reformers so rarely do; it sets out clearly and carefully what in relation to its subjects it considers the function of the law to be. Statutory additions to the criminal law are too often made on the simple principle that 'there ought to be a law against it.' The greater part of the law relating to sexual offences is the creation of statute and it is difficult to ascertain any logical relationship between it and the moral ideas which most of us uphold. Adultery, fornication, and prostitution are not, as the Report points out, criminal offences: homosexuality between males is a criminal offence, but between females it is not. Incest was not an offence until it was declared so by statute only fifty years ago. Does the legislature select these offences haphazardly or are there some principles which can be used to determine what part of the moral law should be embodied in the criminal? ... What is the connexion between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?

2. For many centuries the criminal law was much concerned with keeping the peace and little, if at all, with sexual morals. But it would be wrong to infer from that that it had no moral content or that it would ever have tolerated the idea of a man being left to judge for himself in matters of morals. The criminal law of England has from the very first concerned itself with moral principles. A simple way of testing this point is to consider the attitude which the criminal law adopts towards consent.

3. Subject to certain exceptions inherent in the nature of particular crimes, the criminal law has never permitted consent of the victim to be used as a defence. In rape, for example, consent negatives an essential element. But consent of the victim is no defence to a charge of murder. It is not a defence to any form of assault that the victim thought his punishment well deserved and submitted to it; to make a good defence the accused must prove that the law gave him the right to chastise and that he exercised it reasonably. Likewise, the victim may not forgive the aggressor and require the prosecution to desist; the right to enter a nolle prosequi belongs to the Attorney-General alone.

4. Now, if the law existed for the protection of the individual, there would be no reason why he should avail himself of it if he did not want it. The reason why a man may not consent to the commission of an offence against himself beforehand or forgive it afterwards is because it is an offence against society. It is not that society is physically injured; that would be impossible. Nor need any individual be shocked, corrupted, or exploited; everything may be done in private. Nor can it be explained on the practical ground that a violent man is a potential danger to others in the community who have therefore a direct interest in his apprehension and punishment as being
necessary to their own protection. That would be true of a man whom the victim is prepared to forgive but not of one who gets his consent first; a murderer who acts only upon the consent, and maybe the request, of his victim is no menace to others, but he does threaten one of the great moral principles upon which society is based, that is, the sanctity of human life. There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.

5. Thus, if the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens (including the protection of youth from corruption), it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, dueling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principle...

6. I think it is clear that the criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else. The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where does it get its authority to do this and how does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derived both from Christian teaching. But I think that the strict logician is right when he says that the law can no longer rely on doctrines in which citizens are entitled to disbelieve. It is necessary therefore to look for some other source...

7. I have framed three interrogatories addressed to myself to answer: 1. Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement? 2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it? 3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?

8. I shall begin with the first interrogatory and consider what is meant by the right of society to pass a moral judgement, that is, a judgement about what is good and what is evil. The fact that a majority of people may disapprove of a practice does not of itself make it a matter for society as a whole. Nine men out of ten may disapprove of what the tenth man is doing and still say that it is not their business. There is a case for a collective judgement only if society is affected. Without a collective judgement there can be no case at all for intervention. Let me take as an illustration the Englishman's attitude to religion as it is now and as it has been in the past. His attitude now is that a man's religion is his private affair; he may think of another man's religion that it is right or wrong, true or untrue, but not that it is good or bad. In earlier times that was not so; a man was denied the right to practice what was thought of as heresy, and heresy was thought of as destructive of society...

9. What makes a society of any sort is community of ideas not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one: or rather, since that might suggest two independent systems, I should say that the structure of every society is made up both of politics and morals. Take, for example, the institution of marriage. Whether a man should be
allowed to take more than one wife is something about which every society has to make up its mind one way or the other. In England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society. 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. The great majority of those who live in this country accept it because it is the Christian idea of marriage and for them the only true one. But a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives...

10. We see this more clearly if we think of ideas or institutions that are purely political. Society cannot tolerate rebellion; it will not allow argument about the rightness of the cause. Historians a century later may say that the rebels were right and the Government was wrong and a percipient and conscientious subject of the State may think so at the time. But it is not a matter which can be left to individual judgement...

11. The institution of marriage is a good example for my purpose because it bridges the division, if there is one, between politics and morals. Marriage is part of the structure of our society and it is also the basis of a moral code which condemns fornication and adultery. The institution of marriage would be gravely threatened if individual judgements were permitted about the morality of adultery, on these points there must be a public morality... I return to the statement that I have already made, that society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; It is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

12. The answer to the first question determines the way in which the second should be approached and may indeed very nearly dictate the answer to the second question. If society has no right to make judgements on morals, the law must find some special justification for entering the field of morality: if homosexuality and prostitution are not in themselves wrong, then the onus is very clearly on the lawgiver who wants to frame a law against certain aspects of them to justify the exceptional treatment. But if society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.

13. The Wolfenden Report, notwithstanding that it seems to admit the right of society to condemn homosexuality and prostitution as immoral, requires special circumstances to be shown to justify the intervention of the law. I think that this is wrong in principle and that any attempt to approach my second interrogatory on these lines is bound to break down. I think that the attempt by the Committee does break down and that this is shown by the fact that it has to define or describe its special circumstances so widely that they can be supported only if it is accepted that the law is concerned with immorality as such.

14. The widest of the special circumstances are described as the provision of 'sufficient safeguards
against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.' The corruption of youth is a well recognized ground for intervention by the State and for the purpose of any legislation the young can easily be defined. but if similar protection were to be extended to every other citizen, there would be no limit to the reach of the law. The 'corruption and exploitation of others' is so wide that it could be used to cover any sort of immorality which involves, as most do, the co-operation of another person. Even if the phrase is taken as limited to the categories that are particularized as 'specially vulnerable', it is so elastic as to be practically no restriction. This is not merely a matter of words. For if the words used are stretched almost beyond breaking-point, they still are not wide enough to cover the recommendations which the Committee make about prostitution.

15. Prostitution is not in itself illegal and the Committee do not think that it ought to be made so. If prostitution is private immorality and not the law's business, what concern has the law with the ponce or brothel-keeper or the householder who permits habitual prostitution? The Report recommends that the laws which make these activities criminal offences should be maintained or strengthened and brings them (so far as it goes into principle; with regard to brothels it says simply that the law rightly frowns on them) under the head of exploitation. There may be cases of exploitation in this trade, as there are or used to be in many others, but in general a ponce exploits a prostitute no more than an impresario exploits an actress. The Report finds that 'the great majority of prostitutes are women whose psychological makeup is such that they choose this life because they find in it a style of living which is to them easier, freer and more profitable than would be provided by any other occupation.... In the main the association between prostitute and ponce is voluntary and operates to mutual advantage.' The Committee would agree that this could not be called exploitation in the ordinary sense. They say: 'It is in our view an over-simplification to think that those who live on the earnings of prostitution are exploiting the prostitute as such. What they are really exploiting is the whole complex of the relationship between prostitute and customer; they are, in effect, exploiting the human weaknesses which cause the customer to seek the prostitute and the prostitute to meet the demand.'

16. All sexual immorality involves the exploitation of human weaknesses. The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute. If the exploitation of human weaknesses is considered to create a special circumstance there is virtually no field of morality which can be defined in such a way as to exclude the law.

17. I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without. Here again I think that the political parallel is legitimate. The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate 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 the 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. It is wrong to talk of private morality or
of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. 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. 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 home, is any one 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? You cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate against drunkenness. The same may be said of gambling...

18. But - and this brings me to the third question - the individual has a locus standi too; he cannot be expected to surrender to the judgement of society the whole conduct of his life. It is the old and familiar question of striking a balance between the rights and interests of society and those of the individual. This is something which the law is constantly doing in matters large and small. To take a very down-to earth example, let me consider the right of the individual whose house adjoins the highway to have access to it; that means in these days the right to have vehicles stationary in the highway, sometimes for a considerable time if there is a lot of loading or unloading. There are many cases in which the courts have had to balance the private right of access against the public right to use the highway without obstruction. It cannot be done by carving up the highway into public and private areas. It is done by recognizing that each have rights over the whole; that if each were to exercise their rights to the full, they would come into conflict; and therefore that the rights of each must be curtailed so as to ensure as far as possible that the essential needs of each are safeguarded.

19. There must be toleration of the maximum individual freedom that is consistent with the integrity of society... Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation. Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice. I suppose that there is hardly anyone nowadays who would not be disgusted by the thought of deliberate cruelty to animals. No one proposes to relegate that or any other form of sadism to the realm of private morality or to allow it to be practiced in public or in private. It would be possible no doubt to point out that until a comparatively short while ago nobody thought very much of cruelty to animals and also that pity and kindliness and the unwillingness to inflict pain are virtues more generally esteemed now than they have ever been in the past. But matters of this sort are not determined by rational argument. Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting that he was doing wrong. It is the power of a common sense and not the power of reason that is behind the judgements of society.