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Morals and the Criminal Law

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." The Report stressed, almost in Mill's language, "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality."

In the public debate that followed publication of the Report, Lord Devlin, a distinguished jurist, opposed its principles (though not, all the specific recommendations) while Professors H. L. A. Hart, Ronald Dworkin, and Richard Wollheim supported them. At the heart of the controversy was the distinction between "public" and "private" and, more broadly, the relationship between law, liberty, and morality.

A selection from Lord Devlin's argument (1958) follows.

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 problems, 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,

t From Patrick Devlin, *The Enforcement of Morals* (London, 1965), pp. 125. 1. "Immorality and Treason," The *Ustener,* 62 (July 30, 1959), 162-63, *Law, Liberty and Morality (London,* 1963). and The *Morality of* the *Criminal Law* (Jerusalem, 1965). 2. "Lord Devlin and the Enforcement of *Morals,"*

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?

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.

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.

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.

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. It must be remembered also that although there is much immorality that is not punished by the law, there is none that is condoned by the law. The law will not allow its processes to be used by those engaged in immorality of any sort. For example, a house may not be let for immoral purposes; the lease is invalid and would not be enforced. But if what goes on inside there is a matter of private morality and not the law's business, why does the law inquire into it at all?

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.

* * * 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?

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 co11ective 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.

The language used in the * * * Wolfenden Report suggests the view that there ought not to be a collective judgement about immorality *per* se. Is this what is meant by 'private morality' and 'individual freedom of choice and action'? Some people sincerely believe that homosexuality is neither immoral nor unnatural. Is the 'freedom of choice and action' that is offered to the individual, freedom to decide for himself what is moral or immoral, society remaining neutral; or is it freedom to be immoral if he wants to be7 The language of the Report may be open to question, but the conclusions at which the Committee arrive answer this question unambiguously. If society is not prepared to say that homosexuality is morally wrong, there would be no basis for a law protecting youth from 'corruption' or punishing a man for living on the 'immoral' earnings of a homosexual prostitute, as the Report recommends. This attitude the Committee make even clearer when they come to deal with prostitution. In truth, the Report takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution. What the Report seems to mean by private morality might perhaps be better described as private behaviour in matters of morals.

This view—that there is such a thing as public morality—can also be justified by a *priori* argument. 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. * * *

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.

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. But public morality is not to be confined to those moral principles which support institutions such as marriage. People do not think of monogamy as something which has to be supported because our society has chosen to organize itself upon it; they think of it as something that is good in itself and offering a good way of life and that it is for that reason that our society has adopted it. 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 a out 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.

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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.

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.

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.

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.' '

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.

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. * * *

In what circumstances the State should exercise its power is the third of the interrogatories I have framed. But before I get to it I must raise a point which might have been brought up in any one of the three. How are the moral judgements of society to be ascertained? By leaving it until now, I can ask it in the more limited form that is now sufficient for my purpose. How is the law-maker to ascertain the moral judgements of society? It is surely not enough that they should be reached by the opinion of the majority; it would be too much to require the individual assent of every citizen English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street—or to use an archaism familiar to all lawyers—the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. * * *

Immorality then, for the purpose of the law, is what every right- minded person is presumed to consider to be immoral. Any immorality IS capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its *locus standi.* It cannot be shut out. 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.

I do not think that one can talk sensibly of a public and private morality any more than one can 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. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be

designed to circumscribe the operation of the law making power but to guide those who have to apply it. * **

I believe that most people would agree upon the chief of these elastic principles. There must be toleration of the maximum individual freedom that is consistent with the integrity of society. * * * It is not confined to thought and speech; it extends to action, as is shown by the recognition of the right to conscientious objection in war-time; this example shows also that conscience will be respected even in times of national danger. The principle appears to me to be peculiarly appropriate to all questions of morals. 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 arc 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.

But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society. There is, for example, a general abhorrence of homosexuallty. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious, it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. * * *

The limits of tolerance shift. * * * I suppose that moral standards do not shift: so far as they come from divine revelation they do not, and I am willing to assume that the moral judgments made by a society always remain good for that society. But the extent to which society will tolerate—I mean tolerate, not approve -- departures from moral standards varies from generation to generation. * * * Laws, especially those which are based on morals, are less easily moved. It follows as another good working principle that in any new matter of morals the law should be slow to act. By the next generation the swell of indignation may have abated and the law be left without the strong backing which it needs. But it is then difficult to alter the law without giving

the impression that moral Judgement is being weakened. This is now one of the factors that is strongly militating against any alteration to the law on homosexuality.

A third elastic principle must be advanced more tentatively. It is that as far as possible privacy should be respected. * * * The police have no more right to trespass than the ordinary citizen has; there is no general right of search; to this extent an Englishman's home is still his castle. * * *

This indicates a general sentiment that the right to privacy is something to be put in the balance against the enforcement of the law. Ought the same sort of consideration to play any part in the formation of the law. Clearly only in a very limited number of cases. When the help of the law is invoked by an injured citizen, privacy must be irrelevant; the individual cannot ask that his right to privacy should be measured against injury criminally done to another. But when all who are involved in the deed are consenting parties and the injury is done to morals, the public interest in the moral order can be balanced against the claims of privacy. The restriction on police powers of investigation goes further than the affording of a parallel; it means that the detection of crime committed in private and when there is no complaint is bound to be rather haphazard and this is an additional reason for moderation. These considerations do not justify the exclusion of all private immorality from the scope of the law. I think that, as I have already suggested, the test of 'private behavior' should be substituted for 'private morality' and the influence of the factor should be reduced from that of a definite limitation to that of a matter to be taken into account. Since the gravity of the crime is also a proper consideration, a distinction might well be made in the case of homosexuality between the lesser acts of indecency and the full offence, which on the principles of the Wolfenden Report it would be illogical to do. The last and the biggest thing to be remembered is that the law is concerned with the minimum and not with the maximum; there is much in the Sermon on the Mount that would be out of place in the Ten Commandments. We all recognize the gap between the moral law and the law of the land. No man is worth much who regulate his conduct with the sole object of escaping punishment, and every worthy society sets for its members standards which are above those of the law. We recognize the existence of such higher standards when we use expressions such as 'moral obligation' and 'morally bound.' ,' * *

—It can only be because this point is so obvious that it is so frequently ignored. Discussion among law-makers, both professional and amateur, is too often limited to what is right or wrong and good or bad for society. There is a failure to keep separate the two questions I have earlier posed—the question of society's right to pass a moral judgement and the question of whether the arm of the law should be used to enforce the judgement. The criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave; good citizens are not expected to come within reach of it or to set their sights by it, and every enactment should be framed accordingly.

The arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one. Since it is an instrument, it is wise before deciding to use it to have regard to the tools with which it can be fitted and to the machinery which operates it. Its tools are fines, imprisonment, or lesser forms of supervision (such as Borstal and probation) and—not to be ignored—the degradation that often follows upon the publication of the crime. Are any of these suited to the job of dealing with sexual immorality? The feet that there is so much immorality which has never been brought within the law shows that there can be no general rule. It is a matter for decision in each case; but in the case of homosexuality the Wolfenden Report rightly has regard to the views of those who are experienced in dealing with this sort of crime and to those of the clergy who are the natural guardians of public morals.

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This then is how I believe my third interrogatory should be answered—not by the formation of hard and fast rules, but by a judgement in each case taking into account the sort of factors I have been mentioning. The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle. It is like a line that divides land and sea, a coastline of irregularities and indentations. There are gaps and promontories, such as adultery and fornication--which the law has for centuries left substantially untouched. Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment. All that the law can do with fornication is to act against its worst manifestations; there is a general abhorrence of the commercialization of vice, and that sentiment gives strength to the law against brothels and immoral earnings. There is no logic to be found in this. The boundary between the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sort of considerations I have been outlining. The fact that adultery, fornication, and lesbianism are untouched by the criminal law does not prove that homosexuality ought not to be touched. The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.

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I return now to the main thread of my argument and summarize it. Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves. A rational man, who is also a good man, may have other standards. If he has no standards at all he is not a good man and need not be further considered. If he has standards, they may be very different; he may, for example, not disapprove of homosexuality or abortion. In that case he will not share in the common morality; but that should not make him deny that it is a social necessity. A rebel may be rational in thinking that he is right but he is irrational if he thinks that society can leave him free to rebel.