MURDOCH UNIVERSITY

MURDOCH, WESTERN AUSTRALIA

TENTH MURDOCH LECTURE

TUESDAY 13 SEPTEMBER 1983

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Chairman of the Australian Law Reform Commission *

WALTER MURDOCH TODAY

Such is the relentless movement of time and the years, that Walter Murdoch is for me a name, not a person. I was born in the year he retired from the Chair of English at the University of Western Australia in 1939. By that time he was 65. He went on to continue his service to the University as a Senator and as Chancellor.[1] He had come to the University as one of the first professors in 1913. Through his hands passed generations of educated and civilised citizens of this State. He was a scholar of our century.

It was really after his retirement, and during my childhood, that he flourished as a public man. What a commentary it is on to-day's calls for early retirement, that Walter Murdoch's writing was read even more widely after he was 70, than before.[2] There is a view in some educated circles (including, alas, in the legal profession) that attempts by educated people to communicate their thoughts to the general public are somehow in bad taste. At the heart of this misconception is the purest form of intellectual snobbery. Attempts to talk about difficult, complicated and technical matters for a general audience are bound to result in over-simplification. Therefore, so it is said, we should not try. We should content ourselves in debate with each other, with scholars and with the learned. Walter Murdoch would have none of this. In 1945 he commenced writing a weekly article in answer to questions posed by the general public. He was engaged in this enterprise for nearly 20 years. Listen to the typical comments he made, when this venture was criticised by a colleague:

> Such a lot of people have said or hinted to me that to write such things is beneath my dignity. I explain that I haven't any dignity. Anyhow, those disjointed notes are bringing me into contact with a lot of minds the reverse of academic, and it's doing me good, whether it does them good or not.[3]

According to Professor La Nauze, who inaugurated this lecture series, Murdoch offered his comments, in answer to readers' questions, with a consistent liberalism that gave the effort an intellectual coherency:

> Of course, he selected the questions he chose to answer. I suspect he even made some up, so he could, for instance, speak out on the Constitutional Referendum of 1951 which presented a cruel dilemma to men of liberal and democratic mind. Serious questions were taken seriously, difficult questions were not shirked. Some of the 'Answers' provoked virulent or even libellous abuse, since Murdoch honestly asserted his own humane and liberal values. But as he knew too well the suburban spirit takes many forms.[4]

In the same marvellous biographical note, Professor La Nauze offers two of Murdoch's ideas, in his own words. They are relevant to my theme tonight. Indeed, I take them as my text:

> Do not tamely acquiesce in what your elders say, and meekly imitate what your elders do, and unquestioningly adopt the life mapped out for you by the wisdom of your elders.

And further

> ... There are two sides to every question. I have always believed that to insist on this truth, in season and out of season, is to play one's humble part in civilising one's country. For a civilised country is a country which weighs, without heat, without passion, without violence, both sides of a question.[5]

I try to follow these precepts in my own life. Indeed, the whole effort of the Australian Law Reform Commission is devoted to putting into practice these wise and kindly words of instruction. I draw four principles at least from Walter Murdoch's life and writings:

* Strive boldly to do new things — and do not be deterred by the doubters and the critics who suggest that the task (whether reform of the law or establishing a new university in an isolated and rustic community) is oppressive, daunting and even impossible.

* Do not believe that the educated scholar has nothing to learn from the ordinary citizen — or nothing to impart to him. Murdoch in his weekly column and the Law Reform Commission in its efforts to engage public attention to the injustices and inefficiencies of the law, embrace a common philosophy. It is that, ultimately, those who have been blessed with the gifts of high intellect and learned education must share those gifts. This is not paternalism or condescension. It is the obligation that comes from the fact that we live together in a civilised community.

* Whilst accepting the learning and wisdom of the past — of the 'elders' in Murdoch's words or of the great judges of our eight-century tradition, in the case of law reform — we should not be afraid, in this generation and in a time of great change, to take new directions. We are not the victims of our ancestors : helpless captives to the past. We are free individuals, joined in a community with a high measure of self-direction and open government.

* Finally, we should not shirk difficult questions. We should confront them openly, honestly and doing the best we can with them. But we should do so in a temperate spirit, realising that there are often competing points of view. So far as may be, we should seek to reconcile points of difference. But where fundamental differences remain, there should be no crass effort to suppress legitimate conflicts in bland 'double speak'. That is the most awful prospect of Orwell's nightmare. Instead, we should debate hard issues openly and honestly and, in the end, commit the resolution of differences to the decision of an informed community.

Any of you who know even a little about the work of the Australian Law Reform Commission will realise why I strongly empathise with the philosophy of Murdoch. It is a confident, optimistic philosophy. One would have expected nothing else from the ninth son and fourteenth and last child of the Reverend James Murdoch. James, as a young man of 26, had 'come out' into the Free Church at the disruption of the Church of Scotland in 1843.[6] I suspect that James Murdoch, confident in his simple Scottish faith, would have found most disturbing the matters I will address tonight. But I am sure that Walter would have applauded my chosen topic. Indeed, I feel that his spirit is with me — encouraging me to look at the sensitive and controversial issues I plan to tackle. I will seek to remember his instruction that on all of them there are two sides to the question — and possibly more. In a university worthy of his name, we should not retreat from the legitimate participation in public controversy. This remains the way in which our civilisation is pushed forward. In Australia, it remains a unique institutional function of our universities to stimulate public controversy. Unhappily, this is a function that is insufficiently performed.

MORALITY AND LAW : OLD DEBATE

Many people think of the law as some kind of elaborated Ten Commandments. They conceive of its rules as a kind of elaborated set of instructions on morality. Of course, there is and always has been an interaction between perceptions of morality and rules of law. Even the most primitive societies soon develop rules of law which reflect common perceptions of right and wrong. Protection of the lives of citizens, protection of their person against injury, protection of their immediately surrounding property and later protection of their reputations and transactions. These are the ways in which a legal system develops. The English legal tradition, which remains the basis of the Australian law, began in a close association between the Church and the Bench. The influence of specifically Christian and particularly Anglican Church teachings upon the substantive law persisted long after the all but formal separation of Church and State. Indeed, it is only in recent times that, with growing assertiveness, the English and Australian communities are moving away from the legal enforcement of morality in a number of spheres. The dilemma of our generation is how far this movement should go? To that dilemma the marvels of technology are now adding many new questions. They are certainly difficult ones. They challenge the 'humane and liberal values' in an even more acute way than did the anti-Communist referendum of 1951. At stake is not only the tranquility of political man but the future of humanity, fashioned as some would say in the image of God.

Of course, the reality of the modern legal system is that there are many rules which are morally neutral. It is usual to cite the side of the road we drive on. In terms of morality, it does not really matter whether it is the right or the left, so long as there is a rule which is obeyed in the interest of the motorist and pedestrian. I feel this illustration is no longer entirely value free. When Argentina invaded the Falkland Islands, the first thing the conquerers insisted upon was that the peaceful kelpers should immediately change and drive their few tractors and other vehicles on the right. Doubtless the Argentinian commander did this in order to ensure that a tractor would not collide with a troop lorry. But few instructions could have so mobilised British opinion. Somehow, driving on the right seemed terribly foreign — the ultimate insult to British people and a fate so awful that a rescue operation had immediately and triumphantly to be organised.

But the point is properly made at the outset. The law is not simply an elaborated system for the enforcement of morality. The overwhelming bulk of the law is morally neutral. It simply establishes rules for peaceful co-existence and for the peaceful resolution of conflict. Often perceptions of 'justice', 'fairness', 'due process'

and so on permeate the design of the rules. But for the most part, the rules themselves are morally uncontentious. They may be ineffective, inefficient, cumbersome or inaccessible. But most of them would never generate a debate about morality.

There is, for all this, a small and fairly readily identified area where the circles of the law and morality intersect. I refer especially to the role of the law in enforcing perceptions of 'sin' through the criminal law. The limits of the law's function in the enforcement of morals has been generally accepted for some time in the English legal tradition. Thus, punishment for adultery (still common in Islamic and primitive societies) has long since disappeared from the English criminal calendar. But it was not until 1975, with the passage of the Family Law Act, that it was removed entirely from the divorce law on the Australian legal scene. Fornication, so frequently denounced in the Judeo-Christian morality, is not, as such, a criminal offence. It is perhaps as well that this is so. We would certainly not have the resources to tackle so large a class of offenders. However, the assertion of a new principle for the proper division between the criminal law and Judeo-Christian perceptions of morality was made in its most telling modern form by the celebrated Wolfenden Committee which in 1957 recommended changes in English law on criminal penalties for certain homosexual practices. These practices were (and in many parts of Australia still are) punishable by the severest criminal penalties. But it was the Wolfenden Committee which nailed to the mast a new flag. It is this flag that is increasingly triumphant. This was their assertion:

> [The law's] function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive of injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not in our view the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes which we have outlined ... [T]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[7]

This assertion, in 'brief and crude terms', of the limited function of the law in the enforcement of private morality was not a sudden invention of the members of the Wolfenden Committee, distinguished though they were. It traced its lineage to the teachings of Jeremy Bentham and John Stuart Mill. It is the principle of the Wolfenden report, and its application in many areas of morality presently still reflected in the criminal law, that is the focus of a great deal of public discussion -- and even political debate and discussion in our country.

In New South Wales the former Speaker of State Parliament, Mr Jim Cameron, has resigned from the Liberal Party and joined the Reverend Fred Nile in the 'Call to Australia' political team. Mr Cameron described himself as a 'watchdog for community values' and 'an activator, a detonator of the new surge of moral values'[8]:

> There is a tremendous surge of the old values flooding back, as it is seen that the emptiness of the permissive society has yielded nothing of substance ... Muscular Christians, as I call them. You see them on the beaches, you see them all over the place. This man here [Mr Nile] has fire in his belly and, I make no bones about it, I have fire in my belly.[9]

Mr Cameron told the New South Wales Parliament on 18 August that he intended to propose a motion to 'show whether or not this is a Parliament which accepts Jesus Christ as its Lord and Master'.[10] Consistent with this approach to the interaction between perceived Christian values and lawmaking, Mr Nile endeavoured to get the Australian Broadcasting Tribunal to ban a documentary 'Kids of the Cross' which portrayed the lifestyle of young unemployed people in Sydney's King's Cross district.[11] Mr Nile and Mr Cameron are hard at work campaigning against the equal rights legislation promised by the Federal Government. There are equivalent moves in all parts of Australia to mobilise what is boldly called the 'moral majority'. Supporters constantly refer to the evidence that Australians are still, overwhelmingly, theist and not humanist. They refer to the high proportions who give a stated a religion in the Census form. They could also refer to the findings of the recent Australian Gallup Poll which disclosed that 81% of Australians believe in God, 15% do not believe in God and 4% are unsure.[12] According to the same poll, 55% of Australians believe in life after death; 34% do not believe in life after death; 70% believe that the Bible contains the authentic Word of God, 42% believe in the devil. This poll shows a slight slippage since the last poll was conducted in 1974 but reports:

> Belief in all four tenets of faith were expressly strong amongst Roman Catholics and Baptists and amongst recent churchgoers. [They] were also somewhat stronger amongst Liberal National Party voters than ALP voters. Few significant differences occurred by States or between city and country areas.[13]

So this is the Australian society we have. And because British society was very similar, the conflict between the Wolfenden principle and society's adherence to Christian values led critics to question whether Wolfenden and his colleagues had got it right.

Among the most distinguished Wolfenden critics was Lord Devlin, one of the finest English judges of this century. In a lecture soon after the Wolfenden report, he asserted that the effort to withdraw the law from a realm of private morality had led him to the conviction that the Wolfenden ideal was not only questionable but wrong. Lord Devlin argued that society has a right to punish conduct of which its members strongly disapprove, even though that conduct has no effects which can be deemed injurious to others. The basis of the right to punish is that the State has a role to play as moral tutor. The criminal law is the proper 'tutorial technique' of the State in upholding the strongly held perceptions of morality shared by its people. Commentators from the opposing poing of view have regarded this as an 'eccentric' point of view.[14] But it is certainly not regarded as eccentric by Mr Cameron and Mr Nile -- or by their thousands of supporters in Australia. It is not regarded as 'eccentric' by the proponents in Ireland of the constitutional change recently approved at referendum, which will enshrine in that country's basic law the moral position of the Roman Catholic Church in respect of abortion. The basic argument is that society has a right to protect its own existence. The majority, so it is said, has a right to follow its own moral convictions in defending the social environment from changes which the majority oppose -- however much others -- most closely affected -- want to be let alone by the law.

Lord Devlin's assertion that the right of society to enforce its perceptions of morality through the criminal law acknowledged that there were occasions where the law should stay its hand. It should do so where it detected uneasiness or half-heartedness or latent toleration in society's condemnation of a practice. But where public feeling was high, enduring and relentless, where it gave rise to 'intolerance, indignation and disgust'[15] society's right to act through the criminal law could not be denied. Lord Devlin applied this thesis to homosexuality. If it was genuinely regarded as an abominable vice, society could and should act through its criminal law, to punish the unacceptable.

Devlin's assertion provoked Professor H L A Hart to respond. He contended that the distinguished Law Lord's criticisms rested on a confused conception of what society is. According to Hart there was simply no evidence to support a threat to society, or its danger from the private conduct of a minority group. Furthermore, society consists not just of a mixture of variable individuals but of a complex of moral ideas and attitudes which its members happened to hold at a particular moment of time. It was intolerable, according to Hart, that such a moral status quo should have the right to preserve its precarious existence by force.[16] Lord Devlin returned to this debate. He joined issue:

> I do not assert that <u>any</u> deviation from society's shared morality threatens its existence any more than I assert that <u>any</u> subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.[17]

This debate attracted many commentators. Professor Ronald Dworkin, for example, offers this view:

> Lord Devlin concludes that if our society hates homosexuality enough it is justified in outlawing it, and forcing human beings to choose between the miseries of frustration and persecution, because of the danger the practice presents to society's existence. He manages this conclusion without offering evidence that homosexuality presents any danger at all to society's existence, beyond the naked claim that 'deviations from a society's shared morality ... are capable in their nature of threatening the existence of society'.[18]

This, then, is an intellectual background for an ongoing modern debate. It is a debate with relevance far beyond laws on homosexual conduct. In a country whose overwhelming majority still say they believe in God and accept the hereafter and the Bible, should the criminal law remain a mechanism for the enforcement of aspects of personal morality taught by the organised expositors of the religious beliefs of the majority? Or is there a limit which is, crudely and bluntly, not the law's business? The battle lines are drawn. The debate continues. We have seen many signs of the debate in Australia in recent months.

CONTEMPORARY AUSTRALIAN DEBATE

<u>Gambling</u>. Take, for example, our laws on gambling. Now, you and I may regard gambling as the very definition of boredom. Yet for many Australians, deprived of any real prospect of earning wealth by years of patient achievement, gambling represents a tiny, pathetic, ray of hope. The prospect of winning the lottery, backing the Trifecta, guessing the Lotto, seeing his dog come home — these are the dreams of suburban Australians. Last week it was reported that in Queensland a lizzard was sold for more than $1000 — because it raced well. Australians just like to gamble and I would not be surprised if a dollar or two changed hands over the America's Cup races. Yet the law circumscribes gambling in Australia in detailed, complex and institutionalised ways. There are special gaming squads, police full-time engaged in upholding laws on gambling. A recent review by the South Australian Law Reform Committee disclosed the curious way in which many old English laws designed to suppress the gambling spirit may still exist in Australia. Royal tennis, for example, outlawed as a questionable sport in the reign of King Henry VIII, is probably still illegal in some parts of this country.[19]

This might be amusing, were it not for the differential application of the law on people amazed to find that a card game at home was a criminal offence. On 28 February 1983, the Special Gaming Squad in New South Wales burst into the Coogee home of a leading Australian jockey, Malcolm Johnston. The people present were hauled before the Central Court. Their names and ages were published in all the local newspapers. Their offence? Playing an unlawful game of manilla. At first they thought someone was playing a joke on them, when the police arrived. Solemnly Sergeant Bushell of the Special Gaming Squad entered with his warrant and seized a quantity of playing cards and chips, a fine of $100 was imposed on the 'ring leader'. Fines and bonds were imposed on the others. Matilda Malouf, 68, home duties of Major Street, Coogee, was excused you will be pleased to hear, the magistrate not proceeding to conviction because of her age.

What an astonishing and remarkable case this is. How clearly does it raise the debate about the limits of the enforcement of morality? What business is it of the law to send its hard-pressed and expensive officers into a peaceful home of people playing a card game — however foolish and tiresome? Is this really a matter of enforcing the outraged sentiments of an angry, moral Christian people opposed to the wickedness of gambling? What was so antisocial about their conduct that it warranted the intrusion into a private home by the agencies of the State?

Is it the inability of the State to tax such a private gambling activity that necessitates the continuance of this law? Or is it, more likely, merely the persistence of a law designed to reflect earlier attitudes of society, still with us because no-one would both to address its reform?

Soon after this 'raid' the report of Justice Xavier Connor into the establishment of a casino in Victoria was published. The report rejected the casino on broad social and economic grounds. Yet this rejection did not depend upon the religious ground that gambling was evil in itself.[20] The Roman Catholic journal in Melbourne, The Advocate, commented:

> Is this good enough? Some might feel that the main goal of the Churches was to obtain the recommendation that the new type of gambling be not introduced into Victoria, and that the grounds upon which this was achieved, provided they were respectable, were immaterial. But this evaluation would not satisfy everyone. Many churchmen and women would feel that it was a loss to the prophetic function of the Churches that moral arguments based on religious grounds were dismissed. Even worse, it creates a precedent for dismissal of the religious contribution to subsequent inquiries ...[21]

The Victorian Government accepted the Connor recommendation. But the conclusions of Justice Connor were questioned by the Melbourne Age:

> Those expressing a conservative viewpoint appear to have been better organised and better briefed than their opponents ... [W]e believe Mr Connor has taken an unduly pessimistic view of the ability of society to cope with problems that might arise from the introduction of casinos. If society can handle other forms of gambling, and there are many in this State, why should it not be able to absorb casinos under strict government controls? Should not an individual have a right to patronise whatever form of gambling he chooses, provided it is not harmful to others.[22]

There you have it. On the one hand, The Advocate asserts the right of people with a religious viewpoint of fundamental morality to have their opinions reflected in the law against gambling as such. The secular newspaper asserts, almost in the language of J S Mill: If it is a 'self regarding' activity [if it does not harm others] what business is it of the law to intervene and prevent a person pursuing that activity?

Nude bathing. As if in compensation for the rejection of the casino, the Victorian Government announced immediately the establishment of a separate inquiry into poker machines. That inquiry is now proceeding in Victoria. Interestingly, on 2 September 1983, the New South Wales Government forbade police experts from giving evidence or to speak on matters of policy or to express private views.[23] 'We don't want these Victorians digging around' was the interpretation of counsel assisting the inquiry. Also in apparent compensation for the hard line taken on casinos was the announcement that Victoria is planning to open up a number of beaches for nude bathing. A Nudity (Prescribed Areas) Bill was introduced into the Victorian Parliament. Reflecting the ambivalence of society to such matters, the Melbourne Sunday Observer published a solemn 'Case against nude beaches' beside a near-nude bathing beauty asserting 'nude bathing is OK in private'.[24] Nude beaches are permitted in a number of the warmer Australian States. But here again representatives of the 'moral majority' attacked the proposed changes of the law. It is not enough, for them, that the beach should be isolated, that the area should be well marked, that a minority should want the facility or even that evidence should establish no link between such beaches and crime. To them it is offensive that immodesty should be condoned. It threatens the tradition of modesty. And it may become catching — diverting young people especially from chaste behaviour into the promiscuous habits that are found so unacceptable. It is on this basis that the opponents assert the right to continue the prosectution of public indecency and to do so even where the only people offended by the nudity are those sitting safely in their homes contemplating with horror the decline and fall of our civilisation in the sunshine.

Pornography. What of pornography? Australians are spending more on video cassettes per capita than Americans. It is expected that half a million video cassette recorders will be sold in Australia this year. According to industry sources in July 1983, pornography, distributed by major companies, comprises about 10% of the video cassette market in this country.[25] The proportion of the market devoted to pornography is growing rapidly in the United States and is now a major sector of the cable television industry. Federal and State Attorneys-General of Australia meeting in July 1983 agreed to a plan that would see hard core videos given a special 'X' classification -- on the basis that they are in a class that would not be accepted even in cinema 'R' classifications. Sale of X-rated video cassettes would be prohibited to minors. But so long as the video was classified, the new code would exempt retailers from prosecution under current obscenity laws for sale to consenting adults.

This approach to so-called 'adult entertainment' secured the approbation of a number of editorialists. The Sydney Morning Herald commented:

> One of the effects of the new proposals ... will be a change in how 'indecent', in this context, is defined. The issue will be taken out of the courts and given to the Film Censorship Board. If the Board sees its role as being mainly a rating service rather than a banning agency, the change should have the satisfactory result of restoring some order to what has become a disorderly business. A great deal will depend on the judgment of the official censors. A policy of rigorous censoriousness needs to be balanced by the fact that, whether one likes it or not, it is pointless to ban video material that can be seen live in theatres in King's Cross and Oxford Street.[26]

However, though that may be the view of an earnest editor, the laws remain unreformed. Six weeks earlier, a motel proprietor in a country town in New South Wales, was charged with screening pornographic films late at night on closed circuit television to guests in the motel. The chief of the Sydney CIB Vice Squad, Detective Inspector Shepard, said that the squad had stayed at the motel in Western New South Wales and had been told that a blue movie 'service' was available in the rooms on specific request. Twelve people were charged under the Indecent Articles and Classified Publications Act. A large quantity of video tapes was confiscated.[27]

In Britain, Mrs Thatcher announced in July 1983 that legal curbs on the sale of pornographic video tapes would be introduced. She made this announcement after a Conservative MP, Mr John Townend, spoke of 'growing public concern about the availability of video tapes featuring hard pornography'.[28]

Between Mrs Thatcher's approach to ban and criminally punish video pornography and the Australian Attorney-Generals' approach, to classify, prohibiting only very few, is a world of difference. It is the difference between the Devlin assertion of the right of organised society to enforce its moral code and the Wolfenden claim that this right has its limits. Wolfenden would say that if adult people in a lonely country hotel room deliberately choose to take access to video pornography -- without having it forced upon them unwillingly -- that is their affair. So long as they are adults and in private, the State should simply mind its own business. Mrs Thatcher and her government feel otherwise. They fear, presumably, the erosion of public morality, the destruction of 'right thinking' attitudes and the propogation of unhealthy sexual desires. One's response to these debates depends in part upon the view taken of the proper limit of the criminal law and of the power of the organised State.

Prostitution. The same debate continues in relation to prostitution. In Victoria a working party has been established to recommend how to use planning controls to regulate the location of massage parlours, often but not always, associated with prostitution.[29] In New South Wales a State Parliamentary Committee is investigating prostitution.[30] This investigation follows the statement in March 1983 by the New South Wales Premier, Mr Wran. Mr Wran told State Parliament that no law would wipe out sex and prostitution and that it was better to contain prostitution in the Darlinghurst area of Sydney:

> They were here from the arrival of the First Fleet and they will be here forever.[31]

The Opposition introduced a Bill to give police greater powers in dealing with prostitutes and urged the government to 'harass and drive out' the prostitutes in Darlinghurst. Mr Wran said that prostitution was 'a safety valve for the protection of women of the city'.[32] According to Mr Tim Moore, the Opposition spokesman, there were at least 103 brothels within the Sydney City Council area. The government admitted to only 34 transexual and female prostitutes. But Mr Moore was unconvinced:

> [They] would have to be olympic marathon athletes to cover the brothels counted by the Ombudsman.[33]

In a number of parts of Australia, local residents, anxious about the establishment of new massage parlours in residential areas, have taken to local protests and even photography of clientele.[34] Armed with placards reading 'Purity Not Pleasure', 'Illicit Sex is Wicked' and 'Think God', a group of 25 citizens spent a number of cold evenings in August 1983

outside a new massage parlour in a Melbourne suburb. With a certain relish, the Sunday Telegraph reported that the owner of the establishment, Malcolm Childs, claimed that the publicity generated would do him 'nothing but good'.[35] Meanwhile hundreds of good citizens continue to keep the prostitutes in business.

So far as I have seen, no-one has yet asserted the Wolfenden principle to the New South Wales inquiry. Safer by far to refer to practicalities. It cannot be wiped out. It protects decent women. It is a kind of public service. Had he been asked, I feel sure Lord Wolfenden would have said: 'So long as it is in private and between adults, it is simply not the law's business. Attempts to enforce the law will fail, will be enforced in an idiosyncratic way and will undermine respect for the law and the honesty of its officials.' Notably yesterday afternoon the Sydney banner headlines claimed that police were receiving what were called 'freebies' from Sydney prostitutes — presumably to turn a blind eye.

Drugs. Moves towards the Wolfenden approach on drug laws can also now be seen cautiously, timidly in Australia. In Victoria, the State Government introduced new legislation on marijuana. The Bill does not legalise the possession of marijuana. Nor does it condone its cultivation in small quantities. These remain criminal offences, though of a relatively minor order. The approach of the Victorian Government is substantially to reduce the penalties for the possession of marijuana, separating completely the penalties incurred for the private use of the drug and those incurred for trafficking in it.[36] Soon after this announcement, the South Australian Health Minister, Dr Cornwell, said he would support a motion, and would consider introducing a Private Member's Bill, to reform South Australian laws on private use of marijuana.[37] The Federal Minister for Health, Dr Blewett, said he would consider calling a meeting of Federal and State Attorneys-General and Health Ministers to consider reform of marijuana laws. The Leader of the Opposition in Queensland is reported as saying that the Party there would move, if elected, to decriminalise the smoking of marijuana and to remove the stigma and job loss that now occurred with convictions involving the drug.[38] A call was made for introduction of the Victorian reforms in New South Wales. But one unnamed government source declared:

> If we can't even get homosexuality decriminalised, how can anyone possibly expect the decriminalisation of marijuana?[39]

Legalisation of marijuana for personal use was strongly opposed by the Police Department in New South Wales. And the State Minister for Health announced that the criminal laws would not be changed.[40]

An attempt last year by the Australian Foundation on Alcoholism and Drug Dependence to promote a serious national debate on Australia's laws on marijuana failed. It was undermined by extravagant press coverage and inflammatory, scaremongering, ill-informed commentary by people who should have known better. Yet nowhere in that debate did anyone really tackle the central issue of principle raised by the Wolfenden report. I know of no-one in the anti-smoking lobby to-day who would suggest that the destructive effects of nicotine and alcohol should be forbidden in the private home. The experiment in alcohol Prohibition in the United States was a brave one. But it ultimately collapsed because it could not be enforced and was producing too many undesirable social consequences. Even those who would forbid smoking in public places and endeavour to curtail advertising of smoking, particularly in conjunction with sporting events[41], would normally concede the right of smokers and drinkers to pursue their activities, if adults, in private. Should not this same principle apply in the case, at least, of marijuana?

I am second to none in my opposition to smoking in public. It invades my space. I have my rights. I am entitled to look to society to protect my space and my rights. But in private, is it the law's business? Do we pay too high a price for this endeavour to enforce but a segment of private morality about drug use? Do we undermine respect for the rule of law by the differential way in which we allow social acceptability to some drugs yet seriously punish others? In a time of unemployment, is the criminal conviction too high a penalty on young people, blighting their careers? Is the difference between the criminal law and perceptions of morality among young people encouraging breaches of the law, alienating them from law-abiding society, inspiring bravado cause the destruction of police morale and even undermine the honesty and integrity of public officials? If these things happen they are high prices to pay. But for some, they are worth paying, for they underline the right of a moral community to prevent further erosion of right conduct by the spread of more drugs.

Bioethics. And as if these difficult problems were not controversial enough, now, our generation is faced by numerous bioethical quandaries:

* Should we permit in vitro fertilisation or is this 'unnatural' creation of human life in a test tube demeaning and destructive of the 'Creator's order of things?'
* Should we permit the scientist to take us down the track of cloning of the human species?
* Should we permit the growing of the human foetus to provide body parts for people in need of body parts?
* Should we permit manipulation of DNA, genetic engineering and the ownership and patenting of life forms?

* Should we condone neonaticide in the case of children born with gross physical or mental disabilities?[42]
* Should the law permit sexual reassignment — a problem in the news last month when a South Australian unmarried mother sought to have her 15 month old baby's sex change officially recognised?[43]
* Should parents be able to forbid schools and health authorities giving contraceptive advice to their children or is this an unacceptable intrusion by the State into the legitimate domain of the family?[44]
* Should a lover be able to forbid the abortion of a child he has fathered, even though the mother wishes the abortion to be performed?[45]
* Should the law change to permit the recognition of de facto relationships for at least some legal purposes?[46]

These and other issues relating to biology, sexuality and society now crowd upon us. All too often the law is silent on these matters. When answers must be found we turn to busy judges in the midst of crowded work dockets. With no common morality or plainly accepted guiding principle, how does a judge in a secular community respond to these questions? Lord Devlin would point him to the Churches and to the good opinion of moral citizens. Wolfenden would point him to the limited function of the law to interfere in our lives, to restraint and to permitting individuality to flourish, so long as it does no harm to others.

CONCLUSIONS: ROLE OF LAW REFORM

What conclusions should be drawn from this necessarily brief and unsatisfactory review of the intersection of law and morality in Australia today:

* First, it seems clear that the debate is hotting up. In the one camp, the political spokesman of the so-called 'moral majority' are now better organised, more vocal and more aware of the political clout that comes to minority parties in closely contested electorates. Anyone who doubts the power of single issue groups in a democracy should reflect upon the impact of the conservationists on the recent Federal election and the anti-abortionists on the preceding Victorian poll. Lord Hailsham has said that these minority groups threaten democracy. They assert that they merely practise democracy.[47] But it is clear that, in a politically polarised community, they may enjoy an importance far beyond their actual numbers.

* Secondly, and despite the rallying of the 'moral majority', I believe it can be said that the battlecry of the Wolfenden Committee is still having its effect throughout the English-speaking world. People of liberal persuasion are asking with increasing insistence what business it is of the State to enter into bedrooms? What business it is of the police to burst into a domestic cottage to break up a nine-member card game? What right it of that the State to prosecute people watching pomo television in a country motel? What warrant has the State for punishing people from pursuing their sexual preference — over which, for the most part they have no control. These questions are now being asked. And from the law, they require answers.

* Thirdly, there is a growing realisation, even by some who would support the old standards of morality, that the law is an imperfect mechanism for enforcing that morality. You may discourage some young people from smoking marijuana — but many will still do so. You may discourage some people from SP booking — but according to reports, hundreds of thousands of Australians are not deterred. You may arrest a few, but millions of dollars will be spent on pomo movies and prostitution. In the personal realm, private conduct does not readily adjust to legal rules where participants do not feel that what they are doing is the proper province of legal prohibition or truly 'wrong'.

* Fourthly, a serious institutional problem is emerging. In part, it is the response by cautious politicans, democratically accountable, to the sensitivity of these debates. All too often, politicans, of all political persuasions, tend to shy away from the issues I have addressed. Where they do seek to bring the law into closer harmony with modern social attitudes, they sometimes fail lamentably or succeed halfheartedly. The best recent illustration of this assertion is to be found in the failure of the New South Wales Parliament to remove the criminal penalties upon consensual homosexual conduct. More than 20 years after Wolfenden, we are still talking about this reform in a number of parts of Australia. Yet in New South Wales, within weeks of the rejection of reform of the criminal law, antidiscrimination laws were enacted to forbid discrimination against homosexuals. The criminal law pulls one way. Discrimination law pulls in precisely the opposite direction entirely.

And this is where law reform bodies can come to the rescue of democratic Parliaments. Let us be candid. Politicans need help in confronting the problems I have outlined — whether in the field of private morality or in the field of bioethics. These questions are just too sensitive, too controversial, too complex and too painful for politicians, unaided,

to tackle. Left to themselves, I fear the quest for a short-term political advantage will all too often be too seductive. It will overwhelm the dispassionate scrutiny of both sides of the argument for which Sir Walter Murdoch called.

To make Parliaments work better should be the aim of all true democrats in Australia.[48] The answers to the questions I have raised tonight should be found in the democratic Parliaments rather than in the unelected judiciary or the enthusiastic bureaucracy. Yet unless Parliaments are given help, they are likely to put these issues to one side. Doing nothing is always the easiest course in politics. Removing disparities between the criminal law and modern morality is a painful duty — but a duty nonetheless of a legislature relevant to today's needs.

Inattention to reform of the law or to development of new laws on the subjects I have canvassed is the product of ambivalence in society about the limits of the function of the law in enforcing morality. But it is also, more significantly, the product of the failure of our democratic institutions to adopt means to keep the law in tune with community attitudes and practices. Those who seek to hold the line for the old morality will rejoice in the ineffectiveness of our institutions. But this satisfaction must surely be tinged by a realisation that the distance between what the law says and what is actually happening in the Australian community is a formula for individual injustice and institutional erosion. For every card player arrested, hundreds go free and look on that law with contempt. For every SP operator detected, hundreds ply their trade with the support of thousands of fellow citizens. For every prostitute arrested and fined, hundreds offer their services weekly to thousands of our fellow citizens. For every homosexual arrested, thousands pursue their activities in fear of the unpredictable and idiosyncratic operation of the law. For every viewer of porno movies caught in a raid on a country motel, thousands switch on the recorder every night, asserting their belief that the law should just keep out of their private lives.

We lack a coherent principle.[48] We stumble from one reform to another : our politicians treading warily and cautiously, if at all.

Yet there are consistent principles. They are, as Murdoch saw them, the two sides of the argument. For some, it is a simple matter of upholding Christian values and the right of a society to denounce and punish disgusting and unacceptable conduct. For others, it is a deep commitment to the limited role of the State. His also is a belief that so long as adult individuals do not hurt others, they should be allowed to do as they please in a free community where difference is tolerated and where we are not all forced to march to the beat of a single drum.

It is my hope that the Law Reform Commission can help the political process to address these issues. And in a consistent way, to reform the law and modernise its rules. But we should not deceive ourselves that in questions of the kind I have been addressing, there are simple answers which will appeal to everyone. These are matters upon which our society will divide — deeply even bitterly. We should seek to understand each point of view. But in the end a choice must be made. Seeing that choice clearly, and realising its importance for the future good health of the rule of law is an imperative that will become more and more important in the years ahead. Were he alive today, I have no doubt that Walter Murdoch would be contributing to this debate. And I have little doubt as to the side he would take in it. Wolfenden raised a battle flag. The skirmishes continue. But the main battles still lie ahead.

FOOTNOTES

* The views expressed are personal views only.

1. J A La Nauze, 'Walter Murdoch — A Centenary Tribute', Inaugural Murdoch Memorial Lecture, 17 September 1974, Murdoch Uni, 1974, 13.

2. ibid, 11.

3. id.

4. id.

5. W Murdoch, quoted La Nauze, 13.

6. La Nauze, 4.

7. Great Britain, Report of the Committee on Homosexual Offences and Prostitution, Cmnd 247 (1957), 9-10, 24.

8. Sydney Morning Herald, 20 July 1983.

9. ibid.

10. Sydney Morning Herald, 19 August 1983, 1.

11. ibid.

12. Australian Public Opinion Polls (The Gallup method), Melbourne Herald, 9 July 1983, 8.

13. ibid.

14. R Dworkin, 'Taking Rights Seriously', Harvard, 1977, 242.

15. P Devlin, The Enforcement of Morals, 1959, reprinted in Devlin, The Enforcement of Morals, 1965, 17.

16. H L A Hart, Law, Liberty and Morality, 1963, 51.

17. Devlin, 13.

18. Dworkin, 246.

19. South Australia, Law Reform Committee, 68th report, Imperial Law on Gambling and Wagering in South Australia, 1982. The statute involved is 33 Henry VIII c 9. See [1983] Reform 124.

20. As quoted, The Advocate, 9 June 1983, 7.

21. ibid.

22. The Age, 25 May 1983, 11.

23. Sydney Morning Herald, 2 September 1983, 1.

24. Sunday Observer, 21 August 1983, 3.

25. Sydney Morning Herald, 27 July 1983, 4.

26. Sydney Morning Herald, 16 July 1983, 6.

27. Canberra Times, 27 May 1983, 3.

28. As reported in the Daily Telegraph (Sydney), 2 July 1983, 9.

29. See notice in the Age, 16 July 1983.

30. Sydney Morning Herald, 30 May 1983, 10.

31. Mr Wran, quoted the Australian, 18 March 1983, 3.

32. ibid.

33. id.

34. The Sun (Melbourne), 22 June 1983, 22.

35. Sunday Telegraph, 21 August 1983.

36. Australian, 14 June 1983.

37. ibid.

38. Australian, 11 April 1983, 3.

39. Sydney Morning Herald, 18 June 1983.

40. Canberra Times, 9 April 1983.

41. See Morgan Research Poll, Sun Herald, 7 August 1983, 3.

42. See eg In Re B (a minor) [1981] 1 WLR 1421 (CA). Cf Justice Mackenzie, Supreme Court of British Columbia, Family and Child Service v Dawson, 19 March 1983, unreported. See [1983] Reform 130.

43. Sydney Morning Herald, 10 August 1983.

44. M D Kirby, Juvenile Justice — Youth and the Law, YMCA Second Perth Youth Lecture, 3 August 1983, mimeo. See also the West Australian, 11 August 1983 and Daily News, 11 August 1983, 17. Cf Gillick v West Norfolk and Wisbech Area Health Authority, 25 July 1983, Justice Woolf, QBD, Times, Law Report.

45. The Attorney-General for the State of Queensland, on the relation of David L Kerr & Anor v. Miss T, unreported judgment, Chief Justice Gibbs, High Court of Australia, 30 March 1983 (The Legal Reporter, p.12).

46. New South Wales Law Reform Commission, De Facto Relationships, 1983.

47. Lord Hailsham, 1983 Hamlyn Lectures; see The Times, 16 May 1983, 11.

48. G S Reid, The Changing Political Framework, Quandrant, Jan-Feb 1980, 1, 5.

49. Cf. D Dawson, Address to Sydney Law Graduates Association, 28 April 1983.