AT THE CENTRE

1986 Bioethics Lunchtime Lecture Series

During July, Baroness Mary Warnock, Mistress of Girton College, Cambridge, and the Chairperson of the British Committee on Human Fertilization and Embryology, visited Australia and the Centre for Human Bioethics. She presented the following lecture in our Lunchtime lecture series on July 16:

MORALITY AND THE LAW: SOME PROBLEMS

To raise the question of the relation between morality and the law may well provoke a groan, even if suppressed. It is a chestnut of a subject. My excuse for raising it is that it is worth doing so, whenever some new moral issue forces itself upon the public attention. Just such an issue is provided by the new developments in embryology. These issues have not, of course, come upon us out of a clear blue sky. But the public has begun to take cognisance of them only in the last decade. And meanwhile there is a general feeling in most countries that legislation of some kind ought to be contemplated, to regulate what has been up to now an uncontrolled field. The upshot then is inevitably a demand to relate any new legislation that may be introduced to the morality, the rights and wrongs, of the treatment of infertility, the wider use of techniques such as AID, or surrogacy or in vitro fertilisation, and the research that such new techniques require.

Far and away the most important and, incidentally, the most philosophically interesting of the issues raised in the English Government Committee of Inquiry which published its recommendations in 1984, was the issue of research using human embryos, and it is to that question that I wish to confine myself, using it as the new centre from which to survey the relation between morality and the law.

By way of introduction, it may be worth reminding you of the most notorious dispute about morality and the law, that between HLA Hart and Lord Justice Devlin, in the early 1960s, contained in Hart's book, Law, Liberty and Morality, and Devlin's, The Enforcement of Morals, the immediate issue being homosexual practices between adult consenting males. The question was whether or not the law should continue to treat such behaviour as criminal. Devlin held that there was a consensus of hostile feeling towards homosexual practices, and
that the law must therefore enforce, or even reinforce such feelings. Conduct that is repellant to the great majority of the public must be treated as criminal. For, in Lord Devlin's view a shared morality is the cement that binds society together. If such shared morality is not enforced by law, society itself will disintegrate. A society is characterized by its beliefs about what is right and what is wrong; without such beliefs there would be no society. To act against such a view is a kind of treason. The law could no more permit acts contrary to the shared morality than it could permit treason itself.

Hart argued, on the other hand, that two moral problems must be distinguished, one primary and the other critical. At the first level, the question is whether a certain practice is right or wrong; at the second level the question is whether, if the law intervenes to criminalise the practice, the infringement of liberty involved is itself right or wrong. To make this kind of distinction is almost inevitably to introduce a kind of Utilitarian calculus into the argument. The primary question is in terms of the harm done by the practice itself; the secondary question is of the harm done, by way of infringement of liberty, invasion of privacy, or contempt for the law itself, if enforcement and conviction become too difficult.

Looking back on the controversy, which I have summarized very crudely, we may notice various important features. First and most obvious is Devlin's assumption that society has a consensus morality, and that this morality is what binds it together as one society. He did not argue that such morality can never change. He would be willing to concede that morality developed as society itself developed. But at any given time, the law must enforce what society believes to be right. The law must follow, not lead, public opinion on moral issues. Hart did not deny the existence of consensus, though I think he dissented from the view that a society could be somehow identified by its moral beliefs. His theory of morality however, did not depend on consensus. It was the simple theory that what is right must be calculated as what is less harmful.

If the morally right is the less harmful, the wrong the more harmful, of alternative courses of conduct, people may ultimately be brought to see this, a matter, if not of fact then at least of probabilities. They may be led to a consensus, where none existed before. If people hold with passion the belief that homosexual practices between consenting males are immoral even though they do no harm, then such people can be treated by legislators as simply wrong-headed, but educable. They must learn to put aside their prejudices; or content themselves with the thought that they personally need not tangle with such practices, even though they may be permitted by the law.