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TAKING LAW SERIOUSLY: STARTING POINTS OF THE HART/DEVLIN DEBATE*

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ABSTRACT. The famous mid-20th century debate between Patrick Devlin and Herbert Hart about the relationship between law and morality addressed the limits of the criminal law in the context of a proposal by the Wolfenden Committee to decriminalize male homosexual activity in private. The original exchanges and subsequent contributions to the debate have been significantly constrained by the terms in which the debate was framed: a focus on criminal law in general and sexual offences in particular; a preoccupation with the so-called "harm principle," a sharp delineation of the realms of law and morality, and a static conception of the relationship between them. This article explores the limitations imposed by these various starting-points and argues for a holistic and symbiotic understanding of the relationship between law and morality.

KEY WORDS: Joel Feinberg, H. L. A. Hart, harm principle, Hart–Devlin debate, law and morality, legal enforcement of morality, legal moralism, limits of the criminal law, Lord Devlin, J. S. Mill, paternalism, sexual offences, Wolfenden Committee

1. The Debate

In 1957 a committee chaired by Lord Wolfenden recommended that consensual sexual activity between men in private should be decriminalized.[1] That recommendation rested in part on a view that the function of the criminal law was:

...to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... not 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 we have outlined.[2]

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[1] Report of the Committee on Homosexual Offences and Prostitution, Cmd 247, 1957 (UK).

[2] Report of the Committee on Homosexual Offences and Prostitution, Cmd 247, 1957 (UK), Paragraph 13.

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> Unless a deliberate attempt is made ... to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is ... not the law's business.[3]

The committee's report provoked a famous reaction from Lord Patrick Devlin in his 1959 British Academy Maccabaean lecture entitled "The Enforcement of Morals."[4] Although Devlin did not express it as straightforwardly as he might have, his basic point was that the criminal law is not (just) for the protection of individuals but also for the protection of society – "the institutions and the community of ideas, political and moral, without which people cannot live together."[5] For that reason, he argued, the sphere of the criminal law should not, *as a matter of principle*, be limited to regulating conduct that has direct adverse effects on identifiable individuals. Herbert Hart responded to Devlin, first in a radio broadcast subsequently published in *The Listener* magazine,[6] and later in three lectures delivered at Stanford University in 1962 and subsequently published under the title *Law Liberty and Morality*.[7] The positive aspect of Hart's attack on Devlin was based on J. S. Mill's so-called "harm principle": "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[8] In 1965, Devlin published a revised version of the Maccabaean lecture along with six other lectures on related topics under the title *The Enforcement of Morals*.[9] The exchange between Hart and Devlin formed the basis of one of the most important jurisprudential debates of the second half of the 20th-century (which, for convenience, I shall refer to as "the Debate").

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[3] Report of the Committee on Homosexual Offences and Prostitution, Cmd 247, 1957 (UK), Paragraph 62.

[4] Patrick Devlin, "The Enforcement of Morals," *Proceedings of the British Academy* XLV (1959), pp. 129–151.

[5] Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), p. 22.

[6] H. L. A. Hart, "Immorality and Treason," in Richard A. Wasserstrom (ed.), *Morality and the Law* (Belmont: Wadsworth Publishing Company, 1971), pp. 49–54.

[7] H. L. A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963).

[8] J. S. Mill, *On Liberty*, G. Himmelfarb (ed.) (Harmondsworth: Penguin Books, 1974), p. 68.

[9] Devlin, *The Enforcement of Morals.*

Hart interpreted Devlin's case for what has come to be called "legal moralism" (or "legal enforcement of morality") as resting on two arguments, which he dubbed "the moderate thesis" and "the extreme thesis" respectively.[10] According to the former, a society is entitled to enforce its morality in order to prevent the society falling apart at the seams, as it were. According to the latter, a society is entitled to enforce its morality in order to preserve its distinctive communal values and way of life. Hart attacked the moderate thesis on the ground that it implied factual claims for which Devlin did not provide, and (in Hart's view) could not have provided, substantial empirical support. For this reason, Hart read the moderate thesis as resting on a tautologous equation of a society with its morality and, therefore, true by definition: to attack a society's morality is to attack society itself. Hart rejected the extreme thesis on the ground that it potentially justified legal enforcement of moral values, regardless of their content, simply because they were widely held. He also thought that the thesis placed an unjustified brake on changes in social mores. Other important elements of Hart's case against legal moralism were distinctions between harm and offence, paternalism and moralism, positive and critical morality; and, within the criminal law, between principles of liability and principles of sentencing. I will consider each of these distinctions in due course. Devlin had some contemporary supporters,[11] but many subsequent commentators have accepted Hart's criticisms as effectively demolishing Devlin's position.

Since the initial exchange between Hart and Devlin, no theorist has devoted more attention to the general topic of the Debate than Joel Feinberg. His monumental four-volume work entitled *The Moral Limits of the Criminal Law* was published some 20 years after the

[10] He later described them more memorably as the "disintegration" and "conservative" theses respectively [H. L. A. Hart, "Social Solidarity and the Enforcement of Morality," *The University of Chicago Law Review* 35 (1976), pp 1–13]. Neither thesis supports the criminalisation of conduct merely because it is morally wrong. Nor does it follow from either thesis that any and every moral wrong may be criminalized.

[11] E.g., E. V. Rostow, "The Enforcement of Morals," *Cambridge Law Journal* (1960), pp. 174–198.

initial exchange.[12] Feinberg contributed to the Debate in three important ways. First, he analysed in detail the concepts of harm, offence, paternalism, and moralism, and developed principles that would enable these concepts to be applied in practice. Secondly, he distinguished between harmfulness and wrongfulness.[13] The criminal law is justified in prohibiting harmful conduct (Feinberg argues) only if that conduct is also wrong. Harm may be a necessary condition, but it is not a sufficient condition, of criminalisation.[14] Feinberg defines harm in terms of a setback to a person's interests and wrongfulness in terms of invasion of a right that such an interest be protected.

Feinberg's third contribution is a perhaps-unintended corollary of the first two. Like many "liberal" contributors to the Debate,[15] Feinberg begins with a "presumption in favor of individual liberty." This means (in his terms) that everyone has both an interest in freedom of action and a (presumptive) right that that interest be protected. It follows that restricting a person's freedom of action causes them harm. In these terms, what the harm principle says is that the harm of restricting a person's protected interest in freedom of action can be justified only if the person has caused wrongful harm to another or has, in other words, wrongfully invaded an interest of the other. Since there is harm on both sides of the equation, as it were, determining the limits of the criminal law depends on weighing one harm against the other or, in other words, balancing conflicting interests.[16] A lawmaker faced

[12] Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984); *Offense to Others* (Oxford: Oxford University Press, 1985); *Harm to Self* (Oxford: Oxford University Press, 1986); *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990).

[13] Feinberg also distinguishes between harms and evils. All harms are evils, but not all evils are harms because not all evils set back the interests of any individual person(s): Feinberg, *Harmless Wrongdoing*, p. 18.

[14] It is unclear whether Mill thought that harm was a necessary condition of criminalisation. On the one hand, he speaks of exercises of power generally and not the criminal law in particular. On the other hand, C.L. Ten argues that Mill's concern was to exclude certain grounds of coercion rather than to specify necessary conditions: C. L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980), pp. 66–67.

[15] Concerning Mill's position, see Ten, *Mill on Liberty*, Chapters 3 and 4. For an "economic" analysis of the relationship between law and morality, see Steven Shavell, "Law Versus Morality as Regulators of Conduct," *American Journal of Law and Economics* 4 (2002), pp. 227–257.

[16] Feinberg, *Harm to Others*, pp. 202–204. For a similar approach to legal paternalism, see Douglas N. Husak, "Legal Paternalism," in Hugh LaFollette (ed.), *The Oxford Handbook of Practical Ethics* (Oxford: Oxford University Press, 2003), pp. 387–412.

with a decision whether or not to criminalize particular conduct must decide whether or not the interest in being free to engage in that conduct outweighs the interest in not being adversely affected by it. Feinberg reaches much the same conclusion as a result of developing what he calls "mediating principles," which he considers to be necessary in order to make the abstract harm principle practically useful. For example, the relative "importance" of the interest harmed by particular conduct and the interest in engaging in that conduct, Feinberg argues, is relevant to determining in practice whether the criminal law is justified in regulating the conduct.[17] Both lines of argument suggest that determining the limits of the criminal law is better understood in terms of reconciling the competing interests of agents and those adversely affected by their conduct, than in terms of implementing a presumption in favour of the agent's freedom of action. Feinberg's third contribution to the Debate, then, was to demonstrate (perhaps unwittingly) that the process of giving practical effect to the harm principle may lead us to re-evaluate the "lexical" priority[18] of freedom of action which is assumed to underpin it.

One important consequence of making explicit the distinction between wrongfulness and harmfulness was reconceptualisation of the Debate in terms of whether it is ever justifiable to criminalize conduct merely on the ground that it is wrongful, regardless of whether it is (and even if it is not) harmful. Whereas Feinberg proposed wrongfulness as an additional, necessary condition for criminalisation, others have considered whether it might operate as an alternative, sufficient condition. For instance, John Gardner and Stephen Shute have argued that the reason why rape is prohibited is because it involves wrongful invasion of a person's sexual autonomy.[19] Rape is a criminal offence regardless of whether it causes any harm to the victim – and rightly so, they say. Nevertheless, they argue, criminalisation of rape does not offend the harm principle because that principle does not require that harm be caused to identifiable individuals as a result of particular instances of criminal conduct, but only that society would be harmed if rape were not a criminal offence. On the assumption that if rape were not a criminal

[17] Feinberg, *Harm to Others*, p. 217.

[18] In the sense adopted in John Rawls, *A Theory of Justice*, Revised Edition (Cambridge: Harvard University Press, 1999), pp. 37–38.

[19] John Gardner and Stephen Shute, "The Wrongness of Rape," in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford: Oxford University Press, 2000), pp. 193–217.

offence, it would occur more often, the result would be a society where people felt more insecure and enjoyed less sexual autonomy. In short (say Gardner and Shute), raping a person is wrong even if it causes the person no harm, and a society in which rape was not criminalized would be a worse society to live in than those where it is.

In the light of the exchange between Hart and Devlin and various subsequent contributions, the purpose of this paper is to reconsider starting points of the Debate. I will suggest that those starting points distorted and cramped the Debate, and continue to do so. More positively, I will argue, first, that the limits of law are better fixed by open-endedly assessing reasons for and against legal regulation than by elaborating the harm principle. Secondly, I will show that the questions addressed in the Debate are relevant to regulation of conduct by civil law as well as by criminal law. Thirdly, I will argue that the Debate rests on an understanding of the relationship between law and morality according to which the two occupy distinct normative domains, and conflicts between them ought to be resolved in favour of morality. I will offer an alternative approach to law that stresses its social value and which takes it seriously as a potential source of correct or preferable norms of human conduct.

2. Starting Points of the Debate

The fact that the Debate was sparked by the report of the Wolfenden Committee importantly affected the terms in which it was framed and in which it has subsequently been conducted. First, because the Wolfenden Committee was established to consider the law regulating prostitution and male homosexual conduct, the Debate inevitably focused on the topic of sexual behaviour and mores. Secondly, because Hart detected an affinity between the views of the Committee, quoted at the beginning of this paper, and Mill's arguments in *On Liberty*,[20] Mill's more pithy statement of "the harm principle" became, and has remained, the starting point for the "liberal" side of the Debate. Thirdly, because the Committee was concerned with certain criminal offences, the Debate has focused almost exclusively on criminal law and more-or-less ignored other forms of law. Fourthly, the Committee's famous aphorism that there must be "a realm of private morality that is not the law's business" led to the

[20] Hart, *Law, Liberty and Morality*, p. 14.

framing of the Debate in terms of "law" on the one hand and "morality" on the other; and, fifthly, to an understanding of their relationship in terms of competition rather than creative interaction. In the rest of this paper, I want to examine in turn each of these starting points of the Debate.

3. Sex

The initial focus of the Debate on sexual and, in particular, homosexual behaviour was unfortunate. The very establishment of the Wolfenden Committee witnesses to the fact that social attitudes towards homosexuality in Britain were in a state of flux in the 1950s. Devlin's opposition to the Committee's specific proposal to decriminalize homosexual behaviour perhaps made it easier than it might otherwise have been for critics to dismiss his general arguments. If the wrongness of the behaviour under consideration had been less contested, at least the tone of the Debate might have been more evenly balanced and less emotionally charged.[21]

The tenor of the Debate was perhaps also influenced by controversy about the nature of the connection between sexual behaviour and morality.[22] There is reason to think that at least some of those on of the "liberal" side of the Debate thought either that private homosexual behaviour between consenting adults was not immoral, or that its normative status was not a moral issue at all.[23] Whereas the Wolfenden Committee said that such behaviour was a matter of private morality and not the law's business, others were apparently of the view that it was not morality's business either, and that its (de)criminalisation raised no genuine question about the moral limits of the criminal law.

In Devlin's view, the contested nature of the link between sex and morality was partly a result of the relationship between sexual mores and religion. As British society became more secular, the hold of the sexual mores propagated by the Christian church became weaker and

[21] For a helpful discussion, see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996), pp. 248–254. For a modern judicial re-run of the debate over homosexual activity, see *Lawrence v Texas* 539 US 558 (2003).

[22] Hart certainly thought that sexual mores and offences were distinctive (Hart, *Law, Liberty and Morality*, pp. 5, 22, 29, 73).

[23] E.g., Feinberg, *Harmless Wrongdoing*, p. 125.

people's views about sex became much less homogeneous. For secular opponents of the decriminalisation of homosexuality, such as Devlin, the critical issue was how to support the existing law without relying on its religious roots and without appealing to the authority of God or the Church. The problem is, of course, much more general than this. When people disagree about whether the law should be used to enforce or reinforce norms of human behaviour, how is such disagreement to be resolved in the absence of a universally recognized source of an authoritative answer?

According to a common interpretation of Devlin's position, he asserted that legal enforcement of particular moral norms is justified in a society if members of that society generally think it is justified. This interpretation is encouraged by Hart's introduction into the Debate of the distinction between positive and critical morality. Positive morality, he said "is the morality actually accepted and shared by a given social group" whereas critical morality consists of the "moral principles used in the criticism of actual social institutions including positive morality."[24] Hart used this distinction to make two different points. The first point was that the question of whether society may use the criminal law to enforce morality is itself a moral question to which the actual practice of any particular society provides no answer. Hart's second point was that, on the assumption society is entitled to use the criminal law to enforce morality, the question of which moral principles it is entitled to enforce is a moral question to which the actual practice (the positive morality) of any particular society can provide no answer.

There is a view that Devlin failed to observe this distinction between positive and critical morality, and that this mistake fatally undermined his position. However, Hart himself rejected this criticism of Devlin in relation to the first point;[25] and on a fair reading of Devlin, the criticism cannot stick in relation to the second point either. Devlin said much[26] about the morality which, in his opinion, society is entitled to enforce; and he clearly did not believe that a common social opinion, that conduct is immoral and should be illegal, by itself justifies its criminalisation. What count, he said, are the views of "reasonable" or "right-minded" people. Identifying community morality is not a matter of counting heads or conducting

[24] Hart, *Law, Liberty and Morality*, p. 20.

[25] Hart, *Law, Liberty and Morality*, pp. 19–20.

[26] Not only in the Maccabaean lecture but also in Devlin, *Enforcement of Morals*, Chapter 5.

opinion polls.[27] Furthermore, he proposed four principles that legislatures should take into account "when ... considering the enactment of laws enforcing morals:" maximum toleration of individual freedom consistent with the integrity of society; conservatism in the face of changing social mores; respect for privacy; and observance of a distinction between moral obligations and moral ideals.[28] Whatever one thinks of these principles or, more broadly, of Devlin's views about the limits of the criminal law, he cannot plausibly be accused of holding the opinion that whether homosexual activity (or any other type of conduct) should be (de)criminalized depended merely on facts about what British people in the 1950s and 1960s actually believed. But even if this had been his opinion, it would not have made him guilty of confusing positive and critical morality because the view that the law should track positive morality is itself a critical moral position. In fact, the distinction between positive and critical morality was a red herring in the Debate.

Devlin was not a philosopher, and it has to be admitted that he does not always express himself with exemplary clarity, consistency or analytical rigor. But my reading of the Debate is that Devlin was more interested than his opponents in the political question of what lawmakers in a democratic society should do in the face of significant and intractable disagreement about issues such as the limits of the criminal law. It was because he was interested in this question that he thought that "community morality counts,"[29] and it was this view that opened him to the invalid criticism that he failed to distinguish between "positive" and "critical" morality. From Devlin's perspective (or so it seems to me), the harm principle,

[27] Devlin, *The Enforcement of Morals*, p. 90.

[28] Devlin, *The Enforcement of Morals*, pp. 16–20.

[29] As Ronald Dworkin put it [Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), p. 255]. Dworkin agreed with Devlin that community morality counts, but criticized what he understood to be Devlin's conception of morality. For Dworkin, views about the limits of the criminal law would count only if they were based on reason rather than prejudice. Feinberg thought Dworkin's position preferable to Devlin's only to the extent that views based on reason are more likely to be "true" than views based on prejudice (Feinberg, *Harmless Wrongdoing*, pp. 140–144). Hart expressed views similar to Dworkin's in H. L. A. Hart, "Immorality and Treason," in Richard Wasserstrom (ed.), *Morality and the Law* (Belmont: Wadsworth Publishing Company, 1971), pp. 49–54. Hart argued that the analogy between private immorality and treason was absurd because there can be no such thing as "private" treason and because treason destroys political systems. Both points are very weak. Most traitors aim to operate as secretly as possible; and treason is a crime regardless of whether it causes harm to any individual or to society (see Devlin, *The Enforcement of Morals*, pp. 112–113).

understood as advice to lawmakers, is inadequate not only because of what it says but also because of what it omits to say. It provides no guidance about what to do in the face of serious, reasoned and reasonable disagreement about the validity or application of the principle itself. Devlin's critics have more-or-less ignored this issue; and (in my opinion) they have given Devlin too little credit for attempting, however inadequately, to address it. Perhaps this is because they have found his views on homosexuality so wrong-headed and even repugnant.[30]

4. The Harm Principle

The principles by which the recommendations of the Wolfenden Committee were supported, Hart wrote, "are strikingly similar to those expounded by Mill in his essay *On Liberty*"[31] – in particular, the harm principle. As Mill understood it, the harm principle carves out for individuals an area of freedom of action protected from social control. Hart raised the stakes by arguing that if there are any "moral" rights, "it follows that there must be a natural right" of every person to be equally free.[32] Feinberg went one step further when he approvingly observed that "most writers on our subject have endorsed a kind of 'presumption in favor of liberty.'"[33] Giving the liberty-protecting harm principle such privileged status had important ramifications for the exchange between Hart and Devlin. For one thing, it enabled Hart to cast onto Devlin the burden of proof on the issue of the relationship between immorality and social harm. Certainly, Devlin provided no hard evidence to support his assertion that society would be worse off without legal moralism;

[30] Another possible explanation is fear of democracy, attributed by David Dyzenhaus to Feinberg "and many other contemporary liberal writers" [David Dyzenhaus, "Liberalism, Autonomy and Neutrality," *University of Toronto Law Journal* 42 (1992), p. 359]. Certainly, Hart's discussion of democracy in Hart, *Law, Liberty and Morality*, pp. 77–81 is defensive in tone; and he is much more concerned to stress the individual's right to resist legitimate laws than to establish the conditions of legitimacy. For the idea that democracy provides the best available procedure for seeking true values, see David Dyzenhaus, "The Legitimacy of Legality," *University of Toronto Law Journal* 46 (1996), pp. 129–180.

[31] Hart, *Law, Liberty and Morality*, p. 14.

[32] H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64 (1955), pp. 175–194.

[33] Feinberg, *Harm to Others*, p. 9.

but neither did Hart provide any factual evidence that society would be a better (or, at least, no worse a) place without legal moralism.[34]

Starting with the harm principle also enabled Hart to win several easy, but ultimately pyrrhic, victories over Devlin. Devlin argued that the unavailability of consent as a defence to various harm-based offences – which Hart apparently did not find problematic[35] – showed that the harm principle was not the law's normative foundation. Hart's reply was that a distinction needed to be drawn between moralism and paternalism – the latter, as opposed to the former, being in Hart's view, "a perfectly coherent policy."[36] In response to Devlin's argument that the existence of the crime of bigamy – to which Hart apparently did not object – also undermined the harm principle, Hart replied that Devlin had failed to draw a distinction between harm and offence, and that what was wrong with bigamy was its offensiveness to people's religious sensibilities.[37] These distinctions – between paternalism and moralism, and between harm and offence – have been widely adopted, and provide the basic structure for Feinberg's exhaustive discussion of the limits of the criminal law. What is surprising is the implication that drawing these distinctions bolsters rather than weakens the force of the harm principle.[38] On the one hand, both Hart and Feinberg are prepared to accept that offence may provide good grounds for criminalisation even though offence is not harm, as they understand it.[39] On the other

[34] Devlin, *The Enforcement of Morals*, p. 123.

[35] Feinberg, by contrast, thought that in principle, consent should always be a defence (Feinberg, *Harm to Others*, pp. 35–36).

[36] Hart, *Law, Liberty and Morality*, pp. 31–32. Devlin's discussion of the distinction between paternalism and moralism (Devlin, *The Enforcement of Morality*, pp. 132–137) is worth reading. For Feinberg's reply, see Feinberg, *Harmless Wrongdoing*, pp. 16–17.

[37] An implausible view, if only because bigamy is usually secretive [Devlin, *The Enforcement of Morals*, pp. 137–138. Contrast Feinberg, *Harm to Self*, pp. 265–267 (bigamy should be decriminalized)].

[38] Cf. Ginsberg's comment on Mill and Sidgwick [Morris Ginsberg, "Law and Morals," *The British Journal of Criminology* 4 (1964), p. 286]. On offence, see Dyzenhaus, "Liberalism, Autonomy and Neutrality," p. 362. There are those who think that stretching of the concept of "harm" has transformed Mill's principle from a liberty-protector to a liberty-destroyer [Richard A. Epstein, "The Harm Principle – And How It Grew," *University of Toronto Law Journal* 45 (1995), pp. 369–417].

[39] Concerning Mill's approach, see Ten, *Mill on Liberty*, pp. 106–107.

hand, paternalism can be accommodated within the harm principle, as Mill stated it, only by deleting the words "to others."[40]

Another distinction used by Hart to protect the harm principle was that between principles of criminal liability and principles of sentencing.[41] In his opinion, the fact that the moral gravity of an offender's conduct – its wrongfulness as opposed to its harmfulness – can (*rightly* in his view, it seems) be taken into account in sentencing tells us nothing about the relationship between law and morality.[42] Hart offers no reason why we should subdivide the criminal law in this way and treat the rules and principles of sentencing as casting no light on the proper uses of the criminal law, or why we should, by contrast look for them only in principles of liability. More particularly, it is difficult to understand (on the basis of what Hart says, anyway) why factors that are accepted as being relevant to sentencing, such as the offender's motive, character, culpability and social circumstances, should be considered irrelevant to debates about the province of the criminal law (as opposed to its instrumental functions, such as deterrence). At stake here, I believe, is a more fundamental point. There is a puzzling difference between the way many theorists think about the basis of criminal responsibility on the one hand, and the scope and functions of the criminal law on the other. Theories of individual criminal responsibility tend to put most weight on the agent's capacities, choices, and reasons for action, and either play down or ignore the consequences of the criminal conduct. By contrast, theories about the uses and limits of the criminal law typically take as their starting point the consequences of criminal conduct. There is no obvious reason why the harm principle should be at the centre of debate about the

[40] Joseph Raz's version of liberal perfectionism allows much more paternalism than many versions of liberalism [Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 422]. On the (in)compatibility of support for the harm principle with a perfectionist account of autonomy, see Wojciech Sadurski, "Raz's on Liberal Neutrality and the Harm Principle," *Oxford Journal Legal Studies* 10 (1990), pp. 130–132.

[41] Devlin's discussion of this point is worth reading (Devlin, *The Enforcement of Morals*, pp. 128–131). Feinberg concedes the point to Devlin by accepting that rules and principles of sentencing, as well as those of liability, must comply with the harm principle (Feinberg, *Harmless Wrongdoing*, pp. 154–155).

[42] Arthur Ripstein uses Mill as representative of a tradition that treats sanctions as "extrinsic to the wrong[s] that [they are] supposed to address" [Arthur Ripstein, "Authority and Coercion," *Philosophy and Public Affairs* 32 (2004), p. 4]. He argues against this view in relation to private law but not, it seems, in relation to criminal law.

acceptable scope of criminal liability while theories of criminal responsibility tend to treat the consequences of criminal conduct as more and less irrelevant.

In fact, there are important issues about the limits of the criminal law that seem to have little or nothing to do with the immediate consequences of the criminalized conduct. These include the criminalisation of attempts, the basis and limits of inchoate offences and offences of risk-creation, and the acceptability of strict and negligence-based criminal liability. Should our approach to such issues nevertheless begin with the harm principle? If so, what should our attitude be to grounds and bounds of criminal liability that appear to conflict with the harm principle?

There are at least three possible reactions to criminal liability that seems, at first sight anyway, to flout the harm principle. One is to reject it on the basis that if the law conflicts with settled "intuitions" (such as the harm principle), it must be the law that is wrong. I will discuss this approach in more detail later. Here it need only be noted that this is an unpromising strategy because there are many more-or-less uncontroversial elements of current criminal law that seem problematic in terms of the harm principle.

Another possible reaction is to attempt to rationalize in terms of the harm principle any and every aspect of the criminal law that appears at first sight to be inconsistent with it. This is the strategy adopted by Gardner and Shute in relation to rape,[43] and their approach could be applied more generally to cover risk-creation and attempts, for instance. We might say (as Gardner and Shute say in relation to rape) that a society in which the creation of certain risks was not a crime, or in which attempting and contemplating crimes were not themselves crimes, would be (in some sense) a worse society to live in than one in which they were. A worry about this sort of argument, however, is that it depends on the aggregate effect of many such acts, and does not seem to justify coercion of any individual

[43] Gardner and Shute, "The Wrongness of Rape." Concerning the crime of blackmail, see Hamish Stewart, "Review of *Harm and Culpability*," by A. P. Simester and A. T. H. Smith," *University of Toronto Law Journal* 47 (1997), pp. 407–408; Feinberg, *Harmless Wrongdoing*, pp. 238–274.

agent.[44] At the same time, classifying such "diffuse effects" as harm "seem[s] to reduce the significance of Mill's principle to vanishing point."[45] So it is surprising that people who allow that "indirect," aggregate, social harm can justify criminalisation see this as vindicating rather than undermining Mill's starting position.[46] Indeed, reinterpretation of the harm principle to encompass such non-individualized harm looks much like (what Hart called) "the moderate thesis" in different garb.[47]

The problem posed for this second, rationalizing strategy by the issue of culpability is even more serious. Whether liability for any particular type of conduct or any particular consequences of conduct ought to be strict, or based on intent, recklessness or negligence is one about the proper limits of the criminal law,[48] and it is a "moral issue," as this term is commonly used. Indeed, the relevance of culpability to criminalisation represents a major fault-line in normative theorizing about the criminal law. There are those who argue, for instance, that the reason why attempting a crime is itself a crime, and why attempts should be punished in the same way as completed crimes, is that the essence of criminality resides not in the consequences of bad conduct but in the culpability of the agent. One basis for this approach is that consequences are fortuitous, and that it is wrong to punish a person for things they could not control. On this view, grounds and bounds of criminalisation should depend not on

[44] Another way of putting this point is to say that the more "remote" the identified harm is from the criminalized conduct, the harder it is to attribute it to wrongful conduct on the agent's part [Andrew von Hirsch, "Extending the Harm Principle: 'Remote' Harms and Fair Imputation," in A. P. Simester and A. T. H. Smith (eds.), *Harm and Culpability* (Oxford: Oxford University Press, 1996), pp. 259–276]. Social-harm explanations of civil law (such as contract law: see footnote 66 below) are doubly problematic. They require attribution of aggregate harms to individuals, and they also allow the award of remedies to individuals. One might think that aggregate social harm is more properly attributed to governments for failure to take measures to prevent it.

[45] N. E. Simmonds, "Law and Morality," in E. Craig (ed.), *Routledge Encyclopedia of Philosophy* (London: Routledge, 2004), retrieved 19 May 2004 from http://www.rep.routledge.com.

[46] It is unclear how serious a challenge to the harm principle Feinberg considers the recognition of public and collective harms to be (Feinberg, *Harmless Wrongdoing*, pp. 33–37).

[47] See Ten, *Mill on Liberty*, p. 91.

[48] For the same point in relation to tort law, see A. P. Simester and Winnie Chan, "Inducing Breach of Contract: One Tort or Two?" *Cambridge Law Journal* 63 (2004), p. 150.

the consequences of bad conduct but on factors, such as character, motivation and culpability, over which (it is assumed more often than argued)[49] agents have (more) control. Ironically, perhaps, this approach is based on Hart's own capacity/opportunity theory of criminal responsibility.[50]

A third reaction to elements of the criminal law that make trouble for the harm principle is simply to deny that the element in question has anything to do with the moral limits of criminalisation. This was the strategy Hart used against Devlin in relation to the principles of sentencing. However plausible it might seem in that context, it is very much less promising in relation to elements that go to liability, such as culpability and conduct. A possible rejoinder to this objection is suggested by the distinction Hart drew, in his analysis of the justification of punishment,[51] between the general justifying aim of the criminal law and principles of fair distribution of punishment. It might be argued that the harm principle is relevant to the question of what types of conduct ought to be criminalized but not to the question of whether any particular instance of such conduct should attract liability. This rejoinder is highly implausible. It is one thing to say that rules and principles about the amount of punishment are irrelevant to the scope of the criminal law but quite another to make the same statement about principles determining whether a person deserves any punishment at all.

In discussions of the proper limits of the criminal law the harm principle has become a sort of Procrustean bed into which all questions, about whether or not particular conduct ought in principle to attract criminal liability, have to be forced. The debate about the limits of the criminal law has become a debate about the meaning of the harm principle and the definition of "harm." Devlin's approach was better.[52] He asked a non-leading question: what factors ought to be taken into account in deciding whether conduct ought to be criminalised? Harm (however defined) is one such factor. But should it be given lexical priority over other relevant factors? There are two

[49] For an argument, see Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self and Morality* (Princeton: Princeton University Press, 2002), pp. 199–237.

[50] H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968).

[51] Hart, *Punishment and Responsibility*, Chapter 1.

[52] See also Nicola Lacey, *State Punishment* (London: Routledge, 1988), pp. 98–120. There are obvious affinities between Devlin's general approach and Lacey's communitarian theory of criminal law (Lacey, *State Punishment*, pp. 176–181).

points to be made here. First, there seems no good reason why the scope of individual liberty should be tied, in the way the harm principle ties it, to the adverse consequences of one's actions. A person's autonomy is expressed not only in what they achieve in the world but also in what they do and attempt to achieve, and in their reasons for action. Consequences are relevant to the normative assessment of a person's conduct, but they are not the only relevant factor. Giving priority to the harm principle in the Debate about the limits of the criminal law has diverted attention from factors, other than consequences, that are relevant to the normative assessment of human behaviour and to the question of the appropriate use of legal coercion to prevent or deter particular types of conduct. The whole range of normatively relevant factors should be taken into account not only in deciding how much punishment a particular criminal should receive, and in deciding whether a particular criminal ought to be punished, but also in deciding what types of conduct ought to be legally punishable.

The second point is perhaps more radical. There seems no compelling reason why the relevant consequences of conduct should be limited to those that qualify as "harm," or why the issue at the heart of the Debate should not be rephrased more broadly in terms of whether particular consequences of conduct provide a reason to criminalise that conduct. This point goes beyond what is perhaps the most common criticism of the harm principle, namely that the concept of harm is value-laden and presupposes a theory of legitimate interests.[53] My suggestion is that the concept of harm is an unnecessary and analytically superfluous hindrance to clear thinking about the limits of (criminal) law.

Ironically, Feinberg's analysis supports this conclusion. As we saw earlier, his attempt to give the harm principle practical content and save it from being a "mere empty receptacle, awaiting the provision of normative content before it can be of any use"[54] effectively led him to the conclusion that determining the limits of the criminal law involves balancing competing interests in freedom of action on the one hand, and freedom from adverse effects of action on the other. The importance of this conclusion is that it demotes harm from the status of a side-constraint on criminalisation to a factor to be taken

[53] Hart's apparent failure to appreciate this was arguably the greatest weakness of his attack on Devlin. Here too, I suspect, the polarising focus on sex had a detrimental effect on the quality of the Debate.

[54] Feinberg, *Harm to Others*, p. 245.

into account in determining the limits of the criminal law. Furthermore, Feinberg concedes that wrongfulness is always relevant to the criminalisation calculation, and that adverse effects of conduct always count in favour of its criminalisation even if those effects do not constitute harm as Feinberg defines it – although he considers that on its own, wrongfulness typically carries relatively little weight compared with harmfulness.[55] In the final analysis, Feinberg's position appears not to be that harm is a necessary condition of criminalisation but only that it is the weightiest factor available to justify deploying the criminal law to restrict freedom of action. From this point it is only a short step to rephrasing the Debate in terms of the relevance to the limits of law of "consequences of conduct" (as opposed to "harm").

What Feinberg described as the "presumption in favour of liberty" has also had a distorting effect on the Debate. It is easy enough to accept Hart's idea that freedom is a basic human value.[56] Human beings are individuals, and being able to express that individuality in one's choices and actions is an essential component of human well-being. Alongside the individuality of human beings, however, their other most noticeable characteristic is sociability. It is not just that most people choose to live in (larger or smaller) communities or that most people belong to various overlapping and interacting groups. People are also heavily reliant on those communities and groups, and on their relationships with other human beings. If individual freedom is a precondition of human flourishing so, too, is membership of communities and groups, and a rich network of social interactions.[57] Indeed, not only is individual freedom of choice and action of greatest value in social contexts; it seems that it would have little value in any other context. Value is a function of scarcity. Just as time would have little or no value if human beings were immortal, so individual freedom would have little or no value in the absence of external constraints.[58] In this light, it seems hard to justify giving the individual's interest in freedom of

[55] Feinberg, *Harmless Wrongdoing*, pp. 5, 20, 37–38, 66–67, 321–324.

[56] See footnote 32, above, and text.

[57] For elaborated versions of this type of argument, see, e.g., Raz, *The Morality of Freedom*, pp. 369–429 (liberal perfectionism); Neil MacCormick, *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982), pp. 18–38 (social solidarity).

[58] Pleasing oneself would have no point if there were no competitors for one's attention.

choice lexical priority over the interest in social cooperation and coordination.

It does not follow that the individual's interest in freedom of choice and action should never be given greater weight than a shared interest in security, cooperation and coordination. However, to extent that the harm principle presupposes a presumption in favour of freedom of action, the demotion of harm from a trump to a factor to be weighed in the balance casts doubt on the strategy of starting the debate about the relationship between law and morality with such a presumption. The fact that Feinberg starts with the presumption in favour of liberty, but ends with an exercise of weighing competing interests, suggests that while the presumption may have rhetorical force at an abstract level, it is of much less use when it comes to giving practical effect to judgments about the proper balance between individual freedom on the one hand, and community cooperation and coordination on the other.

5. Criminal Law

The Wolfenden Committee was established to consider the criminal law relating to certain sexual offences. As a result, Devlin's Maccabaean lecture and the exchange between Devlin and Hart focused on the criminal law in general, and on offences related to homosexuality in particular. Feinberg expressly restricted his inquiry to criminal law because, he wrote,

> the threat of legal punishment enforces public opinion by putting the nonconformist in a terror of apprehension, rendering his privacy precarious, and his prospects in life uncertain. The punishments themselves brand him with society's most powerful stigma and undermine his life's projects, in career or family, disastrously. These legal interferences have a prior claim on our attention ... because of their immense destructive impact on human interests.[59]

Most other contributions to the debate also limit attention to the criminal law.

Devlin discussed three other areas of law in subsequent chapters of *The Enforcement of Morals*: tort law, contract law, and what he called "quasi-criminal law." By "quasi-criminal" offences, Devlin meant offences involving conduct, such as driving on the wrong side of the road, which was not "inherently" immoral. He thought that the

[59] Feinberg, *Harm to Others*, p. 4.

distinction between conduct that was and was not inherently wrong had moral significance, and he proposed that imprisonment should be available as a punishment only in relation to offences involving inherently immoral conduct.

Devlin thought that tort law bore little relationship to morality because tort liability typically does not depend on "moral fault." He also believed that the typical tort remedy of compensation could not be used for moral purposes because compensation is normally calculated according to the amount of harm done, not the degree of the agent's fault.[60] Concerning the law of contract, he thought it was based primarily on pragmatic considerations to do with the promotion of commerce, rather than on morality. Devlin believed it right that contractual obligations to perform morally "wicked" ("really immoral") acts should be unenforceable, but that this principle should be confined to what he called the "direct consequences" of the immorality.[61] His approach to all three areas of law seems to have been moulded by his view that only "inherently wrong" conduct is really immoral,[62] and that to the extent the law is concerned with conduct not immoral in this sense, it cannot be said to be performing a moral function or "enforcing morality." This suggests that at the bottom of the disagreement between Devlin and Hart was a difference of opinion about the essence of immorality. Hart thought that this was to be found in the consequences of conduct[63] whereas Devlin found it in the conduct itself.

As implied by the quotation from Feinberg at the beginning of this section, criminal law has three characteristics that explain why it was and continues to be the focus of debates about the relationship between law and morality. First, the criminal law is coercive; secondly criminal liability carries social stigma; and thirdly, criminal penalties invade and restrict individual autonomy. On the whole, contributions to the Debate have paid relatively little attention to this third factor, and most theorists fail to notice the variety of criminal

[60] On this tricky issue, see Peter Cane, "Retribution, Proportionality and Moral Luck in Tort Law," in Peter Cane and Jane Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998), pp. 141–173.

[61] Devlin, *The Enforcement of Morals*, p. 53.

[62] For a critical discussion of the concept of inherent immorality, see Barbara Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*, Second Edition (London: Stevens, 1981), pp. 31–64.

[63] It is not clear how Hart would reconcile this view with his approach to (moral) responsibility. See footnote 50, above, and text.

penalties. Imprisonment seems to be treated as the paradigm criminal penalty. Apart from capital punishment, it is certainly the most invasive and restrictive of all criminal penalties. On the other hand, except in systems that allow capital punishment, it is also the least commonly imposed criminal penalty. The Debate has been significantly distorted by an unsophisticated picture of criminal penalties that fails to recognize their variety and the varying degrees to which they invade individual autonomy, and impose harsh treatment on and stigmatize the offender.[64] This lack of attention paid to the varied nature of criminal penalties[65] is, no doubt, partly the result of Hart's argument that rules and principles of sentencing are irrelevant to questions about the limits of the criminal law. It is implausible to suggest that the nature and severity of the penalties attached to particular conduct are irrelevant to the question of whether that conduct is properly the subject of criminal penalties. Some conduct should not be criminalised at all, no matter what the penalty. But in relation to some conduct, the answer to the question of whether it should be criminalised will depend on whether a suitable penalty is available. If imprisonment were the only penalty in use, the scope of the criminal law would surely be much narrower than it currently is.

Penalties are related to stigma. Part of the stigma attaching to criminal liability is generated by the penalty, and the stigma attaching to criminal penalties marks an important distinction between monetary criminal penalties and non-criminal monetary ("civil" and "administrative") sanctions. Nevertheless, stigma and penalty should be distinguished from one another. The stigma attaching to criminal liability is a function not only of penalty but also of the nature of the offence. Two offences that attract the same penalty may attract different stigma. For instance, a child-sex offender might attract much more stigma than a similarly-punished property

[64] The criminal law's prohibitions (offences) also restrict individual freedom to varying extents.

[65] A central plank of Raz's support for the harm principle is the implausible argument that criminal penalties invade autonomy "globally and indiscriminately" (Raz, *The Morality of Freedom*, pp. 418–419). The effect of any particular criminal penalty on any particular person's autonomy is contingent. Not only may one and the same penalty affect different people differently, but criminal penalties vary considerably in their likely impact on autonomy. Custodial penalties are likely to have much greater and more indiscriminately negative effect on autonomy than non-custodial penalties (which are much more commonly used). And although criminal penalties invade autonomy, some may generate direct countervailing benefits for the criminal and for others. Community service orders, and other "restorative" responses to crime, spring to mind.

offender. Moreover, the stigma attaching to criminal liability and punishment may continue after the punishment is complete and the conviction "spent." Like criminal penalties themselves, the stigma that attaches to criminal liability may invade and restrict autonomy. Indeed, the stigma attaching to criminal conviction and punishment may be more invasive and restrictive in its effect than the punishment itself. Being branded a criminal may adversely affect a person's life chances and choices much more than the mere facts of conviction and punishment.

Even so, many contributions to the Debate stress the coerciveness of the criminal law as the justification for limiting its operation by reference to the harm principle. However, it is not only the criminal law that is coercive. Tort law, contract law, and the law of restitution also have coercive sanctions as their disposal; and these sanctions are, ultimately, underwritten by the criminal law. So should the harm principle limit all legal regulation of human behaviour?[66] Or, rephrasing the question more broadly, should the limits of all legal regulation be defined by reference to the consequences of conduct? This is obviously far too large a question to be fully addressed here. However, it is necessary to make a few general comments.

In one very important respect, the civil law is entirely consistent with a focus on the adverse consequences of conduct. The paradigm civil-law remedy is compensatory damages. A precondition of an award of compensation is proof that "injury," "damage" or "loss"

[66] This question marks the tip of an iceberg. First, not only is civil law coercive, but it may also stigmatise. Doctors, for example, frequently complain about the negative reputational effects of being sued for negligence. Secondly, morality itself is coercive and stigmatising. Does this mean that the harm principle should apply in the non-legal realm as well? Mill apparently thought so (see Hart, *Law, Liberty and Morality*, pp. 75–77). Hart stresses the importance of non-coercive techniques for inculcating morality. They are equally important for inculcating law-abidingness. For most people, the significance of (criminal) law, as of morality, is as a guide to action, not a threat. I return to this point later in this section. Thirdly, one might think that what is distinctive and morally most problematic about the criminal law is not coercion or stigma but the fact that it regulates conduct by prohibiting it as opposed, for instance, to taxing it or requiring people who engage in it to take out some form of insurance against its adverse effects [Kent Greenawalt, "Legal Enforcement of Morality," in Dennis Patterson (ed.), *A Companion to Law and Legal Philosophy* (Oxford: Blackwell Publishers, 1996), pp. 475–487]. But it is not clear that people who oppose the criminalisation of harmless immorality would be any happier about its being taxed. Greenawalt's examples relate to conduct that causes remote harm or harm-to-self, and the argument perhaps has greatest force in such cases.

has been suffered by the claimant as a result of the defendant's breach of the law. Moreover, the amount of compensation payable is calculated by reference to the damage done, or the injury or loss inflicted. The prime remedial function of civil law is to compensate for adverse consequences of conduct. Conduct that attracts civil liability may also attract criminal liability, although not all conduct that attracts legal liability attracts both criminal and civil liability. There is always a question about whether conduct should attract criminal liability or civil liability or both. Even if one subscribes to the harm principle as a limit on legal regulation, it provides, at most, a necessary and not a sufficient condition of legal liability.

There are two fundamental respects in which the civil law is, on its face at least, inconsistent with a focus on consequences. First, conduct may attract civil liability or, in other words, breach the civil law, if it interferes with someone's rights, even if it causes them no "injury," "damage" or "loss." For instance, failure to perform a contractual obligation is a breach of contract regardless of whether it causes any damage or loss to the other contracting party. In the law of torts, the tort of trespass to land is a classic example of legal liability for invasion of rights as opposed to causing injury, damage or loss. Entering another's land without their consent may amount to trespass regardless of whether the entrant injures the landowner, or damages the land or any of the landowner's possessions. One of the main functions of tort law is to protect property rights, and property rights can be fully protected only if liability for their invasion can arise independently of whether the invasion caused any damage to the property owner. Although neither "harmless" breach of contract nor "harmless" trespass to land can attract compensation, both can be addressed by an injunction restraining threatened trespass or breach of contract.

Feinberg argues that (what we might call) a "bare" trespass to land is harmless only in the sense that it does no harm to any interest other than the landowner's property rights in the land. Similarly, he writes that insofar as breach of a promise interferes with the promisee's interest in having the promise performed, the promisee is both wronged and harmed:

> Most such apparent examples of wrongs that are not harms to interests can be interpreted in this way. There *can* be wrongs that are not harms *on balance*, but there are few wrongs that are not *to some extent* harms. Even in the most persua-

sive counterexamples, the harm would usually be an invasion of the interest in liberty.[67]

Extending the reach of the harm principle as far as this deprives it of all analytical purchase. In Feinberg's own terms, doing so effectively collapses the distinction between wrongfulness and harmfulness. It is a sign of how constraining the harm principle has become that it can lead to the condemnation of legal protection of property interests, for their own sake and in their own right, as inconsistent with individual freedom and autonomy. It is true, of course, that Feinberg's project is to establish the limits of the criminal law.[68] However, his concern in the passages that I have referred to and quoted is to define what is meant by "harm" rather than to set the limits of the criminal law. Defining "harm" to include "harmless" invasion of rights merely in order to preserve the harm principle seems perverse, at the least. It is ironical, too, that the result of the manoeuvre is to justify the criminalisation of two wrongs – trespass to land and breach of contract – which are not, in themselves, criminal offences.

Another fundamental aspect of civil law that seems inconsistent with a focus on consequences is restitutionary liability – that is, liability for gains made or received as opposed to loss caused. Such liability can arise in two different types of situation. One is where a person transfers money or property to another, for instance in the mistaken belief that the money or property is owed or belongs to the other. The latter may be required to return the money or property, even if she was in no way responsible for its receipt but was a purely passive recipient. The second type of case is where a person makes a gain as a result of committing a legal wrong, such as a tort, without inflicting any loss on the victim of the wrong. For example a person may make profitable use of property belonging to another in circumstances where the other person would not or could not have made profitable use of the property even if the former had not used it. Liability of the first type is consistent with a focus on consequences in the sense that it arises in circumstances where the gain made by the

[67] Feinberg, *Harm to Others*, pp. 34–35. For an analysis of the harm of breach of contract along the same lines as Gardner and Shute's analysis of rape (footnotes 19 and 43, above, and text), see Simester and Chan, "Inducing Breach of Contract," pp. 141–145. See also Joseph Raz, "Promises in Morality and Law," *Harvard Law Review* 95 (1982), pp. 933–938; Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), pp. 69–78.

[68] He expressly avoids discussing civil law (Feinberg, *Harm to Others*, pp. 20–21).

transferee corresponds to a loss incurred by the transferor.[69] By contrast, in situations of the second type, the person who makes a gain by committing a legal wrong against another may be required to surrender that gain to the victim of the legal wrong even though the gain does not correspond to loss suffered by the latter.

The law provides a restitutionary remedy in respect of wrongful gains in three types of case, involving either exploitation of another's property, exploitation of a relationship of trust, or deliberate wrongdoing aimed at making gains at another's expense. Imposition of liability in these three types of case despite the absence of loss appears to be problematic only if we use causation of adverse consequences as an exclusive criterion of acceptable invasions of autonomy and freedom of action. If we treat liability for adverse consequences as an application of a broader criterion limiting legal interference with individual freedom to what is necessary in order to strike a reasonable balance between the interests we all share in freedom of action on the one hand and security on the other, these three grounds for requiring the giving up of gains seem perfectly acceptable. Causation of adverse consequences is certainly one factor to be taken into account in deciding the proper limits of legal coercion. But treating it (or, even more, the harm principle) as the sole criterion requires us either to reject apparently reasonable principles of legal liability out of hand or, alternatively, to stretch the concept of "adverse consequences" (or "harm") to breaking point in order to cover them.

Another issue brought to the surface by casting our gaze beyond the criminal law is that of standards of liability. A common view is that criminal liability should only be imposed in cases where the agent acted either intentionally or recklessly. In fact, however, the criminal law recognizes a significant number of offences for which a person can be convicted either on proof that they acted negligently, or regardless of whether they acted negligently, recklessly, or intentionally. Offences in the latter category are known as strict liability offences. The most common basis of (civil) tort liability is negligence. Liability for breach of contract is normally either negligence-based or strict. There are relatively few forms of civil liability that depend on proof of intention or recklessness.

[69] The problem, in some cases at least, is to find wrongdoing on the transferee's part.

Here is not the place to discuss in detail the many complex and difficult normative questions about the limits of legal coercion to which this pattern of rules gives rise. The only point I want to make is that these issues are invisible in discussions of the limits of legal coercion that start with the harm principle. For example, the word "intention" does not appear in the index to any of the four volumes of Feinberg's extensive exploration of the limits of the criminal law. We saw earlier that when Devlin turned from criminal law to tort law, contract law and quasi-criminal law, these issues began to attract his attention in a way that they did not in the Maccabaean lecture. I have argued elsewhere that a theory of the responsibility that pays attention only to the question of what it means to be responsible and ignores the question of what our responsibilities are, is too short by half.[70] Here, I want to make the converse suggestion that discussions of the limits of the criminal law that pay attention only to the question of what sorts of conduct may be criminalized and ignore issues such as motivation and culpability, are too short by half. I am not saying, of course, that these latter issues do not receive extensive discussion, but only that they are rarely understood as having any relevance to the limits of the criminal law, discussion of which is dominated by the harm principle.

Finally, in this consideration of the effects on the Debate of focusing on the criminal law, I want to return to the issue of coercion. The conception of the criminal law and of law in general that underpins debate is what we might call a conception of "law as coercion."[71] According to this understanding of law, its prime significance and function is to secure compliance with its norms by threats of coercion and imposition of punishments and other sanctions. Law's coerciveness is seen as the characteristic most relevant to determining its proper limits. This is a deficient understanding of law and its social functions. For the typical, law-abiding citizen the significance of law resides not in its coerciveness but in its normativity. Such a person obeys the law not in order to avoid its coercive sanctions but because they consider obedience to be the preferable or correct course of action. A legal system could not operate effectively if this were not so. In this light, we must question whether a theory of the limits of law based on the assumption that law is seen by those to whom it is addressed as an invasion of their

[70] Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002).

[71] See e.g., Devlin, *The Enforcement of Morals*, p. 20.

autonomy is likely to be sound. Why should we determine the limits of law by reference to the perspective of the minority of people who obey it only because of its coercive capacity, rather than the perspective of those who view law as a legitimate source of standards of behaviour? If law were viewed from this latter perspective, the idea that it might appropriately prescribe standards of behaviour that express shared social values and aspirations would seem much less objectionable.

6. Law

The Debate rests on a sharp delineation of the respective spheres of law and morality. Law is understood both statically and dynamically. Statically described, law is a set of norms of human conduct. This concept of law is, I suspect, partly a function of treating legislation (statutes) as the paradigm of law. This is not done explicitly in the exchange between Hart and Devlin.[72] But the legislative paradigm underlies Hart's *The Concept of Law* and Devlin's exposition of law-making in a democratic state.[73] Because statute law has canonical form, legislation is easily depicted as a set of norms. By contrast, the common law is not formulated canonically, and is better understood in terms of reasons for and against particular outcomes than in terms of a catalogue of precisely worded normative propositions. Moreover, the static account of legislation is misleading because application and interpretation even of canonically-formulated statutory norms often (if not always) requires that they be treated as the product of a process of reasoning about values, purposes and ends.

Dynamically, law is pictured as a product of processes for resolving conflicts of interest by the exercise of political power. This, it seems to me, is the picture implicit in Hart's discussion of democracy,[74] in which he emphasizes the individual's right to dissent from and resist democratically-made laws; and in his apparent endorsement of the idea, which he attributes to J. L. Austin and Jeremy Bentham, that a prime reason for insisting on the distinction,

[72] Feinberg explicitly addresses his arguments to the "ideal legislature," not a court (Feinberg, *Harm to Others*, pp. 4–5).

[73] Devlin, *The Enforcement of Morals*, pp. 86–101.

[74] Hart, *Law, Liberty and Morality*, pp. 77–81.

between what the law is and what it ought to be, is "to enable men to see steadily the precise issues posed by the existence of morally bad laws."[75] The view, that law (especially statute law) is normatively suspect because it is the result of political conflict and compromise, is common but confused. In a pluralistic society in which disagreement about values is tolerated and even encouraged, mechanisms to manage such disagreement, and to reach widely acceptable compromises between conflicting interests, are essential for realisation of the benefits of social life. The mere fact that law is a product of such mechanisms is no ground for legitimate criticism. What matters is that the mechanisms should be good ones, the operation and products of which people generally are prepared to accept and abide by. In the light of pervasive and serious disagreement about values, such mechanisms and the norms they generate can themselves be valuable because unregulated conflict and disagreement may hinder realisation of the benefits of social life. It does not follow, of course, that the norms produced by such mechanisms are immune from critical assessment. All it means is that there is a reason for individuals to endorse and abide by such norms regardless of whether they embody what particular individuals consider to be correct or preferable reasons for action.

As I said earlier, this is an issue to which "liberal" contributors to the Debate have given little or no attention.

7. Morality

In the Debate morality is also understood both statically and dynamically. Statically understood, it is a set of norms about the (sexual) conduct of individuals and (in the guise of the harm principle, for instance) about the conduct of governments. It was suggested earlier that the tenor of the Debate was affected by disagreement about whether sexual mores count as moral norms. In fact, understood statically, morality is a highly contested concept. For instance, the realm of morality might be conceptualized "formally" in terms of characteristics such as universality and impartiality. "Substantively," it can be thought of as concerned, for instance, with interpersonal relationships. Informing various static

[75] H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 53.

conceptions of morality is an assumption that morality is a system of norms for which membership conditions can be specified that enable particular norms to be classified as moral or non-moral, and morality to be distinguished from other types of norms.[76] In the absence of an authoritative institutional source, we might doubt whether this would be possible even in principle. Fortunately, it is not necessary for present purposes to resolve this issue because the Debate can be rephrased simply in terms of whether the criminal law should be used to enforce or reinforce particular norms of conduct regardless of whether or not those norms are conceived of as being "moral."[77]

Dynamically understood, morality is a product of a process of practical reasoning. This is what the Dworkin called "morality in the discriminatory sense,"[78] by which he meant norms of conduct based on reason as opposed to emotion, prejudice, parroting and so on. This process of practical reasoning is often contrasted with political processes of compromise and conflict resolution that figure in the dynamic understanding of law outlined above.

8. The Relationship Between Law and Morality

In the Debate, the relationship between law and morality is conceived as competitive. Statically understood, morality provides a set of critical standards for assessing law. In the dynamic understanding, the idea that morality is a product of reason, as opposed to conflict and compromise, establishes its credentials as a critical standard against which to judge the law. But there is a quite different (but not necessarily inconsistent) way of viewing law, morality, and the relationship between them. This account is based on the idea that law is a set of institutional resources for generating, refining, recording, applying, interpreting and enforcing norms of conduct that may, but need not, be called "moral." This approach involves viewing law dynamically as a set of institutions, mechanisms and procedures rather than statically as a set of norms. It also involves viewing it positively as a set of social resources rather than negatively as a restraint on individual freedom. From this perspective, the Debate is

[76] For a recent discussion, see R. Jay Wallace, "The Rightness of Acts and the Goodness of Lives," in R. Jay Wallace, et al. (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004), pp. 385–411.

[77] Cf. Devlin, *The Enforcement of Morals*, pp. 138–139.

[78] Dworkin, *Taking Rights Seriously*, pp. 240–258.

concerned not with limiting the scope of the (criminal) law but rather with identifying good reasons to utilize law's institutional resources to generate, record, apply, interpret and enforce norms of conduct.[79]

Here are some examples of the social benefits that law's resources can provide. First, law can generate reasons for action. For instance, although there may be an extra-legal obligation to help people in serious need, only the law creates an obligation to pay taxes proportional to income.[80] Secondly, law's institutional resources can be used to legitimize certain negative reactions to breaches of behavioural norms. We allow sanctions such as blame, disapproval and social ostracism to be imposed without procedural safeguards to protect their targets, but not deprivation of liberty or seizure of a person's property without their consent. These latter are legal penalties in the sense that we do not allow them to be imposed without legal due-process. Law regulates the private enforcement of behavioural norms by effectively limiting it to certain "informal" sanctions and requiring other sanctions to be authorized by a public, legal institution.

Thirdly, law can underwrite value-pluralism. If disagreements about values become so serious that they threaten social stability and harmony, the law may be able to maintain social cohesion by laying down a norm that people are prepared to accept, even if it conflicts with their own normative beliefs about the matters in issue, because its being the law provides a reason to comply with the norm that would not otherwise exist. Law may help to maintain beneficial social cooperation in the face of serious disagreements about values. Fourthly, because legal officials must resolve legal questions presented to them, many disagreements that are not, or need not be, resolved in non-legal contexts are authoritatively settled by the law. For this reason, legal norms are in many respects much more detailed and fine-grained than their non-legal counterparts.[81]

What is the relevance to the Debate of this way of viewing law? The Debate addresses the question of when the criminal law should be used to enforce and reinforce norms of conduct that exist

[79] Raz thinks that contract law can properly be used to support social practices of undertaking voluntary obligations: Raz, "Promises in Morality and Law."

[80] Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002), pp. 43–44.

[81] So also Shavell, "Law Versus Morality as Regulators of Conduct," pp. 234–236.

independently of the criminal law. These may be called "moral norms" or, more neutrally, "social norms." The law itself provides an answer to the question addressed in the Debate by using its resources to enforce and reinforce some such norms and not others. But this is not the only way that answers to this question can be generated. Ordinary people form views about how to answer it, and philosophers recommend various techniques (such as seeking a "reflective equilibrium") to generate answers.

Underpinning the Debate is a picture of the relationship between the legal answer and "moral" answers according to which conflict between them should be resolved in favour of morality. This is (partly, at least) because the "moral" answer is understood to be the product of reason whereas the legal answer is conceived as the product of political conflict and compromise rather than reason. But the fact of pervasive disagreement amongst philosophers and ordinary people about the limits of the criminal law suggests that we have no reason necessarily to prefer any particular non-legal answer to the legal answer. This is because no method of answering the question is universally, or even widely, accepted as infallible. For that reason, whatever the faults of the legal method of answering it, there is no reason to assume that in any conflict between the legal answer and any particular non-legal answer, the former should be assumed to be correct or preferable. Because the law possesses valuable institutional resources for creating, interpreting and applying norms, legal norms deserve to be taken seriously as candidates for the accolade of correct or preferable. In terms of the Debate, this conclusion suggests that it would be better to conduct a dialogue between the harm principle (and other relevant norms) and the law rather than to use the harm principle as a privileged starting point for assessing the legal answer. In other words, we should not assume that legal deviations from the harm principle undermine the legitimacy of the law while leaving the force of the harm principle undiminished. Taking the law seriously does not mean accepting its norms as correct or preferable but only treating them as eligible candidates for that status, and just as eligible as our normative "intuitions" (for instance).[82]

[82] See also Soper, *The Ethics of Deference*, p. 18. At the same time, it is important not to draw too sharp a distinction between intuitions on the one hand and social normative practices on the other, because such practices may inform our intuitions (I am grateful to Leighton McDonald for help on this point).

9. Conclusion

I have argued that normative discussion of the limits of law has been distorted and cramped by the way the exchange, between Hart and Devlin about the limits of the criminal law, was framed. The search for sound values in a secular, pluralistic society is difficult and complex. The basic methodological strategy of the "liberal" side of the Debate (represented, most notably perhaps, by Joel Feinberg) is to assert a presumption of liberty as a starting point, and the harm principle as a privileged critical standard, for assessment of the criminal law. Negative results have included greater or lesser unwillingness to subject the harm principle itself to critical appraisal (as opposed to creative reconstruction), a tendency to stretch the concept of "harm" to breaking point, and failure to recognize the social value of law and to take it seriously as a potential source of correct or preferable behavioural norms. Taking the law seriously in this way is a demanding and time-consuming task. But if it is accepted that law has valuable resources for generating good reasons for action, it should not be presumed that conflicts between the conclusions of normative reflection and the law must be resolved in favour of the former without taking seriously the possibility that the law may itself embody correct or preferable norms of human behaviour. It may not, of course. But it would be rash to reach that conclusion without giving serious consideration to its claim on our approval. We should not be too quick to trim the law to fit our normative preconceptions and intuitions without first trying to understand its reasons for occupying the space it does. For it is only by having good reasons for what it requires that law retains its normative authority, and hence its ability to achieve those social goods for which we value it.

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