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Legislating Morality: Scoring the Hart-Devlin Debate after Fifty Years

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Abstract. It has now been more than 50 years since H. L. A Hart and Lord Patrick Devlin first squared off in perhaps the most celebrated jurisprudential debate of the twentieth-century (1959–1967). The central issue in that dispute—whether the state may criminalize immoral behavior as such—continues to be debated today, but in a vastly changed legal landscape. In this article I take a fresh look at the Hart-Devlin debate in the light of five decades of social and legal changes.

1. Introduction

Five decades ago, two distinguished British legal figures—Oxford Professor of Jurisprudence H. L. A. Hart and Law Lord Sir Patrick Devlin—squared off in perhaps the most celebrated jurisprudential debate of the twentieth century (Devlin 1959, 1965; Hart 1961, 1963, 1965, 1967). The debate dealt broadly with the aims and limits of the criminal law but was primarily focused on the issue of "legislating morality": May the state criminalize behavior that is, or is widely considered to be, immoral, even if the behavior poses no threat of demonstrable social harm? Devlin defended the "conservative" thesis that such morals laws are sometimes defensible, while Hart supported the "liberal" view to the contrary. This debate, of course, continues today, but in a vastly changed legal landscape. How well do Hart and Devlin's arguments hold up half a century later?

1.1. Devlin's Central Argument

The relation between law and morals has long been debated by political and legal theorists. Prior to the twentieth century, it was widely accepted

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that it was government's role to uphold sound morals or at least to restrain the grosser forms of vice. This traditional view was powerfully attacked by John Stuart Mill in *On Liberty* (1859). Mill argued that it was not government's job to punish or prevent immorality as such. Rather, government should use its coercive powers only in order to prevent concrete harm to others. This view of government's role, now generally known as the harm principle, was vigorously criticized by James Fitzjames Stephen in *Liberty, Equality, Fraternity* (published in 1873). It was only in the mid-twentieth century, however, that the debate over the harm principle became front and center in Anglo-American jurisprudence.

In the mid-1950s, liberalism was in the ascendant in the legal academy and a thoroughgoing reassessment began of so-called "victimless crimes" in secular liberal democracies. In the United States, the drafters of the Model Penal Code proposed in 1955 to decriminalize "all sexual practices not involving force, adult corruption of minors, or public offense" (Grey 1983, 4). In England, the Wolfenden Committee in 1957 recommended that homosexual relations between consenting adults in private no longer be a crime under English law. In defending this view, the Committee argued that it is not "the function of the law to intervene in the private lives of citizens." Given "the importance of individual freedom of choice and action," the Committee concluded, "there must remain a realm of private morality which is, in brief and crude terms, not the law's business" (Lee 1986, 26).

It was the Wolfenden Committee's endorsement of this Millian idea of a "realm of private morality" that sparked Devlin's initial response. First in a 1959 lecture to the British Academy and then in a series of follow-up publications, Devlin argued that "it is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice" (Devlin 1965, 14). Devlin's argument is sometimes opaque and has been interpreted in various ways, but the central thread of his argument can be summarized as follows.

No society could exist without certain shared moral principles. These principles act as a kind of glue that keeps society from breaking apart. Society has a right to safeguard anything essential to its existence, so society has a right to articulate and safeguard these unifying rules of public morality.

In some cases it may be necessary to use the criminal law to preserve shared moral standards, even if the prohibited conduct poses no obvious or direct threat of social harm. Every violation of society's shared moral code is an attack on that code. Such acts may do no actual damage to society's shared morality, but they are *types* of acts that are capable of weakening or destroying society, and as such fall within the police powers of the state. (In this way, Devlin argues, morals offenses are like acts of

treason: neither may cause any real injury to society, but each may be outlawed because of the danger they pose to society's integrity.) How might even so-called "harmless immoralities" like private consensual homosexual sex cause social harm? Devlin cites three possible ways.

First, the morals offender might weaken himself by means of his "private vices"—e.g., by becoming a habitual drunkard—thereby rendering himself of less use to society. Devlin (1965, 104, 111) calls this a kind of "tangible harm" to society.

Second, the vice might become widespread. A single tippler in his remote cottage may do little harm to society, but what if 25% or 50% of the population got dead drunk every night? An "epidemic" of vice of this sort would be another kind of tangible social harm (ibid., 143).

Third, a morals offender may cause intangible harm to society by weakening the moral bonds that act as society's cement. Most people base their moral convictions on religion and take those moral beliefs as a whole (ibid., 115). In other words, most people's personal moral codes are built like a house of cards: remove one or two vital cards and the whole structure will collapse.[1] By violating society's shared morality, a morals offender attacks that code. This, in turn, may weaken people's allegiance to that moral code, and possibly their allegiance to morality itself. This corrosive effect may be compounded if the immoral behavior is permitted by law. For then some citizens may perceive the law as "condoning" vice, and thus lose respect for the law and the state (ibid., 131).

History teaches that the risk of social collapse due to moral weakness or discord is very real. "Societies disintegrate from within more frequently than they are broken up by external pressures" (ibid., 13).

Thus, any so-called "private" immorality may harm or threaten harm to society. And because any conduct that may potentially harm society falls within the coercive powers of the state, there is no sphere of human conduct that is "not the law's business." By right, the state may regulate any form of human behavior and prohibit any violation of conventional moral norms.

It does not follow, however, that the state is *warranted* in outlawing all violations of recognized moral standards. The criminal law is a blunt instrument of social control, and often the costs of criminalization outweigh the gains. There are no simple or hard-and-fast rules for determining when society should use the law to enforce morality. But the following "elastic" guidelines should be kept in the mind:

1. *Maximum individual liberty should be allowed consistent with the integrity of society*. Mere social disapproval of "immoral" conduct is not enough to warrant criminal penalties. There must be a real feeling of

[1] The house of cards analogy is mine, not Devlin's. Following Hart, Devlin (1965, 115) speaks of morality as a "web" of interconnected beliefs.

"intolerance, indignation, and revulsion" (Devlin 1965, 16) and no dispute that the conduct is immoral and deserving of punishment (ibid., 90). In determining such matters, lawmakers should look to *conventional* moral standards, not religious norms or the standards of "enlightened" or "critical" morality. The test is whether a "reasonable man" (or unanimous jury of average citizens) would find the conduct reprehensible and beyond the limits of tolerance.

2. *Lawmakers should keep in mind that the limits of tolerance shift*. While society's moral standards change slowly, if at all, tolerance for breaches of those standards varies from generation to generation. If tolerance increases, morals laws may be left without the strong backing they need to be effective (ibid., 18).
3. *As far as possible privacy should be respected*. Privacy is an increasingly important value in modern societies. Thus, it should be put in the balance against the making and enforcement of morals legislation.
4. *The law is concerned with a minimum and not with a maximum standard of behavior* (ibid., 19). The criminal law can and should be an ally in "the war against vice" (ibid., 111), but it does not demand that citizens be morally perfect. Its purpose is simply to ensure minimum standards of acceptable behavior.

In short, the Wolfenden Committee was wrong to suggest that there is a realm of "private morality" that is "not the law's business." No society can exist without a shared moral code. That code acts as a kind of cement that keeps society intact and cohesive. Any violation of society's shared moral code threatens to weaken that cement, and so threatens society itself. Society has a right to protect itself from dangers. It is not possible, therefore, "to set theoretical limits to the power of the State to legislate against immorality" (ibid., 12). However, there are a number of cautionary guidelines (such as the importance of respecting individual liberty and the value of privacy) that prudent legislators should take into consideration.

1.2. Hart's Critique of Devlin

Devlin's defense of morals laws provoked a flurry of responses, nearly all of them critical.[2] Devlin's argument was seen as novel and, to liberals, insidious. Defenders of morals laws had traditionally based their arguments on religion or a "perfectionist" theory of government. Traditionalists typically argued that immorality should be punished by the state either

[2] A rare exception was Basil Mitchell's lucid and balanced book, *Law, Morality, and Religion in a Secular Society* (Mitchell 1967). Mitchell saw much of value in Devlin's arguments, though he faults him at various points and agrees with some of Hart's criticisms. Other generally sympathetic treatments of Devlin include Rostow 1962, Lee 1986, George 1993, Dworkin 1999, and Murphy 2007.

because (a) God demands it (and may punish those societies which fail to respect those demands), (b) religion is an essential bulwark of morality, (c) respect for state authority and obedience to law will wane if the law is seen as losing its moral compass, or (d) it is the state's task to promote virtue, maintain a healthy moral environment, and foster integral human fulfillment. Most liberal critics of Devlin saw these arguments as unsound and marched proudly under the banner of Mill's harm principle. As they saw it, individuals should essentially be free to do as they please unless their acts harm or threaten to harm others. Devlin's argument was alarming because it supported morals laws on primarily harm-based grounds. Thus, if Devlin was right, liberals were hoist on their petard. And to make matters worse, Devlin's argument justified the enforcement of conventional moral values, even those based on mere prejudice or superstition. So liberals were denied even the consolation of using the criminal law to advance their "progressive" values.

By far the most forceful (and persistent) of Devlin's liberal critics was H. L. A. Hart, now widely recognized as the twentieth-century's greatest philosopher of law. Hart ignored many aspects of Devlin's complex argument and zeroed in on what he took to be its crucial weaknesses. Three major points of contention emerged in their exchanges. I shall score the debate by focusing on these three points.

2. Does Devlin Adequately Respond to Hart's Trilemma?

Hart's overall response to Devlin takes the form of a trilemma. In essence, Hart argues as follows: It is difficult to say precisely what Devlin's argument is, but it appears to be A, B, or C. But none of these views is defensible. Hence, Devlin's argument is apparently indefensible.

Like several other leading commentators (e.g., Feinberg 1988, 137; Dworkin 1977, 242), Hart complains that at crucial points Devlin's argument is unclear. At times, Hart says, Devlin seems to be defending what Hart (1967, 1) calls "the disintegration thesis." This is the claim that society has a *prima facie* right to enforce its shared morality by law because the society might disintegrate (or be substantially weakened) if that common morality is lost. As Hart sees it, the disintegration thesis is a normative claim that rests on "a highly ambitious empirical generalization" (Hart 1967, 3) about what is necessary to effectively guard against the risk of societal breakdown. The problem with the disintegration thesis, Hart (1963, 50) argues, is that Devlin offers no significant empirical evidence to back it up, and there is in fact much evidence against it. (Hart [1963, 71] points out, for example, that many societies have *benefited* from individual divergences from common morality, and that there is no evidence of major social or moral "disintegration" in European countries that long ago decriminalized homosexual conduct despite strong public disapproval of

that conduct [ibid., 52].)[3] Thus, the disintegration thesis is unsupported and highly dubious.

However, it is not absolutely clear that Devlin defends the disintegration thesis, Hart claims. Sometimes Devlin appears to suggest that it is a *necessary* truth that society will disintegrate if its shared morality is lost. Devlin says, for instance, that "society *means* a community of ideas" (Devlin 1965, 10; italics added), and if this is intended as a definition of "society," then any change in a society's shared moral ideas will necessarily cause the extinction of that society. Hart doesn't label this view, so for ease of reference let us call it the "definitional thesis."

If Devlin does endorse the definitional thesis, Hart points out, that thesis provides no support for Devlin's claim that society has a *right* to enforce its shared moral standards by means of the criminal law. For the definitional thesis implies nothing about whether any given moral violation or proposed moral reform is good or bad. According to the definitional thesis, a "society," by definition, must have exactly the moral code it has at that precise moment. Any change at all results in the extinction of that society and, ordinarily, the coming into existence of a different society. This odd and unexciting disguised tautology, Hart (1983, 250) remarks, "hardly seems to be worth ventilating," and it in no way supports the legitimacy of morals legislation.

Late in their debate Hart suggested a third possible reading of Devlin's argument. Following Ronald Dworkin (1977, 246), Hart found hints in Devlin's writings of a different kind of argument for enforcing morality. According to this view, which Hart labels "the conservative thesis," society has the right to enforce its morality by law because the majority have the right to follow their own moral convictions that their moral environment is a thing of value to be defended from change" (Hart 1983, 249).[4]

The conservative thesis appears to be more defensible than the disintegration thesis. As Hart notes, there is little empirical evidence that society will collapse (or even be significantly weakened) if it tolerates at least many "harmless immoralities." The conservative thesis faces a less onerous burden of proof. What the defender of the conservative thesis must demonstrate is that (a) certain established institutions, ideals, traditions, social environments, and ways of life, while perhaps imperfect, are valuable and worth preserving, (b) certain harmless immoralities threaten to undermine or erode those institutions, and (c) the costs of making and enforcing laws against such immoralities (loss of freedom, criminal justice costs, risks of blackmail, arbitrary enforcement) are outweighed by the

[3] For a similar argument on the effects of gay marriage, see Badgett 2009.

[4] *Pace* Dworkin, attributing this view to Devlin is a stretch. The best textual support is probably this passage: "Society must be the judge of what is necessary to its own integrity if only because there is no other tribunal to which the question can be submitted" (Devlin 1965, 118).

importance of preserving those institutions, and (d) in close cases, it is the right of the people (or their elected representatives) to decide whether conditions (a)–(c) are satisfied.

Several conservative theorists have defended versions of the conservative thesis (see, e.g., Mitchell 1967, 27–35; George 1993, 65–82; Murphy 2007, 106–9). In an influential article, Ronald Dworkin (1977, 246–55) offered one standard liberal response to such arguments: Political majorities have the right to enact morals laws only if those laws are based on genuine moral convictions; many traditional morals laws are based on sheer prejudice or emotion, not genuine moral convictions; so political majorities do not have the right to enact many traditional morals laws.

Dworkin's argument is forceful, but it fails as a general response to the conservative thesis because it permits morals laws that *are* based on genuine moral convictions. A better liberal response is offered by Joel Feinberg (1988, 67–8) and Andrew Altman (2001, 165–6), who point out that the conservative thesis presupposes a seriously inadequate conception of the value of individual autonomy and individual rights. As Altman notes, in liberal democracies core individual rights are widely viewed as non-utilitarian "trumps" that may "require society to accept certain significant risks that it may prefer not to accept. And individual rights might require society to produce fairly persuasive evidence that a certain conduct poses a significant risk before it can go ahead with criminalization" (Altman 2001, 165). Thus, for example, society may not restrict my religious freedom simply because it feels that my exercise of that freedom might subtly change the moral environment for the worse (ibid., 165–6).

Hart himself never squarely addressed the merits of the conservative thesis. However, given the high value he placed on individual freedom (see, e.g., Hart 1963, 21–2, 73) it is likely he would agree with the Feinberg-Altman critique.

In summary, then, Hart poses to Devlin the following trilemma: "You defend morality laws by appealing to either the disintegration thesis, the definitional thesis, or the conservative thesis. But none of these views is defensible. So your defense of morality laws fails." How does Devlin respond to this trilemma?

Devlin nowhere addresses the third prong, the moral conservatism argument. Hart and Dworkin canvassed that issue in 1967, two years after Devlin's final word in the debate. Devlin did (belatedly) respond to Hart's first two prongs. In his 1965 book, in a lengthy footnote added to his original 1959 Maccabaean Lecture, Devlin made clear that he did not wish to defend the definitional thesis. He wrote: "I do not assert that *any* deviation from a society's shared morality threatens its existence any more than I assert that *any* 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" (Devlin 1965, 13n.).

This is an important clarification. Devlin makes clear that he is in fact defending a version of the disintegration thesis, but a more limited version than Hart had supposed. In comparing homosexual conduct to treason—a comparison Hart found offensive and absurd—his concern is wholly with what Dworkin (1977, 245) calls the "threshold criterion" of what sorts of conduct are properly regarded as "the law's business." His claim is that any conduct that poses a risk to society falls within the scrutiny of the law, and any breach of society's shared morality poses at least some risk to that society.

Hart (1983, 257n.) is unconvinced by this reply. Like Dworkin (1977, 245), he sees this as an "intellectual sleight of hand" intended to smuggle in a substantive conclusion without anything close to adequate evidence. As Hart sees it, "Lord Devlin uses the same criterion (in effect "passionate public disapproval") to determine both that a deviation from public morality may conceivably threaten its existence and that it in fact *does* so, so as to justify actual punishment" (Hart 1983, 257n.).

This reply misses the mark. Devlin is quite clear that the issue of passionate public disapproval is relevant only at the second level of inquiry, the "balancing question" of whether use of the criminal law is actually justified. And even at that stage passionate public disapproval is only a necessary condition of legal enforcement, not a sufficient one. Other conditions (e.g., no unjustifiable invasion of privacy) must also be met before criminal penalties are warranted.

This exchange exposes a crucial ambiguity in the phrase "not the law's business." It is clear from Devlin's footnote that by "not the law's business" he means "could not conceivably become a matter of state scrutiny or regulation." This explains why he finds it unnecessary to provide more than perfunctory empirical evidence that private immoralities could conceivably harm society. He takes it as obvious that violations of public morality, the "cement" of society, may result in tangible and intangible social harms.

Hart, on the other hand, understands "not the law's business" in a less absolute sense. He understands it to mean "not subject to state regulation, except in unusual or exigent circumstances." Thus, Hart would find it natural to say that decisions about hair length are "not the law's business"—while recognizing that a major lice outbreak or some other unforeseeable circumstances could conceivably justify state action.

This ambiguity reveals the crucial flaw in Devlin's argument. At some point, either at the "threshold question" of whether a certain type of conduct is subject to possible state regulation or at the "balancing question" of whether criminalization is actually justified, substantial empirical evidence is needed to support the claim that private immoralities pose a

significant threat to the "existence" of society. Devlin never provides that evidence. Thus, Hart's basic criticism of Devlin—that he fails to provide anything like adequate evidence for his disintegration thesis—stands. *Score*: Hart 1, Devlin 0.

3. Is Morality a Seamless Web?

We have seen that one of Devlin's central arguments for the disintegration thesis is an appeal to religion as an essential support for the moral order. In Devlin's view, morality is dependent on religion in three important respects. First, in at least most societies, morality is historically derived from religion (Devlin 1965, 4). (Devlin states that in Britain "the whole of our morality is religious in origin" (ibid., 62)). Second, no moral code "can claim any validity except by virtue of the religion on which it is based" (ibid., 4). Third, most people "take their morality as a whole" (ibid., 115) and base their moral beliefs on certain religious assumptions. As a result, to "destroy the belief in one part [of an individual's moral code] will probably result in weakening the belief in the whole" (ibid., 115). Thus, by refusing to enforce public morality, the state invites moral anarchy, "as individuals, having come to doubt parts of their seamless morality, quickly chuck all the rest of it" (Feinberg 1988, 40).

Hart's reply to this argument is brief, but telling. He says nothing about Devlin's highly contestable claim—for which Devlin provides no argument—that only religiously-based moral codes can claim any "validity." Instead, he focuses on Devlin's "undiscussed assumption" that morality forms a "single seamless web" (Hart 1963, 50–1). As Hart sees it, "there is no evidence to support, and much to refute" (ibid., 51) Devlin's "chuck-it" theory of morals, especially when it comes to conventional norms of sexual morality. What empirical evidence is there that individuals who come to reject society's traditional sexual norms tend to reject morality lock, stock, and barrel, thereby becoming threats to society's very existence?

Devlin's response is basically to stick to his guns. He states that while "seamlessness presses the simile rather hard," it is nonetheless true that "most men take their morality as a whole and in fact derive it [. . .] from some religious doctrine. To destroy the belief in one part of it will probably result in weakening the belief in the whole" (Devlin 1965, 115).

The idea that religion is an essential support of morality was once, of course, widely held. In the Enlightenment period, versions of this view were defended by such notables as Locke, Voltaire, Benjamin Franklin, and Edmund Burke. In our own day, Robert Bork has vigorously argued for the logical and psychological dependence of morality on religion. Bork writes:

> For most people, only revealed religion can supply the premises from which the prescriptions of morality can be deduced. Religion tells us what the end of man should be and that information supplies the premises for moral reasoning and hence a basis for moral conduct. (Bork 1996, 278)

From this it seems to follow that atheists should be an ill-behaved, morally rootless lot, which Bork admits is not always the case. He retorts, however, that "such people are living on the moral capital of prior religious generations" (Bork 1996, 275) and that this capital will eventually be used up.

Five decades after the Hart-Devlin debate, the issue of whether morality is typically a "web" of interdependent beliefs appears in a new light. During this period, two highly relevant developments have occurred in Europe and in many other parts of the developed world: secularization and liberalization. In Europe, there has been a dramatic decline in religious belief and practice, with sizeable percentages of the population now disclaiming belief in God.[5] At the same time, many nations in Europe and around the globe have liberalized their laws, repealing or modifying many traditional morals laws on divorce, adultery, fornication, gay marriage, euthanasia, pornography, gambling, recreational drug use and other morality-based restrictions on individual liberty.[6] Some see the past half-century as a period of moral decline (Bork 1996)[7], though others strongly disagree (Medved 2008, 232–56). But it is significant that nothing like Devlin's moral anarchy/social disintegration scenario has occurred. Secularized European nations are not plagued by hordes of amoral individuals who have "chucked" all their moral values along with their religious beliefs. Nor do such nations appear to be anywhere near the brink of "disintegration." On the contrary, civic bonds have remained strong despite—some would say "because of"—increasing moral pluralism and tolerance for unconventional lifestyles. It seems that social cohesion is not nearly so fragile as Devlin imagined. *Score*: Hart 2, Devlin 0.

[5] In a 2005 survey, only 19% of citizens in the Czech Republic claimed to believe in God. The figures in other European countries include: Sweden 23%, France 34%, United Kingdom 38%, Germany, 47%, Spain 59%. Europameter 225 "Social Values, Science and Technology" Report 2005, *ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf*

[6] See text and notes in Eskridge and Spedale 2006, 185–7. In 1964 Devlin could write: "At present there is no real pressure whatever—the sort of pressure that governments have to take account of sooner or later—for any reform of the law based on the extrusion of moral principle. Mill's doctrine of liberty has made no conquests on *terra firma*" (Devlin 1965, 126). No one could plausibly make that claim today.

[7] See also Brent Bozell, The Numbers on Moral Decline, *The Washington Times*, March 14th, 2007; Steve Doughty, Four in Five People Believe Britain Is in "Moral Decline," *Daily Mail*, September 8th, 2007.

4. Is Mill's Harm Principle (or Something Close to It) Defensible?

Devlin's principal objection to the Wolfenden Report was not its call for the decriminalization of homosexual conduct—a recommendation he publicly supported as early as 1964 (Hart 1965, 35n.). His main complaint, rather, was the Wolfenden Committee's endorsement of something close to Mill's harm principle (the claim, roughly, that legal and social coercion is justified only in order to prevent harm to others). The Committee had said:

> [T]he function of the criminal law [. . .] is 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, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. (Quoted in Devlin 1965, 2)

Devlin saw this as a novel and highly troubling view of the limits of state power over the individual, and he criticized it on three major grounds. First, as we have seen, it denies society the right to protect itself by preserving its shared morality. Second, it makes it impossible to take moral desert into account in criminal sentencing. Finally, it is a simplistic view of the purpose of the criminal law that would require the repeal of many laws that liberals themselves would presumably support. We have already fully considered the first criticism. Let us turn, then, to the second and third.

4.1. The Moral Gradation of Punishment

According to the Wolfenden Report and Hart, the criminal law is not concerned to prevent or punish immorality as such. Devlin argues (following Stephen 1991, 152–4) that this is inconsistent with a legitimate and widely supported feature of the criminal law: the moral gradation of punishment. As Devlin (1965, 129) notes, gross violations of morality (e.g., murder) are generally punished more severely than minor violations (e.g., jay-walking), and offenders who commit the same crime may receive different punishments, depending on the circumstances and their levels of moral responsibility and blameworthiness. In some cases, judges and other legal officials may allow certain offenders (e.g., petty thieves) to get off scot-free, choosing only to punish those who are particularly morally culpable (ibid., 130). Such practices, Devlin argues, make clear that the law is properly concerned with "immorality as such."

Hart sees this argument as an *ignoratio elenchi*. Two questions, he says, must be distinguished: (1) What justifies the *practice* of legal punishment, the creation and enforcement of a *system* of criminal laws? (2) How much should a certain crime be punished? The first question deals with what Hart calls the "general justifying aim" of the criminal law. For liberals like Hart, the purpose of the criminal law is simply to prevent harm and

serious offense, not to promote virtue or punish vice.[8] The second question deals with what Feinberg (1988, 151) calls the "machinery" of how the criminal justice system should operate. At this level, as Hart and Feinberg concede, most liberals have no objection to the "the enforcement of morals." As Hart (1963, 36) points out, allowing moral considerations to play a role in sentencing decisions may be necessary to ensure fairness or to maintain public respect for the law. Liberals insist only on three claims with respect to the enforcement of morals: (1) No truly harmless (or inoffensive) immoralities may be made crimes, (2) restrictions on individual liberties generally may not be justified by appeals to diffuse and intangible harms, and (3) moral considerations may not factor into sentencing decisions when they involve non-grievance immoralities, such as having lustful thoughts while jay-walking (Feinberg 1988, 154). Thus, Devlin's appeal to the moral gradation of punishment fails, because he misunderstands what liberals claim about the enforcement of morals.

4.2. Liberalism's Unpalatable Implications

Perhaps Devlin's most forceful argument against Hart is when he presses home, as Stephen (1991, 152–62) had earlier, how radically the law would apparently have to change if Mill's harm principle (or some close cousin of it) were actually adopted. Mill argued that the criminal law "should be used only to protect others from harm to which they do not consent" (Devlin 1965, 127). Moreover, by "harm" Mill meant "chiefly physical harm to other individuals" (ibid., 104). Devlin argues that this is *prima facie* inconsistent with two fundamental principles of then-current British criminal law and eight specific crimes (ibid., 127–8). The two fundamental principles are that moral considerations should play a role in the gradation of punishment and that the consent of the victim is generally not a defense to a criminal charge. The eight specific crimes are bigamy, cruelty to animals, homosexual conduct, abortion, incest, obscenity, bestiality, and offenses connected with prostitution (e.g., pimping). None of these principles or crimes, Devlin argues, appears to be consistent with Mill's harm principle. Yet they all have (or did in Devlin's day have) strong public support. Are Hart and the Wolfenden Committee seriously suggesting that they be abolished or repealed? If so, they do not have their feet on the *terra firma* of contemporary social reality (ibid., 126–8).

Hart's response surprised Devlin. He denies that liberals are committed to either the strict harm principle or, by and large, to the radical legal

[8] However, as Feinberg (1988, 153) notes, there is arguably a moral element in this claim, since "harm," properly understood, refers only to *wrongful* harms. Feinberg (1988) provides a number of examples (e.g., football, academic philosophy, and business corporations) where the general justifying aim of the institution is largely or wholly non-moral, but where there are important moral constraints on how the institutions should operate.

changes Devlin alleges. We have seen how Hart responds to Devlin's argument on the moral gradation of punishment. Laws against cruelty to animals can be justified by extending the harm principle to include harms to animals (Hart 1963, 34). Laws against bigamy may be seen as protecting religious feelings from serious offense (ibid., 38–42). Disallowing consent as a defense to crimes such as murder or assault can be justified on paternalistic grounds—the protection of people against themselves (ibid., 30–4). Laws making homosexuality a crime should be repealed, since such laws infringe a core freedom, cause needless misery, and cannot be justified in terms of harm, offense, or self-protection. Of Devlin's other five morals offenses—abortion, incest, obscenity, bestiality, and prostitution-related crimes—Hart says virtually nothing.

Devlin finds these responses both puzzling and unforthcoming. He is puzzled by Hart's acceptance of at least some offense- and paternalism-based laws, because this modification of Mill's views appears to open the door to a host of anti-liberal prohibitions. Paternalism, in particular, might be used to support many traditional morals laws. No clear line can be drawn, Devlin says, between physical and moral harms to self. And once one admits moral harm as a legitimate liberty-limiting criterion, one cannot consistently claim that immorality as such is "not the law's business" (Devlin 1965, 133–7).

Devlin also faults Hart for being cagey on what he would substitute for Mill's strict harm principle. Hart admits that harm to others, serious offense, and harm to self are sometimes sound reasons for criminal prohibitions. But when, precisely? What counts as "harm"? When are possible or likely harms sufficient to justify restrictions on individual liberty and self-sovereignty? What kinds of offense- and paternalism-based laws are justifiable, and what kinds are not? Devlin (1965, 128) complains that Hart's views on these critical questions "can be glimpsed only through a glass darkly."

Hart, of course, is not attempting to propound a full-scale liberal theory of the proper scope of the criminal law. Just how large and complex such a task is was made clear in Joel Feinberg's now-classic four-volume work, *The Moral Limits of the Criminal Law* (1984–1988). But Devlin is right that Hart needs to say more about notions such as "harm," "offense," and "paternalism" and when such principles may legitimately be invoked to support criminal prohibitions. The importance of such theoretical work is underscored by recent defenses of morals legislation, which have largely abandoned Devlin's attempt to ground legal moralism on appeals to conventional morality and the threat of social disintegration. Instead, these theorists have appealed to values such as flourishing social relationships and a sound moral environment (George 1993, 65–82), integral human fulfillment (Finnis 1996, 5), essential social institutions and worthy traditions (Mitchell 1967, 26–35; Kekes 1998, 133), moral ideals (Murphy 2007,

107–8), and the public condemnation and discouragement of wrongful acts (Dworkin 1999, 945–6). To meet these sorts of neo-Devlinian challenges, liberals will need to articulate, much more fully than Hart does, a defensible theory of the proper limits of the criminal law. Feinberg (1984–8) offers by far the most impressive attempt to date to formulate such a theory. But at many points Feinberg's argument relies on highly contestable liberal intuitions (e.g., that moral harms are true harms only if the victim has an antecedent interest in being good: ibid., 70). In the end he concedes that liberals may need to make certain concessions in the face of "stubborn" conservative counterexamples (Feinberg 1988).

In all fairness, it cannot be said that Devlin himself offers a clear and detailed theory of the proper limits of the criminal law. He plainly states that society has a *prima facie* right to legislate against immorality as such (Devlin 1965, 11). But when does this *prima facie* right become an *ultima facie* one? More generally, what sorts of conduct may the state rightly make criminal? Devlin says little about which types of offense- and paternalism-based laws are legitimate. And anyone who has read Feinberg's nuanced and immensely complex account of the moral limits of the criminal law will find Devlin's four "elastic" guidelines for the enforcement of morality far too general and simplistic.

Even worse, by resting his defense of legal moralism entirely on conventional moral values and denying that the state may enforce "doctrines in which citizens are entitled to disbelieve" (ibid., 7), Devlin renders his own view incoherent. For his claim that governments may prohibit immorality as such is certainly a doctrine which citizens have a right to disbelieve.

So who gets the better of this argument on whether Mill's (duly qualified) harm principle is an adequate basis for determining which sorts of conduct may rightly be made criminal? Assessments will vary, but on the whole I would award a slight edge to Devlin. *Final Score:* Hart 2 ½, Devlin 1.

5. Conclusion

For half a century, the general consensus has been that while "there is something to be on each side" of the Hart-Devlin debate (George 1993, 65), Hart in the final analysis "emerged as the victor" (Murphy 2007, 103). This retrospective analysis tends to confirm that conclusion. At the same time, various developments over the past half-century have bolstered Hart's critique of Devlin. In particular, the decline of religion, the liberalization of social attitudes, and the spread of moral pluralism have cast doubt on Devlin's fears of moral collapse and social disintegration. Many would argue that moral values have declined over the past five decades, though others are cheered by what they see as more enlightened attitudes on

issues such as race, gender, sexuality, democracy, the environment, war, the death penalty, juvenile justice, and the treatment of animals. But what stands out perhaps most clearly over this period of vast social and ideological change is the *resilience* of social cohesion and moral commitment. We may be sailing, as Nietzsche said, on an uncharted open sea, but the ship appears to be in no imminent danger of sinking.

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