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Morality and the criminal law: an examination of some recent attempts to define theoretical limits to the proper scope of the criminal law.

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Preface

The aim of this essay is to show that any attempt to define theoretical limits to the proper scope of the criminal law must fail. In Chapter 1 an attempt is made to refute the Wolfenden Committee's contention that society must recognise 'a realm of private morality and immorality which is ... not the law's business.' In so far as his arguments also pursue this aim Lord Devlin's thesis is defended but no attempt is made to defend all that he said. Briefly, the argument advanced asserts that, if it is accepted that any society has the right to take whatever steps it considers necessary to ensure its continued survival then no jurisdictional barrier, such as that proposed by the Wolfenden Committee can be erected, owing to the public nature of all conduct. In other words, if by 'private morality and immorality' is meant 'private behaviour in matters of morals' then there is no sphere of morality which can be distinguished on the ground that it has no public effect. The argument that there can be no theoretical limits placed on the proper scope of the law does not commit one to holding that all immoral conduct ought to be prohibited by law but rather that any immoral conduct may justifiably be prohibited.

In Chapter 2 an attempt is made firstly, to evaluate the theoretical objections to Lord Devlin's thesis raised by Professor H.L.A. Hart and secondly, to critically examine Professor Hart's own view of the proper scope of the criminal law. With regard to the criticisms levelled at Lord Devlin's thesis it is concluded that Professor Hart's arguments cannot be upheld. As far as his own views are concerned it is claimed that they are an illegitimate modification of Mill's doctrine as set out in _On Liberty_ and as such require a complete and separate justification. Moreover, it is found that such a justification is not possible and thus it is concluded that Professor Hart fails to provide a coherent alternative to Lord Devlin's position.

The final Chapter deals with the nature of the relation of law to society. It is submitted that the widespread discussion which the publication of Lord Devlin's original Maccabaean Lecture aroused has become confused because most contributors have at times lost sight of the essential nature of the relation. Briefly, that relation may be described by saying that the law is an instrument of society to be used to support the values which the members of society hold. Once the nature of this relation is understood it becomes clear that _no_ attempt to define, in advance, theoretical limits to the proper scope of the criminal law can succeed.

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CHAPTER 1

The enforcement of morals

Introduction

On March 18th 1959 Lord Devlin (the Honourable Sir Patrick Devlin as he then was) delivered the second Maccabaean Lecture in Jurisprudence before the British Academy.[1] His lecture entitled 'The enforcement of morals' took, as its starting point, the statement of jurisprudential principle expressed by the Departmental Committee on Homosexual Offences and Prostitution, widely known as the Wolfenden Committee.[2] The Committee's formal commitment is usefully paraphrased in Chapter II of their Report as follows; 'Our primary duty has been to consider the extent to which homosexual behaviour and female prostitution should come under the condemnation of the criminal law ...'[3] In outlining the Committee's approach to the problem the Report states that, 'There appears to be no unquestioned definition of what constitutes or ought to constitute a crime. To define it as "an act which is punished by the State" does not answer the question: What

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1. Devlin, P. 1959. The enforcement of morals. Proceedings of the British Academy vol. xlv. Hereinafter all references to Lord Devlin are to his book, The Enforcement of Morals (1965) London: Oxford University Press.

2. Report of the Committee on Homosexual Offences and Prostitution. 1957. Cmd.247. Hereinafter cited as the Wolfenden Report. The Committee of fifteen persons under the chairmanship of Sir John Wolfenden C.B.E. was appointed on the 24th August 1954 to consider (a) the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts; and (b) the law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes, and to report what changes, if any, are desirable.

3. The Wolfenden Report. Para.13.

acts ought to be punished by the State? We have therefore worked with our own formulation of the function of the criminal law so far as it concerns the subjects of this enquiry. In this field, its function, as we see it, 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 or economic dependence.'[1] Furthermore, 'It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour'.[2] In recommending that homosexual behaviour between consenting adults in private should no longer be a criminal offence the Committee offered what it considered to be a 'decisive' reason, namely, '... the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin,

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1. ibid. Para.13.
2. ibid. Para.14.

there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.'[1]

Lord Devlin's lecture consisted primarily of a vigorous attack on the standpoint taken by the Committee regarding the proper scope and function of the criminal law. However, it is unlikely that such a debate as has resulted would have been generated but for at least two reasons. Firstly, as Graham Hughes observes, 'a partial explanation of the interest aroused by this lecture is no doubt to be found in the person of its author'.[2] It is indeed unusual for members of the British Judiciary to speak publicly on legal matters, particularly on such a fundamental topic as the aims and limits of the criminal law. Lord Devlin's pronouncements were therefore of the greatest importance if for no other reason than that they represented the views of an eminent British Judge. Secondly, taken as a whole, his lecture constitutes a powerful assault on a jurisprudential position which has become so widely accepted that it may be termed the orthodox approach. The position referred to is that known as the utilitarian approach to legislation most passionately enunciated by John Stuart Mill in his essay On Liberty.[3] While the members of the Wolfenden Committee may well have believed that there existed 'no unquestioned definition of what constitutes or ought to constitute a

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1. ibid. Para.61. The Report is signed by all thirteen members who served on the Committee throughout the enquiry but there were five separate reservations by members or groups of members. One member, Mr. James Adair dis-associated himself from the recommendation referred to.
2. Hughes, Graham. 1962. Morals and the criminal law. Yale Law Journal 71:662.
3. Mill, J.S. 1859. On Liberty. London. Reprinted in Utilitarianism (1962) Edited by M.Warnock. London: Collins.

crime' and have found it necessary to set up their 'own formulation of the function of the criminal law', the similarity between their formulation and that put forward by Mill a century before seems too great to be mere coincidence. In introducing his now famous essay Mill had said that, 'The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.'[1]

In examining Lord Devlin's Academy address then, it is important to realise that he was attacking the formal principles on which the Report rests as opposed to the substantive recommendations contained in it.

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1. ibid. P.135.

Referring to the Report Lord Devlin observes that 'Its authors were not, as I am trying to do, composing a paper on the jurisprudence of morality; they were evolving a working formula to use for reaching a number of practical conclusions. I do not intend to express any opinion one way or the other about these; that would be outside the scope of a paper on jurisprudence. I am concerned only with general principles ...'[1] Briefly then, the Maccabaean Lecture constitutes a forceful attack on the position of juristic principle adopted by the Wolfenden Committee. The aim of the arguments advanced in this part of the essay is to demonstrate the impossibility of upholding the Wolfenden Committee's contention that society must recognise '... a realm of private morality and immorality which is, in brief and crude terms, not the law's business' once it is admitted that society has the right to ensure its continued survival. In so far as his arguments also pursue this aim, Lord Devlin's position will be defended but no attempt is made to defend all that he said. Consequently, detailed discussion of his lecture will be limited to that part concerned with refuting the attempt made by the Committee to define theoretical limits to the proper scope of the criminal law.

Crime and sin

Lord Devlin sets out the terms of reference for his 'general and fundamental' inquiry in the form of the

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1. Devlin. op. cit. P.2.

following question: 'What is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?'[1] There is already, in this opening statement, an identification of immorality with sin which may be disturbing to the secular reader. However, Lord Devlin is to be partially excused, for what at first sight might appear to be a serious blunder, on the ground that the Wolfenden Report from which Lord Devlin began, also equated sin with immorality.[2] The difficulty which arises with this equation is that for the religious person most actions which he terms 'immoral' constitute sins in as much as they represent a failure to act in accordance with the 'divine law', whereas for the secular person who rejects the notion of a divine law altogether, the term 'sin', as it is employed in common discourse, is devoid of reference. However, if, following Lord Devlin, 'sin' is allowed the wider of the two meanings assigned to it in the Oxford English Dictionary where it is defined as 'transgression against the divine law or principles of morality', offence is unlikely to be taken. Although Lord Devlin makes explicit reference to the English criminal law, it will be assumed that his remarks were not intended to be applicable to that legal system alone. Throughout the rest of his lecture he does not refer explicitly to

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1. ibid. P.2.
2. See para 61 quoted above.

England save by way of example and for this reason it seems that notwithstanding the opening references to England his normative theoretical statements were intended to be applicable to societies in general.

Lord Devlin structures his lecture by posing three questions which he endeavours to answer.

1. Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement?
2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?
3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?[1]

Has society the right to pass judgement on matters of morals?

In Lord Devlin's opinion the Wolfenden Report contains the implication that '... there ought not to be a collective judgement about immorality *per se*.'[2] However, whilst attempting to answer the first question Lord Devlin appears to stray from the issue at hand for he proceeds to demonstrate that there does exist, in England for example, a public morality which condemns, among other things, homosexual behaviour. Lord Devlin argues that the Committee

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1. Devlin *op. cit*. Pp. 7-8.
2. *ibid.* P. 8.

implicitly recognises the existence of such a public morality, for, 'if society were not prepared to say that homosexuality is morally wrong there would be no basis for having a law protecting youth from "corruption" ... as the Report recommends.'[1] Here Lord Devlin quite clearly seems to be in error for there may well exist other reasons which makes the fixing of a minimum age limit desirable. In England, for example, the drinking of alcohol is not generally regarded as immoral in itself and yet there are laws prohibiting minors from drinking on licensed premises. Similarly, in the same society, heterosexual activity is not regarded *per se* as immoral but there are laws prohibiting sexual intercourse with any female under the age of sixteen years, as well as laws which make it illegal to live on the earnings of a female prostitute. To punish acts of a similar nature in a homosexual context need not involve a general judgement about homosexual acts between consenting adults.[2]

However, the question as to whether a collective judgement or a public morality ought to exist will not be answered by proving that such a thing does exist and it seems odd that Lord Devlin appears to attach so much importance to

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1. *ibid.*

2. In considering at what age a man is to be regarded as an 'adult' for the purposes of their recommendation the Committee states that, 'It seems to us that there are four sets of considerations which should govern the decision on this point. The first is connected with the need to protect young and immature persons; the second is connected with the age at which the pattern of a man's sexual development can be said to be fixed; the third is connected with the meaning of the word 'adult' in the sense of 'responsible for his own actions'; and the fourth is connected with the consequences which would follow from the fixing of any particular age'. The Wolfenden Report. Para.66.

proving that a public morality exists in a society such as England. Lord Devlin does, however, present what he terms an '*a priori*' argument designed to 'justify' the existence of 'such a thing as a public morality'. He argues that, 'What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives. Every society has a moral structure as well as a political one.'[1] An analogy can be drawn, according to Lord Devlin, between immorality and treason. 'Society cannot tolerate rebellion; it will not allow argument about the rightness of the cause.'[2] Just as treason threatens the very existence of society by threatening the existence of its political structure, so immoral behaviour threatens society by threatening its moral structure. It is here that Lord Devlin introduces what appears to have become the single most controversial issue of his lecture, namely the degree to which any immoral conduct is capable of threatening the shared morality. He asserts that, 'If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically, it is held by the invisible bonds of common thought.'[3]

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1. Devlin. *op. cit.* P.9.
2. *ibid.*
3. *ibid.* P.10.

Lord Devlin's affirmative answer to the first question rests then on two premises. The first asserts that society has a right to take any steps necessary for its preservation. Lord Devlin does not make clear exactly what sort of 'right' it is to which he refers, nor does he attempt to establish the right at all. It would seem, however, that for the purposes of Lord Devlin's address it should be regarded as a principle of critical morality - '... a principle, rationally acceptable, to be used in the evaluation or criticism of social institutions generally.'[1] Professor Hart commenting on Lord Devlin's use of this principle concedes that 'it is surely clear that anyone who holds the question whether a society has the "right" to enforce morality, or whether it is morally permissible for any society to enforce its morality by law, to be discussable at all, must be prepared to deploy some such general principles of critical morality.'[2] For the purposes of the present essay this principle of critical morality will be assumed as given and no detailed attempt will be made to support its adoption. The justification for proceeding in this manner is that Professor Hart's subsequent attack on Lord Devlin's thesis, which is the subject of the following chapter, consists of an attempt to show that this principle, even if accepted, is inadequate for the latter's purpose.[3]

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1. Hart, H.L.A. 1963. Law, Liberty and Morality. London: Oxford University Press. P.19.

2. ibid. Pp.19-20.

3. Professor Hart makes this explicit at the conclusion of Law, Liberty and Morality where he states that '... the proposition that it is justifiable to enforce morality is, like its negation, a thesis of critical morality

If, however, it can be shown that once this 'right' is admitted it becomes impossible to define ex ante theoretical limits to the proper scope of the law, then any attempt to impose such limits (such as the attempt made by the Wolfenden Committee), will require a denial of the existence of such a 'right'. The limited aim of the arguments advanced in this chapter is, then, to show that it follows upon the acceptance of this principle of critical morality that any attempt to define such limits must fail.[1]

The second premise on which Lord Devlin's argument rests, namely that 'What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives', whilst appearing at first sight quite

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requiring for its support some general critical principle. It cannot be established or refuted simply by pointing to the actual practices or morality of a particular society or societies. Lord Devlin, whose thesis I termed the moderate thesis, seems to accept this position, but I have argued that the general principle which he deploys, namely that a society has the right to take any step necessary for its preservation, is inadequate for his purpose.' (P.82).

1. It is realised that dependent on the consequences of accepting this general principle some people may doubt the principle itself. For example, Professor Hart points out that, 'If a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the "disintegration" of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it.' Law Liberty and Morality (P.19). However, discussion of how such general principles may be supported or refuted is beyond the scope of the present essay and is not required to satisfy its limited aim.

straightforward, is, in fact, fraught with ambiguities. Firstly, it is not at all clear what type of statement it is supposed to be. Is it a quasi-definition of 'society'?[1] If so, then all immorality is eo ipso disruptive of society and, if the first premise is true, ought to be suppressed. Or is it that immorality is thought to be causally connected with social disintegration? In that case it is a statement of sociological fact and needs to be supported by argument. Reading the lecture as a whole it would seem that Lord Devlin generally adopts the second - surely the more plausible - position, and it is this position which will be discussed in the present chapter. However, the vague generalisations that Lord Devlin puts forward cannot be said to constitute 'evidence'. He suggests that 'an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of

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1. At one point in his lecture Lord Devlin does state baldly that 'society means a community of ideas; without shared ideas on politics, morals and ethics no society can exist'. (P.10). If the term 'means' is here used as synonomous with 'can be defined as' then Lord Devlin's thesis becomes vacuous. However, there is also a sense of 'means' which is synonomous with 'requires as a necessary condition' and it is submitted that it is in this sense that Lord Devlin's statement is made. Lord Devlin's use of 'without' immediately following, the ambiguous phrase 'society means a community of ideas' seems to support this latter interpretation.

disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.'[1]

Secondly, Lord Devlin seems to equate the 'fundamental agreement' which, he argues, is necessary for the creation and persistence of a society with the 'shared public morality', and this may be an illegitimate identification. If by the 'public morality of a society' is meant 'the actual moral principles generally accepted by members of the society', then it would seem that the public morality to which Lord Devlin makes repeated reference may include values held concerning many issues which would not of themselves appear to be necessary aspects of the minimum agreement required for the continued survival of society. For example, whilst it would seem that a society in which there was no shared moral value condemning the indiscriminate killing of other members would be doomed to destruction, it may be argued that a shared view concerning the morality of homosexual behaviour is not, in itself, part of the minimum required agreement. Even the statement that some shared morality constituting the 'fundamental agreement' is necessary, is ambiguous on its own. It may mean that there are certain specific moral principles (which could be listed) which must be commonly held, or alternatively, it may mean that any society must have some shared moral principles without it

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1. Devlin. <u>op. cit.</u> P.13.

being possible to enumerate just which principles. From Lord Devlin's discussion of the institution of marriage it seems clear that his thesis requires the latter interpretation.[1] Lord Devlin's view seems to be that there are certain institutions which rest on moral principles that might be held to be essential for a particular society, not in the sense that no society could exist without them, but rather in the sense that their removal would result in a fundamental change in the life style of the members of that society. Thus Lord Devlin argues that a consequence of England's Christian heritage, for example, and its resultant adoption of monogamy as a moral principle is that 'the Christian institution of marriage has become the basis of family life and so part of the structure of our society ... It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down.'[2]

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1. In a subsequent lecture entitled 'Mill on liberty in morals' Lord Devlin states that, 'It is generally accepted that some shared morality ... is an essential element in the constitution of any society. Without there would be no cohesion. But polygamy can be as cohesive as monogamy and I am prepared to believe that a society based on free love and a community of children could be just as strong ... as one based on the family. Devlin. op.cit. P.114.

2. Ernest Nagel charges Lord Devlin with failing to establish that any specific tenet of public morality 'is actually included in the community of ideas whose maintenance he thinks is indispensible for the preservation of a social order'. Nagel E. 1968. The enforcement of morals. The Humanist 28:20-27. Reprinted in: Kurtz, P. (Ed.) 1969. Moral Problems in Contemporary Society. Englewood Cliffs N.J.: Prentice-Hall. P.149.

Leaving aside for the moment the problems associated with providing criteria for the 'disintegration' or 'destruction' of a society,[1] Lord Devlin's argument in answer to the first question is, then, that any immoral conduct may, under certain circumstances, pose a threat to the survival of society. That it may do so follows, according to Lord Devlin, from the very nature of the public morality, of which he says, 'Most men take their morality as a whole ... To destroy the belief in one part of it will probably result in weakening the belief in the whole.'[2] Unfortunately, nowhere does Lord Devlin discuss in detail this observation, but it is submitted that his argument may validly rest on the correct understanding of the nature of morality and the nature of behaviour. In order to demonstrate this it is first necessary to make exactly clear just what is involved in the Wolfenden Committee's contention that 'there must remain a realm of private morality and immorality which is ... not the law's business.'[3] It would appear that the Committee's standpoint can be explained in the following manner. A person's voluntary actions which are not morally neutral are most often in accord with his moral beliefs - his morality. Some of these moral beliefs will concern behaviour which is obviously capable of

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1. This problem will be discussed in Chapter II of the present essay.

2. Devlin, op. cit. P.115.

3. The Wolfenden Report. Para.66.

directly affecting others. A person's beliefs regarding the sanctity of human life would be an example. Few people would argue that a person's beliefs concerning the sanctity of human life should not be a matter of concern to others. However, there remains a considerable sphere of human behaviour which may appear, at least at first, to be incapable of affecting others. Presumably the field of sexual behaviour would be so regarded by many people. So long as the sexual activity is between persons with the capacity to consent, who do in fact consent, then, it may be argued, society has no grounds on which to justify interference. To argue thus is to contend that society must recognise a realm of private morality which is outside the proper scope of the law.[1] However, once having ascertained what is involved in the Committee's contention it must be clear that such a contention cannot be upheld - if it is accepted that society has the right to take any steps it considers necessary to ensure its continued survival - owing to the public nature of all behaviour. The refutation of the Committee's argument rests on the fact that there cannot be any area of private morality which is to be distinguished because

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1. It would appear that this is also Lord Devlin's interpretation of the Committee's view when he argues that, 'What the report seems to mean by private morality might perhaps be better described as private behaviour in matters of morals.' (P.9). The Committee's contention can then be restated as follows: '... there must remain a realm of private behaviour in matters of morals which is ... not the law's business.'

behaviour in accord with that sphere of morality can have no public effect. An important distinction must be drawn at this point between behaviour which is said to take place 'in private' and what is termed 'private behaviour'. Whilst behaviour may be commonly said to take place in private in the sense of taking place 'out of sight of the public' it is submitted that to speak of private behaviour in the sense of behaviour which is incapable, under any circumstances, of affecting others, is to make a linguistic error.[1] It must be remembered that it is classes of behaviour which are prohibited or allowed by the law and whilst some classes of behaviour may be less likely to affect other people there is not a single class which is incapable of affecting others, under certain circumstances. Thus it is submitted that, if it is accepted that society has a right to ensure its continued survival and that a minimum shared morality is essential to the survival of any society, then it must be the case that society also has the right to pass judgement on matters of morals on the ground that any conduct is, under certain circumstances, capable of removing the minimum shared morality which is essential.

Has society the right to use the weapon of the law to enforce its judgements?

It must now be clear why Lord Devlin believed that

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1. Of this distinction Lord Devlin seems to be undoubtedly aware for whilst denying the possibility of 'private behaviour' (pp.12-14) he does argue that '... as far as possible privacy should be respected.' (P.18).

his answer to the first question was so important as to 'very nearly dictate the answer to the second question.'[1] As he points out, '... if society has the right to make a judgement and has it on the basis that recognised morality is as necessary to society as, say a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore, the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.'[2] Furthermore, it follows that the right to use the weapon of the law must be unconditional and without theoretical limits. In other words, it is not the case that some further condition must exist before society has the right to enforce morality. It is not the case, for instance, that the immorality must be of an 'other-regarding' nature as Mill maintained, or that it must be shown to affect those who are 'specially vulnerable' as the Wolfenden Report maintained. If society has the right to ensure its continued survival and as has been submitted, there is no sphere of morality that can be distinguished as having no public effect, then any attempt to set ex ante theoretical limits to the proper scope of the law must fail. Thus Lord Devlin draws a distinction between conduct which may harm individual members of society and conduct which, without harming any specific

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1. Devlin. op. cit. P.11.
2. ibid. P.11.

member, may harm society as a whole. Bigamy, for example, is a crime in England irrespective of whether an innocent partner is deceived, but it is not clear that the prohibiting of such conduct could be justified if the sole legitimate object of legislation was to protect individuals from harm. It may plausibly be argued that the outlawing of bigamy reflects a recognition that monogamy is a necessary moral principle for the cohesion of English society. Just as the prohibiting of 'black market' activities may be justified as an attempt to protect the economic structure of a society, so the prohibiting of bigamy can be justified as an attempt to protect the moral code of a society. Sadism with consenting partners, homosexual acts between consenting males, and lesbianism are presumably all instances of activity which according to the Wolfenden Committee, should be a matter of private morality but which, as Lord Devlin points out, may have a considerable effect if carried out by large numbers of people. Therefore, if society's right to enforce a shared morality is justified on the ground that some minimum moral agreement is essential and it is impossible to distinguish a realm of morality which can have no public effect then there can be no realm of private morality which is justifiably regarded as being forever, and for all societies (with a legal system or set of rules proscribing certain conduct), outside the proper scope of the law.[1]

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1. A difficulty may arise here in deciding whether this thesis can be applied to societies without a legal code, or body of rules, distinct from the mores or customs generally observed. Briefly, it would seem that the

It must be noted, however, that this argument does not attempt to show that every breach of the public morality ought to be prohibited by the law but only that any breach may justifiably be prohibited. The right to intervene need not be exercised in every instance and the decision whether or not to intervene in a particular case should be based on practical considerations. The argument set out above shows merely that there can be no prior theoretical principle which limits the proper scope of the law.

The problem of ascertaining the moral judgements of society

Once it is accepted that society has a right to enforce the common morality the problem arises as to how the moral judgements of society are to be ascertained. Lord Devlin argues that the law-maker should attempt to ascertain the moral judgements of 'the reasonable man' of whom he says, 'He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the view point of the man in the street - or to use an archaism familiar to all lawyers - the man in the Clapham omnibus. He might also be called the right-minded man. For my purposes I should like to call him the man in

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arguments will only be applicable to societies in which the rules of conduct are set up with the specific intention of compelling members to act in a certain way under threat of punishment. The thesis being advanced above would serve as a guide to the law-makers in such societies but it would not seem to have application in a society where there was no recognised law-making body.

the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.'[1] The terms by which Lord Devlin refers to the reasonable man whilst appearing entirely natural to a common law Judge have met with considerable opposition from many academic philosophers. However, much of the criticism appears to be due to a failure on the part of the critics to understand fully the point which Lord Devlin is attempting to make by the employment of these legal expressions, namely, that the ordinary man to whom the legislator must turn has certain characteristics which find expression in courts of law in phrases such as 'the reasonable man.' For example, being a right-minded man, in a legal sense, amounts to holding moral views similar to the rest of the community in related matters. Thus if a legislator in England was attempting to ascertain the community's feelings toward homosexuality then a man who regarded all heterosexual conduct between consenting adults (which, it is submitted, the vast majority of the society regards as moral) as evil, except in those cases where it was incestuous in nature, would not be regarded as a right-minded man as far as sexual behaviour was concerned. Similarly, by identifying 'the reasonable man' with 'the man on the Clapham omnibus' Lord Devlin is asserting that in attempting to ascertain the moral judgements of society there is no one social class to whose members the legislator can turn. Whilst

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1. *ibid.* P.15.

at times Lord Devlin does appear to overestimate the moral uniformity of most contemporary societies his opponents sometimes write as if they thought that the ordinary man's convictions should count for nothing in moral matters. Basil Mitchell suggests that some of the confusion results from a failure by both sides, to distinguish two different questions.[1] One concerns the considerations which ideally should determine legislation and here, argues Mitchell, expert advice backed by adequate social research is definitely needed. The other is a question as to how a final decision is to be reached when opinions differ and Mitchell observes that in England most people would agree that ultimately the answer must be given by the ordinary man. Mitchell charges Lord Devlin with holding that the 'democratic' answer to the second question will do as an answer to the former, and his opponents with tending to ignore the second question in favour of the first. However, it is submitted with reference to the charge levelled at Lord Devlin's position that Mitchell's observation rests on an ambiguity found in Lord Devlin's original lecture which the latter subsequently succeeds in removing. In his preface to The Enforcement of Morals Lord Devlin states that, 'I do not want to alter anything that I wrote but I think that at one point the emphasis might be reduced. That is the emphasis on the part which "feeling" plays in the judgement of the reasonable man. I put the word in quotation marks because

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1. Mitchell, B. 1967. Law, Morality, Religion in a Secular Society. London: Oxford University Press. P.50.

I am not sure that I use it in its correct philosophical sense ... What I want is a word that would clarify the distinction between "rational" and "reasonable". The reasonable man is to be expected not to hold an irrational belief. The Emperor Justinian, Professor Hart says, stated that homosexuality was the cause of earthquakes. That may have been a rational belief in the Emperor's time, but now that we know a good deal more about earthquakes and a little more about homosexuality, we can safely say that it would be irrational so to believe. But when the irrational is excluded, there is, as any judge and juryman knows, a number of conclusions left for all of which some good reasons can be urged. The exclusion of the irrational is usually an easy and comparatively unimportant process. For the difficult choice between a number of rational conclusions the ordinary man has to rely upon a "feeling" for the right answer. Reasoning will get him nowhere.'[1] In a later lecture Lord Devlin makes explicit his reasons for using the term 'the man in the jury box.' He explains that, 'When I call him the man in the jury box, I do not mean to imply that the ordinary citizen is invested with some peculiar quality that enables him to pronounce ex cathedra on morals. I still think of him simply as the ordinary reasonable man, but by placing him in the jury box I call attention to three points. First, the verdict of a jury must be unanimous; so a moral principle, if it is to be given the force of law, should

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1. Devlin. op. cit. P.vii.

be one which twelve men and women drawn at random from the community can be expected not only to approve but to take so seriously that they regard a breach of it as fit for punishment. Second, the man in the jury box does not give a snap judgement but returns his verdict after argument, instruction and deliberation. Third, the jury box is a place in which the ordinary man's views on morals become directly effective.'[1] In discussing the manner in which the man in the jury box should arrive at his decision Lord Devlin argues that, 'On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusions is manifest.'[2] Thus it seems quite clear that Lord Devlin does not intend, as some commentators accuse him of doing, that the snap decisions of unreflective morality based on mere feelings of dislike and indignation are to be made the ground on which a practice is to be made criminal. If Lord Devlin believes that the moral judgements of society should be arrived at in a manner akin to the way a jury man arrives at his verdict - through argument, instruction and deliberation - then it would seem that Mitchell's charge is refuted. It is interesting to note at this point the view, similar to Lord Devlin's expressed by Lord Reid, the one dissentient in the widely discussed Shaw case[3]

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1. ibid. P.90. It should be noted that in England Jury verdicts are no longer required to be unanimous.
2. ibid. P.18.
3. Shaw v. Director of Public Prosecutions (1961) 2.A.E.R.446.

Of the reasonable man Lord Reid observes, 'The law departs at its peril from the views of the reasonable man. He could not give a definition of what he means by justice and neither can I. But that does not prevent him from saying that particular things are clearly unjust. We as lawyers and legislators can go far but we cannot afford to go so far that we offend his sense of justice. We may try to educate our masters, but we shall do incalculable harm if we try to override the views of the average reasonable man.'[1]

Other contributors to the discussion have also misinterpreted Lord Devlin's reference to 'the man in the jury box.' Ernest Nagel observing that on Lord Devlin's view actions judged to be criminal because they are held to be immoral are actions which threaten the safety of the social order inquires as to the justification for assuming that 'twelve "right-minded persons" in a jury box - who presumably have no specialised training for evaluating the effects on others of some form of deviant behaviour, nor the opportunity to undertake a careful study of what is already known about them - are more qualified to make competent judgements on what may be complex moral issues, than they are to pass on the significance of a scientific idea or on the merits of a surgical technique?'[2] However,

1. Lord Reid. 1968. 'The law and the reasonable man' Proceedings of the British Academy 54:189-205. Expressing the same sentiments Lord Devlin says of the man in the jury box that 'it will not in the long run work to make laws about morality that are not acceptable to him.' (P.21.)

2. Nagel, E. 1968. The enforcement of morals. op. cit. Pp.152-153.

the central thesis of Devlin's lecture is simply that owing to the nature of the public morality any breach of it may threaten the whole and thereby threaten society itself. The ordinary man - the man in the jury box - is therefore not asked whether or not he believes that a particular instance of deviant behaviour threatens the continued existence of the society but asked rather, whether or not he considers such behaviour to be immoral, and, if so, how strongly he feels about such behaviour.[1] It is submitted that to answer these questions one would not require any specific training such as one would need to be able to competently pass judgement on 'the merits of a surgical technique.'

The practical aspect of legislation

Lord Devlin's answer to the third question posed at the beginning of the lecture is of a different nature from the first two. The two earlier questions were theoretical in that they were concerned with the right of any society to enforce its own morality. The third question to which Lord Devlin addresses himself requires a practical answer - having shown that society has the

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1. Lord Devlin does at one point say that 'before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society.' (P.17). However, it is submitted that this is not the task of the man in the jury box but rather the task of the law-maker in deciding whether or not to prohibit the practice on the basis of the intensity of the feelings of the man in the jury box. As the men in the jury box, our task is to consider 'whether looking at it calmly and dispassionately, we regard it is a vice so abominable that its mere presence is an offence.' (P.17).

right to pass moral judgements on the ground that a minimum shared morality is essential for society and that society also has the right to use the weapon of the law to enforce those moral judgements, Lord Devlin turns to consider the circumstances in which he believes that it would be prudent for society to exercise these rights and also the principles which should be borne in mind by the law-maker concerning proposed legislation.[1] As such, his answer to this question reflects his own cultural bias and will be discussed only briefly. Lord Devlin presents four 'elastic' principles.[2] Firstly, there must be the maximum individual freedom that is consistent with the integrity of society. Secondly, the legislators should always remain aware of the fact that the 'limits of tolerance shift.' Thirdly, privacy should be respected as far as possible and fourthly, it should be remembered that the law is concerned with the minimum and not with the maximum. It would appear that few of the contributors to the subsequent discussion have recognised these statements of guiding principles for what they are - ethnocentric expressions of moral principles which Lord Devlin presumably believes to be extremely valuable in themselves. However, it is implicit in the central thesis which Lord Devlin is advancing throughout the lecture that the moral principles held by men in society may, and presumably will,

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1. Lord Devlin states that 'The arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one. Since it is an instrument, it is wise before deciding to use it to have regard to the tools with which it can be fitted and to the machinery which operates it.' (P.20)

2. <u>ibid.</u> Pp.16-20.

differ from society to society. The moral principle urging the preservation of individual freedom, for example, may or may not be considered important by the members of different societies.[1] Similarly, it may be the case that in many contemporary societies privacy, as a value in itself, is generally held to be of little significance, whilst to the average Englishman, although his home may no longer be regarded by the law as his castle, it remains an institution into which any intrusion is strongly resisted.

However, included in Lord Devlin's discussion of the third question is one feature which has attracted wide criticism, namely, the importance which he attaches to feelings of 'intolerance, indignation and disgust.' At least one critic has gone so far as to suggest that 'it would be a negligible exaggeration of Devlin's moral philosophy to say that for him what is wrong is what makes "the man on the Clapham omnibus" sick.'[2] In arguing for what he terms 'the chief of these elastic principles' namely, that there must be toleration of the

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1. It may be plausibly argued, for example, that in pre-European New Zealand society the interests of the individual members were regarded as considerably less important than the interests of the larger family group or those of the tribe as a whole. This is not to suggest that the tribal 'laws' generally were designed with the explicit aim of restricting the freedom of the individual but rather to suggest that if the ordinary member of such a tribe was asked to list the principles which he thought should be considered when decisions had to be made on such matters, he would probably have presented an entirely different list from that presented by Lord Devlin.

2. Wollheim, R. 1959. 'Crime, sin and Mr. Justice Devlin'. Encounter 13:P.39. See also: Hart, H.L.A. 1959 'Immorality and treason' The Listener. July 30. P.163.

maximum individual freedom that is consistent with the integrity of society, Lord Devlin states that, 'I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.'[1] It may seem at first sight that it is difficult to reconcile this view with that earlier expressed by Lord Devlin when he argued that the moral judgements of society are to be decided in the manner in which a juryman reaches his verdict. However, the difficulty is removed by Lord Devlin himself later when he admits that, 'It may be that the language I used put too much emphasis on feeling and too little on reason. Even so, I think that the intense criticism which has been focused on the words "intolerance, indignation and disgust" (which I do not wish to modify) was on any view excessive. To assert or to imply - both assertion and implication have been frequently employed - that the author would like to see the criminal law used to stamp out whatever makes the ordinary man sick hardly does justice to the argument ... The phrase is not used in that part of the argument which discusses how the

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1. Devlin. <u>op. cit.</u> P.17.

common morality should be ascertained but in that part of it which enumerates the factors which should restrict the use of the criminal law ... It must be read in subjection to the statement that the judgement which the community passes on a practice which it dislikes must be calm and dispassionate and that mere disapproval is not enough to justify interference ... If there is not that intensity of feeling, so my argument runs, the collective judgement should not be given the force of law.'[1] Here Lord Devlin clearly points out that the phrase 'intolerance, indignation and disgust' is not to be considered as an extension of his theoretical argument concerning the manner in which the public morality is to be ascertained. Rather, the phrase is found in that part of the lecture dealing with the practical difficulty of deciding, in any particular instance, whether or not it is prudent to invoke the law. It is his opinion as a law-maker, that conduct which transgresses the public morality does not threaten the cohesion of society unless the ordinary man in the street views such conduct with 'indignation, intolerance and disgust.'[2]

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1. ibid. P.viii-ix.

2. In a subsequent interview Lord Devlin states that, 'It is not enough that you should say the majority of people disapprove of a certain practice; they must feel more strongly than that, to my mind. You must get more than the majority, and it must be more than disapproval. I look upon it as a restraining factor. If, for example, you asked the ordinary man: "Do you disapprove of homosexuality?" he might very well say "Yes" ... But if you went on and said: "Yes, but more than that, does the idea of it disgust you? Does it make you indignant?", a great number of people who would say they disapprove would say: "No, we don't feel that about it." 'Encounter with Lord Devlin'. 1964. The Listener June 18. P.980.

Richard Wollheim argues that it is quite unjustified to separate, as Lord Devlin does, the second from the third enquiry; '... it is wrong to ask, first, whether society has a right to punish immorality, and then, (as though it were a quite separate question) whether this right is qualified or not.'[1] However, to argue thus is to miss the important distinction drawn above between the theoretical question as to whether society has the right to legislate against immorality on the one hand and the practical question as to the circumstances under which it is prudent for society to exercise that right. It is submitted that in giving his own answer to the latter question Lord Devlin in no way intends to qualify the right established by the answers to the two earlier questions.

Conclusion

The aim of this part of the essay has been to defend Lord Devlin's thesis concerning the impossibility of defining a realm of private morality which lies outside the proper scope of the criminal law. If the premise that a certain minimum sphere of agreement on moral issues is essential for the continued existence of society is conceded and the general principle that any society has the right to take whatever steps are necessary to preserve that society is accepted, then prima facie society has the right to legislate against immorality as such. The right to enforce the public morality which presumably will include

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1. Wollheim, R. op. cit. P.39.

values held on issues, concerning which agreement is not necessary for survival is sustained on the ground that the public nature of all conduct makes it impossible to set aside any particular area of conduct as being incapable of destroying the minimum required moral agreement. This is certainly not to suggest that all the tenets of the public morality are of equal importance to the cohesion of society but rather that it is not possible to determine *ex ante* the breaching of which tenets will threaten the minimum required agreement. For this reason there can be no prior theoretical principle which limits the proper scope of the criminal law to certain classes of conduct. If the society has the right to ensure its continued survival and the members of a society believe that this right should be exercised then the law-maker does not discharge his duty by protecting the individual from harm but must protect also the institutions and the community of ideas, political and moral, essential to the continued survival of that society.

CHAPTER 2

An examination of Professor Hart's view of the relation between morality and the criminal law

Introduction

The widespread discussion that the publication of Lord Devlin's Maccabaean Lecture has aroused is largely the result of the entry into the arena of Professor H.L.A. Hart. In this part of the essay an attempt is made, firstly, to evaluate the theoretical objections to Lord Devlin's thesis raised by Professor Hart and secondly, to examine briefly Professor Hart's own formulation of the proper scope of the criminal law.

Professor Hart's theoretical objections to Lord Devlin's thesis

In considering the positive grounds which may be held to justify the legal enforcement of morality Professor Hart distinguishes a moderate and an extreme thesis. According to Professor Hart the moderate thesis asserts that a shared morality constitutes the cement of society; 'without it there would be aggregates of individuals but no society', and he attributes this thesis to Lord Devlin.[1]

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1. Hart, H.L.A. Law, Liberty and Morality. op.cit. P.48. According to Professor Hart '... the extreme thesis does not look upon a shared morality as of merely instrumental value analogous to ordered government, and it does not justify the punishment of immorality as a step taken, like the punishment of treason, to preserve society from dissolution or collapse. Instead the enforcement of morality is regarded as a thing of value even if immoral acts harm no one directly or indirectly by weakening the moral cement of society.' (P.49.) He attributes this thesis to the noted Victorian judge and historian of the criminal law, James Fitzjames Stephen as expressed in the latter's Liberty, Equality, Fraternity. (1874). London.

Based on this understanding of Lord Devlin's position Professor Hart identifies what he sees as an important ambiguity in it. Lord Devlin's thesis may be an empirical one, namely, that a breakdown in the shared morality of a society is causally connected with the disintegration of that society in which case evidence must be produced to support it, or alternatively, argues Professor Hart, the argument might be that a society and a group sharing a common morality are 'identical'; hence any change in the morality is 'tantamount to the destruction of a society.'[1] On the latter interpretation Lord Devlin's argument is based on a particular definition of 'society' and as such the conclusion is no more than a necessary truth. However, it is submitted that the charge of ambiguity rests on a misreading of Lord Devlin's position as Lord Devlin himself points out by stating that he does not assert 'that any deviation from a society's shared morality threatens its existence anymore 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.'[2] Lord Devlin's reply would seem to provide almost conclusive proof that the interpretation of his position offered in the first part of this essay is the correct one, namely, that there is no class of conduct which is incapable, under certain conditions, of threatening the minimum agreement essential to the survival of society.

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1. ibid. P.51.
2. Devlin. op. cit. P.13n.

Professor Hart appears to acknowledge that some minimal moral consensus is essential to the survival of society for he speaks of 'the acceptable proposition that some shared morality is essential to the existence of any society' which he argues 'might even be accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common.'[1] Unfortunately, the supposedly plausible definition of society is quite misleading as it stands for it is not at all clear whether the phrase 'certain moral views' refers to specific, objective views which are universal in the sense that any society of human beings must hold them or whether it allows that the necessary 'moral views' may differ from society to society. However, elsewhere Professor Hart argues that it is both possible and helpful to discriminate between those parts of a society's moral code which are essential and those which are not, and he describes two possible ways of so discriminating.[2] It may be held 'that the common morality which is essential to society, and which is to be preserved by legal enforcement, is that part of its social morality which contains only those restraints and prohibitions that are essential to the existence of any society of human beings whatever.' According to Professor Hart these would include 'rules restraining the free use of violence and minimal forms

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1. Hart. op. cit. P.51.
2. Hart, H.L.A. 1967. Social solidarity and the enforcement of morality.' The University of Chicago Law Review 35:1-12. Pp.9-10.

of rules regarding honesty, promise keeping, fair dealing, and property.' Alternatively, it may be argued that 'the morality to be enforced, while not coextensive with every jot and tittle of an existent moral code, includes not only the restraints and prohibitions such as those relating to the use of violence or deception which are necessary to any society whatever, but also what is essential for a particular society.'[1] Professor Hart correctly identifies the latter view as corresponding to Lord Devlin's thesis, citing as evidence, Lord Devlin's statement that the polygamous marriage in a polygamous society may be just as much a cohesive force as the monogamous marriage in English society.[2] It is, however, now quite obvious that Professor Hart himself regards as essential only such 'universal' values as those relating to the use of violence and deception of which he says: 'It is ... quite clear that neither Devlin nor Durkheim means that only these (universal) elements ... are to be enforced by law, since any utilitarian or supporter of the Wolfenden Report would agree to that.'[3] Professor Hart offers no reasons at all to explain why these values alone should be enforced, even if it is conceded that they alone are necessary to the survival of society. It would seem that if it is accepted that society has the right to take whatever steps it considers necessary to its survival then it is up to those who would place

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1. ibid. It is not clear what Professor Hart means by 'every jot and tittle of an existent moral code' but it would seem to correspond with Lord Devlin's view that mere disapproval of a practice is not sufficient warrant for its prohibition.
2. See Devlin. op. cit. P.114.
3. Hart. op. cit. Social solidarity and the enforcement of morality. P.10.

theoretical limits on the proper scope of the criminal law to show that certain classes of conduct cannot, under any circumstances, threaten the minimum agreement which Professor Hart believes is necessary. In other words, for whatever class of conduct that Professor Hart may argue lies outside the proper scope of the law all Lord Devlin need reply is that surely if an overwhelming majority of members of society believed strongly that such conduct was evil might not the failure of the law-maker to prohibit such conduct threaten the survival of society, by threatening the minimum required moral agreement. Because Lord Devlin may reply in this way regarding any conduct whatsoever it may seem that his thesis is rather vacuous. However, to take this line is to forget that all Lord Devlin is trying to show is that if society has the right to ensure its own survival then no theoretical limits can be drawn which would place certain classes of conduct forever outside the proper scope of the law. Lord Devlin would agree that immorality as such ought not be punished unless it threatens society and he believes that it is the task of the law-maker to decide whether society is threatened by gauging the intensity of the common belief.

According to Professor Hart, Lord Devlin's belief that there cannot be a prior theoretical limit set to the proper scope of the criminal law rests on the undiscussed assumption, namely, that all morality forms 'a single seamless web, so that those who deviate from any part are likely, or perhaps bound, to deviate from the whole.'[1]

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1. Hart. Law, Liberty and Morality. Pp. 50-51.

It is submitted that this observation is misleading in as much as the term 'seamless', implies characteristics which Lord Devlin may consistently deny that morality exhibits. In reply to Professor Hart's observation Lord Devlin points out that 'seamlessness presses the simile rather hard, but apart from that, I should say that for most people morality is a web of beliefs rather than a number of unconnected ones. This may or may not be the most rational way of arriving at a moral code. But when considering the degree of injury to a public morality, what has to be considered is how the morality is in fact made up and not how in the opinion of rational philosophers it ought to be made up.'[1] Professor Hart, by describing the web of beliefs as 'seamless' implies that for Lord Devlin all the moral beliefs which a person holds are of equal importance to him which is a view that Lord Devlin could consistently deny. His actual view would appear to be rather that while some beliefs that a person holds may be more deeply held and regarded as being morally more important than others which he holds, it is impossible to determine exactly the effects on the code of beliefs as a whole which the breaching of any one particular belief will have. For this reason, society cannot be denied the right to legally enforce any particular moral belief which its members may hold. To argue that on his view of morality Lord Devlin is committed to the view that 'those who deviate from any part are likely or perhaps bound to deviate from the whole' is to take Lord Devlin's

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1. Devlin. op. cit. P.115.

statements out of context altogether. Lord Devlin is concerned not with the effects of the breaching of specific tenets of the common morality on the people who do so act, but rather the effects that such conduct will have on the person who sees such acts go unpunished. Thus Lord Devlin's argument is rather that 'when considering the degree of injury to the public morality' it is not possible *ex ante* to predict the effect on that morality of the breaching of any specific tenet.

According to Professor Hart the most remarkable feature of Lord Devlin's position concerns the source of the morality which the criminal law may enforce. 'In his reaction against a rationalist morality and his stress on feeling, he (Lord Devlin) has I think thrown out the baby and kept the bath water; and the bath water may turn out to be very dirty indeed.'[1] It is not at once clear just what Professor Hart means by 'a rationalist morality' but Lord Devlin interprets it to be 'the morality embodied in the rational judgement of men who have studied moral questions and pondered long on what the answers ought to be.'[2] Professor Hart's emphasis on 'reason' is understood by Lord Devlin to be based on the view that by accepting the sovereignty of reason each conscience will be directed to the same conclusion. While it may plausibly be argued that Professor Hart is not committed to the view that the exercise of reason will direct all men to the *same*

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1. Hart. 'Immorality and treason.' P.163.
2. Devlin. *op. cit.* P.91.

conclusions in moral matters it would seem that he is committed to holding that through the exercise of reason all men will arrive at superior moral views and the question now arises as to whether as men of reason all men are equal. If all men are regarded as possessing equal abilities to reason then there can be no objection to morality being a matter for the popular vote. Thus argues Lord Devlin 'The objection is sustainable only upon the view that the opinion of the trained and educated mind, reached as its owner believes by an unimpassioned rational process, is as a source of morals superior to the opinion of ordinary men.'[1] It is submitted that Lord Devlin's position at this point is a formidable one for Professor Hart is forced to accept either that the morality which should be enforced is the common morality or to maintain that there exist 'moral experts'; trained men capable of discovering a superior 'rationalist' morality. Although Lord Devlin appears at times to admit that there are 'correct' moral views[2] his argument is that it is not necessary that the moral view on which the legislation is based be the 'correct' one. 'I have said that a sense of right and wrong is necessary for the life of a community. It is not necessary that their appreciation of right and wrong, tested in the light of one set or another of those abstract propositions about which men forever dispute,

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1. <u>ibid.</u> P.93.
2. At one point Lord Devlin remarks that '... a great many people nowadays do not understand why abortion is wrong.' (P.24). The use of 'understand' here is extremely odd for it seems to suggest some revelation granted to the author and few others.

should be correct ... What the law-maker has to ascertain is not the true belief but the common belief.'[1] Elsewhere he argues that 'What is important is not the quality of the creed but the strength of the belief in it.'[2] It must be remembered that these remarks are addressed to the law-maker whose task, as Lord Devlin points out, 'is to preserve the essentials of his society, not to reconstruct them according to his own ideas.'[3] If, as Lord Devlin holds, the justification for the legal enforcement of morality derives from the cohesive character of a public morality then surely 'the quality of the creed' is irrelevant. If the law's concern with morality is based on its cohesive force then what is important 'is not the true belief but the common belief.' Furthermore, it is submitted that, in fact, the concept of 'correctness' is inapplicable to answers to moral questions such as 'Is homosexuality wrong?' To such a question there is no 'correct' answer as there is to a factual question such as 'What is the present population of England?' To argue thus is not to deny the obvious value of social research which, if brought to the attention of the reasonable man, may dispel factual misconceptions which hitherto contributed to his belief but rather to assert that once the appropriate factual considerations have been agreed upon (and here the usefulness of such inquiries as that conducted by the Wolfenden

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1. Devlin. op. cit. P.94
2. ibid. P.114.
3. ibid. P.90.

Committee should be readily apparent) further dispute is always possible resulting from differences in attitude.

Basil Mitchell argues that if Lord Devlin's thesis is accepted 'we are committed to the view that the positive morality of a given society is beyond criticism. Apartheid must be accepted in South Africa, genocide in Nazi Germany.'[1] However, to argue along these lines is to presuppose firstly, that the policies referred to do, in fact, reflect the public moralities in the respective societies and secondly, that if the views of the 'rational' man alone were considered in each of these societies such policies would never have been introduced. The validity of both of these presuppositions is open to question. Moreover, even if their validity were firmly established Lord Devlin's thesis would not commit him to regarding the respective public moralities as beyond criticism. On Lord Devlin's thesis the values constituting the public morality of any society may indeed be criticised, for example, from a utilitarian standpoint; what cannot be criticised is the law for reflecting those values.[2]

A fundamental objection to Lord Devlin's thesis, according to Professor Hart, is the former's apparent disregard for empirical evidence. 'The question simply is', argues Professor Hart, 'what evidence is there that a failure to enforce by law a society's accepted sexual morality is likely to lead to the destruction of all morality and so jeopardise the existence of society?[3] Before an attempt is

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1. Mitchell. op. cit. P.42.
2. This point is considered in detail in Chapter 3.
3. Hart. 'Use and abuse of the criminal law'. P.51.

made to meet this objection it must be pointed out that Lord Devlin's thesis appears to be a general one concerning the effects of any breach of society's moral code rather than being limited to the effects of sexual immorality. It would seem that a satisfactory answer to Professor Hart's objection may be given using the 'quite plausible definition of society as a body of men who hold certain moral views in common' to which he makes reference.[1] If it is accepted that it is impossible ex ante to predict the effects on this minimum necessary moral agreement of the breaching of any specific tenet of the public morality then any society which believes it to be the duty of the law-makers to ensure the continued survival of that society must give the law-maker the prima facie right to legislate against immorality.[2]

However, before the task of looking for evidence can be approached there must be agreement as to what will count as criteria for 'disintegration'. Unfortunately neither

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1. Hart. Law, Liberty and Morality. P.51.
2. In 'Social solidarity and the enforcement of morals', op. cit., Professor Hart phrases the question facing Lord Devlin in the following way: '... what evidence is there that a failure to enforce ... morality is likely to lead to the destruction of all morality and so jeopardise the existence of society?' However, Professor Hart's use of the term 'likely' is misleading for if he concedes that society has a right to take any steps it considers necessary to ensure its continued survival and yet wishes to set theoretical limits to the proper scope of the law then he must show not merely that some classes of conduct are not 'likely' to threaten the minimum required agreement but rather that certain classes of conduct are incapable, under any circumstances, of threatening it.

Lord Devlin nor Professor Hart attempts to provide a definition of 'disintegration' in a manner applicable to the study of societies.[1] Historians generally appear to use the term without making the criteria of application explicit. For example, J.M.R. Owens discussing the changes which the European colonisation of New Zealand brought to the native population admits that 'our criteria for defining the stages of European contact are arbitrary and lack precision. If this is a legitimate criticism of Wright it could also be applied to most historians who have chosen to talk of the 'breakdown', 'disintegration' or 'decline' of that seldom defined entity 'Maori Society'[2]

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1. Lord Devlin draws an analogy between a society and a h house; of the institution of monogamous marriage in English society he says '...it remains there because it is built into the house in which we live and could not be removed without bringing it down.'(P.9).
2. Owens,J.M.R. 1968. Christianity and the Maories to 1840. The New Zealand Journal of History,Pp.25-6., commenting on Wright,H.M. 1959. New Zealand 1769 - 1840; Early Years of Western Contact. Cambridge. Mass. 1959.
   Rene Maunier, the noted French Historian, discussing generally the effects of intersocietal contact between 'primitive' societies and 'advanced' European societies observes that 'without his wishing, without his always being able to prevent it, the settlement of the white man in a primitive country has the effect of disintegrating the tribe, destroying the customary political and traditional order, abolishing established power ... old authorities are shaken, old taboos effaced, and nothing is provided to replace the ancient rules and laws which the European has been obliged to break down by the mere fact that he is trying to colonise.' The Sociology of Colonies. Edited and translated by E.O. Lorimer. (1949). Vol.1. Pp.80-81. Although Maunier's comments concern intersocietal contact his description of the disintegration process appears to be closely related to the process referred to by Lord Devlin.
   A.J. Toynbee devoted a complete volume of his 12 volume work A Study of History to a discussion of 'The Disintegrations of Civilisations' setting out numerous case studies drawn from ancient and modern history. (See

What then would count as acceptable criteria for 'disintegration' in the present context? Often Lord Devlin seems to imply that any 'fundamental change' in a society's way of life would constitute 'disintegration', as he understands the term, whereas Professor Hart sometimes writes as if he thought that anything short of the annihilation of all members would be better described as 'a mere change in the same society.'[1] However, elsewhere Professor Hart concedes that 'it would no doubt be sufficient if our evidence were to show that malignant change in a common morality led to a general increase in such forms of antisocial behaviour as would infringe what seem to be the minimum essentials; the prohibitions and restraints of violence, disrespect for property and dishonesty.'[2] On this statement of Professor Hart's position the basic difference between it and the thesis advanced by Lord Devlin concerns the nature of the required minimum agreement. Professor Hart explicitly states above that the minimum required agreement concerns universal issues on which any society must reach agreement in order to survive whereas Lord Devlin's view is rather that the minimum agreement necessary may involve different issues in different societies. Stated in this way it is submitted that Lord Devlin's view is surely the more plausible; from the standpoint of the cohesion of a society there would seem

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especially Vol.5). In presenting his 'challenge-response' theory Toynbee writes that '... the ultimate criterion and the fundamental cause of the breakdowns of civilisations is an outbreak of internal discord through which they forfeit their faculty for self-determination'.(Vol.5.P.17)

1. Hart. 'Social solidarity and the enforcement of morals'. P.3)
2. *ibid*. P.12.

to be no reason for believing that the only issues on which agreement is necessary will be universal issues. On the contrary it would appear more likely that the cohesion of different societies will rest on agreement concerning different issues, although this is not to deny that owing to the mental and physical structure of human beings certain issues may arise more frequently than others. Thus for present purposes 'disintegration' of a particular society may be tentatively defined as 'the destruction of the minimum required agreement necessary for that particular society.' Having thus tentatively determined what will count as evidence of 'disintegration' the question as to whether any societies have thus disintegrated as a result of the widespread breaching of a particular tenet (or several tenets) of their positive morality belongs to the fields of history, sociology, anthropology, psychology and the other 'social' disciplines. However, for the purposes of the thesis being advanced in this essay it is sufficient to realise that no theoretical limits to the proper scope of the law can be validly drawn based on a distinction between classes of conduct which are capable of threatening the minimum agreement required for any society and classes which are not. Evidence which the 'social' disciplines may provide may show that for a particular society certain breaches of the positive morality pose a graver threat than others, but it cannot show that certain classes of conduct are incapable of affecting the minimum agreement on which that society is based. Theories which attempt to set out the proper scope

and limits of the criminal law for all societies by drawing a distinction between those classes of conduct which are the proper concern of the law and those which are not must, therefore, fail.

Professor Hart and legal paternalism

Professor Hart's view of the proper scope of the Criminal Law has been enunciated within the framework of his attacks on Lord Devlin's thesis and as such has been revealed somewhat accidentally. It is important to notice immediately that the position adopted by Professor Hart, although drawing heavily on the doctrine set out by J.S. Mill in On Liberty, differs considerably from the latter in certain respects. In this part of the essay two questions concerning Professor Hart's position will be discussed: Firstly, does it constitute a legitimate modification of Mill's views, and secondly, how coherent is the new position?

In Chapter V of On Liberty Mill goes to great lengths to protest the evils of paternalism. He cites, for instance, the example of restrictions of the sale of drugs and criticises such restrictions as interferences with the liberty of the would-be purchaser rather than with that of the seller. The basis of Mill's attack on paternalism is his view that no one knows better than the individual what is best for the individual.[1] Thus

1. Mill argues that 'The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual.' On Liberty. op. cit. P.138. Elsewhere he

'the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others.'[1] In other words, 'His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right.'[2] However, Professor Hart makes it quite clear that he does not wish to defend all that Mill said for he believes that indeed 'there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others.'[3] For Professor Hart the justification for allowing what he terms 'legal paternalism' rests on 'a general decline in the belief that individuals know their own interests best.'[4] For this reason Professor Hart thinks that a modification of Mill's principles is required if they are to accomodate the rule of the criminal law. However, the means by which Professor Hart attempts to make this modification rests, it is submitted, on an extremely forced reading of Mill.

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asserts that '... neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it ...; with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.' ibid. Pp.206-7.

1. ibid. P.135.
2. ibid.
3. Hart, H.L.A. Law, Liberty and Morality. op. cit. P.33.
4. ibid. P.32.

Professor Hart distinguishes between 'because it will be better for him to do so, because it will make him happier' and 'because in the opinions of others, to do so would be wise or even right.' He argues that there is a clear distinction between the first two qualifications which form the basis of the doctrine of legal paternalism and the latter which constitutes 'legal moralism'. Before turning to consider the coherence of such a distinction it should be noted that in constructing his 'modification' Professor Hart is jettisoning two of the three grounds which Mill believed could not justify interference which it seems clear were meant to be read cumulatively and not alternatively. Lord Devlin argues that 'Professor Hart's argument might have been clearer if he had left Mill out of it. If Mill was obviously wrong about paternalism why should he be right about enforcement of morals.'[1] The strength of Lord Devlin's criticism lies in the fact that Mill's basis for excluding certain grounds as justifying interference is the same for all three excluded grounds; namely, that no one knows another man's interests better than that man himself. If, as Professor Hart believes this principle is invalid and so not capable of supporting the first two instances it seems plausible to inquire as to the justification for regarding it as sufficient to support the third instance. Thus it is submitted that Professor Hart's 'modification' of Mill's position is not a legitimate one at all but rather involves the refutation of the very

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1. Devlin. <u>op. cit.</u> P.133.

basis of Mill's doctrine. As such Professor Hart's own position constitutes a different view altogether which requires a complete and separate justification.

The cogency of Professor Hart's views concerning the proper scope of the Criminal Law which would allow legal paternalism as a justifiable ground for interference but would deny legal moralism obviously depends on the possibility of establishing a firm distinction between preventing harm which he approves of, and enforcing morality, which he condemns. Professor Hart does not make his position entirely clear but it would seem that two possiblities are open to him. Firstly, he may limit legal paternalism to the prevention of physical harm or he may include as well, the prevention of non-physical or psychological harm provided that the latter can be defined in objective terms which do not reflect specific moral values. Secondly, he may extend legal paternalism to include protection from moral harm also, in which case, for his criticism of Lord Devlin's position to remain standing, he will have to distinguish between moral paternalism and legal moralism. In any event the choosing of the second alternative will involve a concession that there is no realm of private morality which is 'not the law's business.'

There would seem to be no reasonable grounds on which to limit justifiable paternalism to a concern for physical harm. As Lord Devlin argues, 'if paternalism be the principle, no father of a family would content himself with looking after his children's welfare and leaving their

morals to themselves.'[1] Indeed, as has been noted above, the very ground on which Professor Hart justifies legal paternalism is '... a general decline in the belief that individuals know their own interests best.' If the decline in the belief is justified it would appear to be quite implausible to suggest that whilst individuals do not know what is best for them physically they do know what is best for them in a non-physical or psychological sense. Would it then be possible for Professor Hart to allow physical and psychological paternalism but to deny that the latter amounted to protecting people from moral harm? Lady Wootton observes that 'long indeed is the road to be travelled before we can hope to reach a definition of mental-cum-physical health, which is objective, scientific, and wholly free of social value judgements.'[2] Basil Mitchell correctly identifies the principal difficulty as arising from 'the tendency to define mental health in terms of social adjustment, so that the aim of therapy should be to adjust the individual to the demands of his society.'[3] It is usual for the psychologist and the psychiatrist to describe their task as ensuring that the patient will be able to live a 'normal' life. Surely 'normal' is to be considered a relative term; 'normality' can only be defined with reference to other members of the society. Furthermore, as Mitchell points out 'to define

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1. Devlin. op. cit. P.135.
2. Wootton. Social Science and Social Pathology. P.225.
3. Mitchell. op. cit. P.57.

mental health in terms of adjustment, not to an existing society, but to an ideal society, does no more than substitute explicit for implicit value judgements.'[1] Professor Hart's second possiblity is to allow that legal paternalism should cover physical and moral well-being but to argue that moral paternalism and legal moralism the enforcement of morals - are distinguishable. According to Lord Devlin such a distinction is an impossibility because '... a moral law, that is, a public morality, is a necessity for paternalism, otherwise it would be impossible to arrive at a common judgement about what would be for a man's moral good. If then, society compels a man to act for his own moral good society is enforcing the moral law; and it is a distinction without a difference to say that society is acting for a man's own good and not for the enforcement of the law.'[2] It would certainly seem that if one man tells another to do or refrain from doing some act because it is morally harmful then that man is attempting to impose his own moral views on another. When the former's voice is given the force of law moral paternalism and the enforcement of morals are indistinguishable.

The distinction between legal paternalism and legal moralism is defended by Professor Hart on the ground that the former constitutes a sounder policy because it is based on the principles of 'critical morality' rather than on the views of the ordinary man. However, Professor Hart's

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1. ibid. P.59.

2. Devlin. op. cit. P.136.

argument assumes that a distinction between legal paternalism and legal moralism has already been made and also that there exists a unique system of critical morality which underlies the proposals of legal paternalism and provides it with a sound base whereas in fact many systems of critical morality have been developed and their respective answers as to what is in men's best interests do not always coincide.

Moreover, regardless of the possibility of distinguishing clearly between moral paternalism and legal moralism the acceptance of the former doctrine must have the consequence of denying the possibility of a realm of private morality which lies outside the proper scope of the criminal law. Thus it is submitted that Professor Hart's positive thesis fails to provide a coherent alternative to Lord Devlin's position.

CHAPTER 3

The relation of law to society

Introduction

The main aim of the arguments advanced in the first two chapters of this essay has been to refute the statement of principle expressed in the Wolfenden Report that society must recognise 'a realm of private morality and immorality which is, in brief and crude terms, not the law's business.' For the purposes of argument the Committee's view has been understood as proposing the fixing of a jurisdictional barrier which would place certain classes of conduct forever, and for all societies with a legal code (as distinct from a system of mores or customs), beyond the proper scope of the law. The thesis advanced in the first two chapters asserts that if it is admitted that any society may justifiably take whatever steps it considers necessary to ensure its continued survival then no such barrier can be erected.[1] However, it seems to have been assumed by both Professor Hart and to some extent Lord Devlin as well as by the members of the Wolfenden Committee that the law can be discussed, and the limits to its proper scope in any society settled, by rational philosophical argument, as if the law in any society enjoyed an existence independent of the society in which it functions. It is against this

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1. It must be noted that the preservation of society is not being put forward as valuable in itself but rather as a necessary instrument in safeguarding the interests of the individuals who compose the society.

assumption that the arguments of this chapter are directed. The aim of the chapter is to suggest rather, that if the operation of the law as an institution in any society is justified by the right of any society to take whatever steps it considers necessary to ensure its continued survival then the proper functions for, and limits to, the law must be precisely and only what the members of that society wish them to be because only in this way can the law justifiably attempt to ensure the continued survival of that society. A consequence of this view will be that any theory which attempts to define theoretical limits to the classes of conduct which constitute the proper scope of the law will be doomed to failure.

The law as an instrument of society

It is submitted that the debate between Lord Devlin and Professor Hart has become confused because both parties have at times appeared to lose sight of the nature of the relation of the law to the society in which it operates. Briefly, it is submitted that the operation of the law as an institution should be discussed in the way that the operation of any man-made instrument is; namely, that the law can only be evaluated in terms of the extent to which it serves the purposes for which it is used. Thus it is suggested that the proper functions, and limits to, the scope of the law in any society cannot be discussed without reference to the values that the society does in fact hold.

It is necessary at this stage to distinguish at least two different levels of values which the members of any society may hold concerning the law. Firstly, there are those values which may be termed 'substantive values' which concern the classes of conduct which should come under the scrutiny of the law. For example, it is quite obvious that both Lord Devlin and Professor Hart believe that the killing of one man by another should, in most circumstances, be prohibited by the law. Secondly, there are the values which the members of a society may hold regarding the principles in accord with which the law should be made and administered. These may be termed 'procedural values.' In English society, for example, there is a widely held belief that the highest legislative body should be a Parliament whose members are voted into office by a majority vote. If the arguments advanced in the previous two chapters are valid then the way in which the law must function if it is to preserve society must be by supporting the values, both substantive and procedural, which the members hold. Thus there can be no argument about the merits or demerits of a particular law or a particular legal system as such in isolation from the values held by the society in which it functions.

It may be argued that the members of a society may hold a substantive value which because of its content may not be necessary for the continued survival of that society. However, to agree in this way is to ignore the fact that the values which a society holds are important to the

members of that society. Thus, to use Professor Hart's example, if the members of a society believe that homosexuality causes earthquakes, and feel strongly that such behaviour should be prohibited by law, then it is the duty of the law-maker, acting for the preservation of society, to legislate according to this belief. It may also be the case that a society holds substantive values which because of their content are thought by the law-maker in that society, not to be condusive to the continued survival of that society. ~~In this case it may be argued that it is the duty of the law-maker in that society, not to be condusive to the continued survival of that society.~~ In this case it may be argued that it is the duty of the law-maker to 'protect society against itself.' However, it is submitted that in such a situation the law-maker should attempt to point out to the society why, in his opinion, the proposed law is inconsistent with the preservation of the society. If the members of the society accept that there is such an inconsistency and agree that their strongest wish is the preservation of society, then the law-maker may be said to be 'protecting society against itself' only in the sense of ascertaining the deeper and more reflective wishes of society in which case he would still be legislating in accordance with the values in fact upheld by society and not against them. If however, the members of the society choose to ignore the warnings of the legislation whilst accepting his predictions as accurate, and still maintain that the substantive value in

question ought to be enforced then the problem is more difficult. The reason for this is that if the view that the law's proper function is to reflect the wishes of the society in which it operates is justified on the basis that each society has the right to ensure its continued survival and that legislating in accordance with such wishes is the way this should be done, then if the members of the society do not care about whether or not society survives the justification for the law functioning in accordance with the wishes of the members of the society is removed. Thus the thesis being advanced above cannot be applied to societies in which the members do not wish the society to survive. However, it is submitted that in as much as the thesis is advanced as a practical guide to legislation it will not be strongly criticised if it cannot accomodate such extreme examples as the one cited above. There is no way by which one could give the law the independent duty of preserving a given society in being - it can only derive its tasks and the ways it carries them out from the values held by the society in and for which it functions.[1] Another possibility is that the members of the society may refuse to accept that an inconsistency exists in which case it would seem that the duty of the law-maker is to enforce the belief whilst continuing to try and make the members realise the probable consequences in the hope that as the

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1. In other words, if the preservation of society is not regarded as being valuable in itself but only in as much as it serves to promote the interests of its members then if the members do not wish the society to contrive there can be no justification for the law-maker attempting to ensure its survival.

situation worsens (if it does, in fact, worsen) and it becomes evident that the survival of the society is threatened, the people will see their earlier error and make a choice which removes the inconsistency.

Should the law be used to lead public opinion?

It is often argued that it is sometimes the duty of the 'enlightened' legislator to lead public opinion; to encourage the changing of the values held by the members of a society by the enforcement of laws which, whilst in opposition to present public opinion embody values which it would be 'better' or even 'morally right' for the members to hold. Thus, in connection with the desegregation laws in the U.S.A. Professor Ginsberg argues that, 'It may well turn out that the desegregation laws, if persistently enforced, may help to bring about a change in attitude, in behaviour, and eventually in moral convictions.'[1] Firstly, it must be noted that even Professor Ginsberg who advocates such laws, is uncertain as to the consequences of such legislation although he seems quite willing to take the risk of proceeding in such a way in opposition to public opinion. However, even if the consequences of such legislation could be predetermined in detail further problems remain. For example, it has already been argued in the preceding chapter that there are no 'correct' moral views' in as much as a person can be said to give a wrong or incorrect answer to a question such as 'Is racial segregation good?' Even if the factual

1. Ginsberg, M. 1965. On Justice in Society. Penguin Books. P.235.

consequences of such a policy are agreed upon there is no reason for supposing that any two people must agree that those consequences are either 'good' or 'bad'. Thus the argument must be that, for example, the consequences of the desegregation policy will be 'better' or 'morally superior'. But now the question must be asked as to who is to decide whether this is so. Obviously, it cannot be the members of the general public as they would have arranged their moral valued differently - one's ground for holding a moral principle is in most cases based ultimately on an evaluation of the consequences of behaving in accord with that principle - in which case there would be no need to lead public opinion at all. So it would seem that the argument is simply that for a person who considers the consequences of a policy of segregation to be 'bad', the consequences of a policy of desegregation are 'better' which is hardly surprising.

Those who would assert that in some cases the law-maker has a duty to lead public opinion usually argue that what gives the law-maker the right to attempt to lead public opinion in some cases is that after a certain period of time the general public will realise that the moral views they once held were 'incorrect' or, if it is conceded that the concept of 'correctness' is not applicable to moral views, that they were not in the best interests of mankind or the members of society in which those views were held. However, the problem here is that these same people will wish to deny that the law-maker has this right when the

legislation with which he intends to change public opinion seems likely to have consequences which they consider not to be in the best interests of mankind etc. But once this is realised it must also be seen that as far as the law is concerned either it has the right to lead public opinion or it does not. Suppose, for example, that in a particular society the members act in accordance with a certain custom which they believe is valuable in itself and so ought to be continued although they also admit that acting in accord with this custom does cause a limited amount of pain to each of them. It may be argued by a certain group of people outside the society that because there does not appear to them to be any rational justification for the infliction of pain in this case it is the duty of an 'enlightened' law-maker to prohibit the practice and thereby attempt to change public opinion. Let it be assumed that the law-maker legislates accordingly and within a short period of time the members of the society are in agreement that the custom was not valuable at all and that they are better off without it. However, some time later another allegedly 'enlightened' law-maker takes office and is persuaded that in fact the original custom was valuable and that it should never have been prohibited at all. The new law-maker legislates accordingly and he too is successful in changing public opinion with the result that the members of the society once more regard the custome as valuable. This possible example shows the difficulty which those, who would assert that the law-maker has, under certain circumstances, the right to change public opinion, face; namely,

that each person will only wish to give the law maker this right when his own moral principles conflict with those held by the members of the society.[1] In the example cited above, for instance, those who would wish to give the law-maker this right in the first instance would wish to deny the existence of such a right in the latter instance, whilst those who would wish to give the law-maker the right to change public opinion in the latter instance would wish to deny it in the former instance. The problem is, however, that the law-maker can never determine, in any particular instance, whether he does have this right for the answer to his question will depend solely on which person he asks. It may be argued that in a society in which the law-makers were voted into office the people will decide, in each case, whether the law-makers were justified in attempting to change public opinion by either re-electing them or voting them out of office. However, to argue in this way is to confuse two distinct issues. The mere fact that the law-makers are re-elected may indeed show that they have succeeded in changing public opinion[2] but it cannot show that they were justified in attempting to do so.

The arguments presented above should not be construed as attempting to deny the quite different point that the enforcement of any law may, and in most cases will, have some effect on public opinion. It would indeed seem

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1. This may explain why those who would give the law-maker this right refer to 'leading public opinion' rather than to 'changing public opinion, thus implying that the proposed change will be for the better.
2. If the subsequent election is fought on an issue concerning the enacted legislation then the re-election of the law-maker's would seem to be grounds for believing that the law-makers succeeded in changing public opinion. However,

likely that in a society in which the rule of law is regarded as being valuable and in the best interests of the members as a whole there may be a strong belief in 'the majesty of the law' in which case the law as an institution may be regarded to some extent as the arbiter of morals. Whatever may be the theoretical reason it seems to be a plain matter of fact that many people's moral attitudes are commonly influenced by the law. However, this in itself does not commit one to the view that it can ever be the duty of the law-maker to specifically set out proposed legislation with the aim of changing moral views according to his own moral views. Lord Devlin seems to recognise this point when he observes that obviously the legislator '... will assume that the morals of his society are good and true; if he does not he should not be playing an active part in government. But he does not vouch for their goodness and truth, his mandate is to preserve the essentials of his society not to reconstruct them according to his own ideas.'[1]

To argue thus is not to deny that the individual whose moral views differ from those held by the rest of the community has no right to attempt to bring about a

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it may be the case that the subsequent election is fought fresh issues in which case re-election of the law-makers may be unconnected with the particular legislation in question.

1. Devlin. op.cit. P.90. Lord Devlin's use of 'true' is misleading if the arguments of this chapter are sound. However, if that term is removed from the quotation, the tenor of Lord Devlin's view is unaltered. It is interesting to note that Professor Hart refers to 'the innocuous conservative principle that there is a presumption that common and long-established institutions are likely to have merits not apparent to the rationalist philosopher.' Law,Liberty and Morality. op.cit. P.29.

change in the law but rather, to assert that his proper course of action in such a case is to attempt to change the commonly held views. Thus it would seem that a member of a democratic society, for example, may consistently believe that a particular view held by the majority is not in the society's best interests (or in the best interests of mankind as a whole) and yet still believe that the majority view should prevail. In such a case his proper course of action, it is submitted, is to attempt to change the commonly held view by pointing to its probable consequences and thus appealing to factual misconceptions on which the majority view may be based.

Finally it would seem that if, as has been argued in the preceding chapter, the laws concern with morality is with its cohesive force then the quality of the common belief is irrelevant. If the people of a society believe strongly that certain conduct is evil and ought to be prohibited by law, then the law-maker, whilst he may attempt to show the people that their view is based, for instance, on factual misconceptions, must, if the people do not accept his arguments, act in accordance with their view.

Critical morality and positive morality

On the views advanced above the answers to questions of the form, 'Ought the law ...?', should be arrived at by reference to the answers to questions of the form 'Does the society wish its law to ...?' Thus when

considering whether or not the criminal law of England ought to punish homosexual behaviour the relevant question to ask is whether the members of English society wish the law to punish homosexual behaviour. To argue in this way is not to rule out of order any criticism based on the principles of a certain morality but rather to assert that they are properly addressed to the society which holds the values being criticised and not when directed at the law for reflecting those values. In other words, the positive morality of a society may be attacked by appeal to the principles of a critical morality but the latter cannot be used to criticise a law which reflects that positive morality. For example, a certain value held by the members of a particular society may be criticised from a utilitarian position as not tending to promote the greatest possible happiness. However, if it is a fact that such a value is held by the members of the particular society then the law as an institution cannot be criticised if it is in accord with that value.

Thus the law may be criticised on the grounds that it is out of step with, or lags behind the values at present held by the members of the society in which it functions.[1] Similarly a law which attempts to support a value held by the society may be criticised for attempting to do so in a way in which the members do not believe that

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1. Lord Devlin refers to the 'shifts in the limits of tolerance' and on the arguments advanced in this chapter a law-maker who refused to act in accordance with such 'shifts' could justifiably be criticised as could his laws.

it should. For example, the members of a society may believe that homosexuality is evil and ought to be discouraged and yet not believe that it should be prohibited by law. They may hold that such a law would, in practice, be unenforceable and so bring the law as a whole into disrepute or that social ostracism is more effective in curbing such conduct. Again a system of law may be set up by a native tyrant who rules over an unwilling populace by sheer force or, used by a sub-group of society to further its own ends without regard to the wishes of the people at all. On each of these grounds the law may justifiably be criticised.

The problem of ascertaining the values held in a pluralist society

In a strongly monolithic society the problem of ascertaining the values which constitute the positive morality will not be acute. However, it may plausibly be argued that in a truly pluralist society it may prove very difficult for the law-maker to determine what values society does, in fact, hold - by definition different groups within it hold a variety of conflicting values. Does this mean that for the law to reflect the positive morality is not possible in such a society? If so, this would mean that the thesis here being advanced will not be applicable to most contemporary societies and this would constitute very strong criticism indeed of a thesis which is designed as a practical guide to legislation. However, the answer would seem to be simply that even in

such a pluralist society it will still be for the members of that society to determine how, and within what limits, the law is to function.

If for example, a third of the population believe that homosexual behaviour ought to be prohibited by the law and two thirds believe that it should not then it is up to the members of that society to decide how such a dispute is to be settled. For example, the members may believe that any disagreement over substantive values (i.e. values concerning the content of the law) should be settled by general discussion and compromise (a procedural value). If this is the case then the problem may be solved relatively easily; perhaps those who wish the law to prohibit homosexual behaviour would be satisfied with a law designed to protect minors and prohibit homosexual prostitution, whilst those who wish the law to permit homosexual behaviour may be satisfied if the law allows such conduct to be carried out in private between consenting adults. However, it may be the case that there is a dispute about how substantive disputes are to be settled; one side may hold, for example, that whilst all political and economic issues, etc. should be settled in accordance with the views of the majority, the law's concern with the society's sexual moral code should be decided by a team of 'experts', whereas the other side may believe that in so far as the law is concerned with the society's sexual moral code it should reflect, as clearly as possible, the majority public opinion. This dispute (a procedural one) will in turn have to be decided in the way in which society's members believe such

disputes should be settled.[1] For instance, the members of the society may agree that such procedural issues should be settled by a referendum in which case no matter which side 'wins' the law-maker will be able to legislate in accordance with the values (procedural) held by the members (although reflecting only a proportion of the member's substantive values) and so, it is submitted, will be able to legislate in accordance with the 'values' held by members of the society. If it is thought that following such a procedure to the law will not, 'in reality' be reflecting the values held by the members of the society then it may be illuminating to consider whether, for example, a member of a democratic society can, without being inconsistent, believe both that a certain opinion held by the majority is inappropriate and also that the wishes of the majority should prevail. If, as has earlier been submitted, the two beliefs are indeed consistent then there would seem to be no objection to saying that a law which is set up in accord with the procedural values of the members of a society is reflecting the wishes of the members of the society even though some of the members may be in disagreement with the substantive content of the law.

1. It would seem that as the dispute widens to involve more deeply held values the chances of society finding a method of settlement which is acceptable to all will increase (as the minimum agreements on which the society is based, is approached) although failure to find such a method will, at the same time, pose a greater threat to the continued survival of the society as one society. Furthermore, it should not be dismissed that each side to the procedural dispute will be composed of the same members of the society as composed each side in the substantive dispute. A member of the group which composed two thirds of the population in the original substantive dispute will not necessarily, nor even probably, believe that the will of the majority should prevail in moral matters.

Conclusion

The aim of the arguments presented in this chapter has been to show that the law as an institution operating within a society cannot be discussed, nor its limits defined, without references to the values held by the members of the society in and for which it functions. If the arguments presented are valid then it follows that any attempt to define *ex ante* theoretical limits to the proper scope of the criminal law must fail. The law in any society exists as an instrument to support the values held by the members of that society in the way the members wish them to be supported; its shape can be moulded, and its limits defined, only with reference to those values. The law of any particular society should express the values held by the members of that society; it should constitute a formal statement of those values.

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