Philosophy of Law
An introduction

2nd Edition

Mark Tebbit

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

8 Liberty, privacy and tolerance

Only in recent times has the debate about tolerance and respect for diversity become a prominent feature of democratic societies. What is often not realised is the extent to which toleration of the right to deviate from social norms relating to personal codes of morality is at odds with the principles of democracy as majority rule. The issue at the heart of the debate about 'the enforcement of morals' is that of drawing the line between the moral and the immoral in personal behaviour. Are individuals the best judges of their own interests, or does the state, acting on behalf of society, have the right to set limits on what it regards as morally acceptable? Although the question of a right to privacy is a much wider one, the emphasis here is on sexual and sex-related practices and lifestyle. Until the 1950s, it was widely assumed that the state did have the right to criminalise homosexuality, prostitution, pornography, abortions and many other related practices. Rapid social changes over the following decades have brought about extensive revisions in the law governing this area, but it has not been a one-way process of liberalisation. On most of these matters, there is an ongoing conflict between the rights of the individual and the rights of society.

Liberalisation and the Wolfenden Report

The debate was initiated in 1957, when the Wolfenden Committee made two recommendations to the government: (1) that private prostitution should remain legal and public soliciting be outlawed; and (2) that male homosexual acts in private between consenting adults over the age of 21 should be legalised. What was of particular importance was the Wolfenden view of the function of the criminal law, which was stated with exceptional clarity as follows:

> The function of the criminal law, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide safeguards against exploitation and corruption of others • particularly the specially vulnerable, the young, weak and inexperienced.• 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.• There must remain a realm of private morality which is, in brief and crude terms, not the law's business.
>
> (Wolfenden 1957: cmnd 247, para. 13)

In short, Wolfenden was advocating a new spirit of tolerance. Any private individual activities that presented no threat to other citizens, or to the maintenance of public order and decency, should remain beyond the reach of the criminal law. It should be noted that the emphasis of the recommendations was firmly on the private sphere; there were no liberal implications for the publication or public display of pornography, or any other kind of public behaviour that might be found offensive. Also, the spirit of the report was morally neutral, in that it passed no judgement on what was taking place in private. It simply declared that it was none of the law's business. It was this spirit of liberalism that also guided the subsequent legislation.

Superficially, perhaps, this sounds like a straightforward story of reasonableness and tolerance prevailing over outdated repressive and moralistic attitudes. When we look more closely, however, we find that the relation between the criminal law and private morality is far from simple. What exactly, for example, does 'private' mean in this context? Does it mean 'out of public view', or does it mean that it is the individual's own business? Are privacy and publicness really separable? What does 'harm' or 'giving offence' or 'causing distress' mean? These ambiguities have to be resolved.

J.S. Mill and liberty

The findings of the Wolfenden Committee were clearly based on Mill's classic essay *On Liberty* (l972a). In one of the most influential statements in modern political and legal philosophy, Mill had declared that:

> the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is *self-protection*. 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 sufficient warrant.
>
> (Mill 1972a: 78)

This is sometimes known as the 'harm principle', or more accurately as the 'no-harm principle'.

According to this principle, there is no justification for the use of the law (i.e. 'mankind collectively') against citizens for any purpose other than the prevention of harm to other citizens. The law is limited in its function to the 'self-defence' of society, and is legitimately employed if an individual's action is threatening society in some way. The second point Mill is making is

that the law should also be limited to protecting people against others, not against themselves. These two points are easy to conflate, under the heading of a single 'no-harm' principle, but they need to be kept distinct. According to the first point, if there is no threat to others, there is no justification for legal intervention. According to the second point, if the action is only a threat to the agent, there is no such justification. The first point is an argument against legal moralism, or the enforcement of moral norms regardless of whether there is any danger. The second point is an argument against paternalism, or the interference in a person's freedom of action, when it is ostensibly for that person's own good.

One crucial exception to this principle should be noted. It applies neither to children nor to people vulnerable by virtue of mental defect or disorder such that their autonomy is seriously in doubt. In these cases, legal intervention for their own good is regarded by Mill as legitimate. Otherwise, for everyone of sufficiently mature years and sound mind, their own private behaviour – no matter how dangerous or self-destructive – is their own business.

It requires some effort of imagination to realise how bold a principle this was in Victorian England. The received wisdom about the purpose of law was that, while it included the prevention of harm to society, it was also for the protection of the moral and physical welfare of individuals affected by it, and for the general upholding of the Christian moral order. Mill's 'no-harm' principle, in both its anti-moralist and anti-paternalist aspects, was a radical challenge to the belief that the law was the proper arbiter of matters concerning morality, whether public or private. Furthermore, the temptation to regard the principle as a liberal platitude in the contemporary world, reflecting modern legal practice, vanishes with any serious attempt to think through the consequences of fully applying it. It would, for example, allow the unrestricted sale and use of heroin by adults.

The problems, of course, as Mill realised, only begin with the statement of the 'no-harm' principle. It was no less problematic than the supposedly 'very simple principle' behind his interpretation of the utilitarian philosophy, the principle of the greatest happiness for the greatest number. What he was interested in with the liberty question was establishing the 'no-harm' principle as a first base, so to speak, for theoretical negotiation. The idea was that, once accepted as basically true, the principle could be seen as establishing a dividing line, a cut-off point between the areas legitimately under the control of the individual, and the areas properly belonging to law and society. Once this distinction was accepted, it would only be a matter of thrashing out the details and defining the limits as appropriate to any particular society. The real difficulty, however, lay in having it accepted as a basic truth that there are areas in which the law should not intrude.

Mill's essay as a whole is an eloquent defence of the value to society of the recognition of the unconditional liberty of the individual in matters of conscience, expression and lifestyle. His defence of freedom of speech and liberty of action is a significant milestone in the development of democratic

theory, but the most important feature of *On Liberty* concerns his claim about lifestyle that the greatest danger to the life of the individual in modern society lies in the increasing tendency towards a moral tyranny by the majority, threatening the complete elimination of private moral choices by individuals:

> And it is not difficult to show, by abundant instances, that to extend the bounds of what may be called moral police, until it encroaches on the most unquestionably legitimate liberty of the individual, is one of the most universal of all human propensities.
>
> (Mill 1972a: 216)

Mill believed – as we saw in the context of rights – that this propensity, always a danger, was actually growing rather than receding with the development of democracy and the realisation of the principle of majority rule. The idea of moral policing involved the suppression of eccentricity and peculiarity of taste, which Mill described as a latter-day Calvinism, shaping individuals in a manner reminiscent of the cutting of trees into the figures of animals.

The main point about moral policing, for Mill, is that it involves the invasion of the private space of individuals. In his examples, this space includes such forms of deviance from social norms as were widely regarded as morally degenerate – gambling, fornicating, drunkenness, uncleanliness – but it also includes any kind of behaviour that is eccentric or different in any way from that of the crowd. What Mill was condemning and resisting was the growing tendency of society and the state to seek to control every aspect of the lives of individual citizens, to enforce norms of social behaviour for their own sake, or because they believed them to be desirable and dressed these desires up as moral laws, irrespective of whether the non-conformity was actually dangerous or harmful to others.

The area in which the law should not intrude, then, is abstractly defined as the area of individual privacy, the area consisting of those actions that are of sole concern to the individual. Mill anticipated some of the problems and criticisms relating to the distinction between the private and the public. The most common objection to the idea that there is any real privacy in moral matters is the 'no man is an island' objection. Mill acknowledges the argument that there are virtually no seriously self-destructive actions that are a matter of indifference to others, to friends, family, and so on. The network of social relations is such that there are repercussions and reverberations. He concedes that nothing is truly private in this sense (ibid.: 210–11); however, his reply to this objection is that it only warrants interference by the law if it leads to any breach of duty, such as the non-payment of debts. A related objection is that bad behaviour, while it may have no direct effect on others, is 'injurious by example', which may damage by corrupting or misleading others (ibid.: 211). Mill's response to this is to distinguish what he terms the merely contingent or constructive

injury to society from definite damage to another or to the public. If there is no such definite damage or real risk of such, his contention is that 'the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom' (ibid.: 213).

A closely connected yet distinct set of problems relates to the *kind* of harm, damage or injury under discussion. If – according to the 'no-harm' principle – legal intervention is only justified when the issue is one of harm to others, what kind of harm are we talking about? Is it restricted to real tangible damage of the type that can be measured, or does 'giving offence' or 'causing distress' count as harm? Mill's treatment of this question is vague and inadequate; it will, as we shall soon see, become one of the most important questions in the modern debates on legal moralism.

A most important general feature of Mill's defence of the liberty of the individual in matters of private morality is that it is rooted, not in a general theory of rights, but in the doctrine of utility. He is not arguing that there are individual rights which create an inconvenience for society, but which must be tolerated out of respect for these rights. What he is in fact arguing is an empirical historical thesis about the conditions of a healthy society. It is, he insists, in the long-term interests of society as a whole to encourage the flourishing of the individual. Society should refrain from using the law to repress either criticism or non-conformity, because individual freedom of expression and lifestyle, and the conflict that these engender, are the real sources of dynamic development in any society. Without them, society withers and dies. This is a utilitarian argument, because he is basing the claims to liberty on the general welfare. Society strengthens itself when it gives ground to the individual.

Devlin's critique of the Wolfenden Report

There was little doubt about the intentions of the authors of the Wolfenden Report when it was published in 1957. They had been commissioned by the government to investigate the state of the law on the two issues of prostitution and homosexuality. Their recommendations were that both were to be permissible in private, with public soliciting subject to prosecution. In their view, Mill's 'no-harm' principle was paramount. Private consensual activities between adults that did not directly harm anybody else should be beyond the reach of the criminal law. There was a great deal less certainty in the reactions to the report. The government accepted the proposals on prostitution and rejected the proposal on homosexuality, which was to remain illegal until 1967.

More interesting was the response by Patrick Devlin, a senior judge who had given evidence in favour of legal reform. Although he was not opposed to legalisation, he delivered a lecture in 1958 in which he attacked the thinking behind the findings of the Wolfenden Report. In this lecture, which was the opening shot in what was to become a very long debate, Devlin argued forcefully against the Wolfenden interpretation of how the law

should be used against behaviour regarded as immoral. This apparent contradiction between his support for legalisation and his rejection of the liberal thinking behind it is explained by his recommendation that there should be tolerance of unconventional sexual practices solely on humane grounds, without the state conceding any rights.

Devlin bluntly rejected the assertion of Wolfenden that there is a realm of private morality and immorality that is not the law's business. As Devlin saw it, 'there can be no theoretical limits to legislation against immorality' (1965: 14). Accordingly, he also rejected the separation of morality into a private and public sphere, a distinction that he regarded as no more intelligible than 'carving up the highway into public and private areas' (ibid.: 1965: 16). What this amounted to was a complete rejection of Mill's 'no-harm' principle, according to which the harmfulness of an action is a necessary condition for using the law against it. If there are no limits to the reach of the law, and hence no recognition of privacy, it cannot be conceded that there is an area of activity – however apparently harmless to the public – that the law cannot touch.

Devlin's argument for this strong and provocative conclusion is developed in three stages, and takes its point of departure from the fundamental principles of English law as it currently existed. First, he argues that the function of law is to enforce morality – 'the moral order' – as well as to promote public order and the smooth running of society. That is to say, the real function of law is wider and includes the one advocated by the authors of the Wolfenden Report. Second, he argues that this is how it should be, that it would be dangerous to relinquish such a fundamental principle, because a serious offence against morality constitutes an attack on society, which should retain the right to use the law to protect its own interests. Third, he argues that the law should be used sparingly and with maximum toleration to enforce morality.

At an early stage in the lecture, Devlin accepts that the authority of the law can no longer depend on Christian doctrine, because in contemporary society the civil right to disbelieve is beyond dispute. In the search for a secular alternative, however, he insists that society must retain the right to pass moral judgement, to approve or condemn from the standpoint of a clear-cut distinction between good and evil. It is precisely this right that he accuses the Wolfenden authors of undermining. What they were saying, he reminds us, is that although we retain the right to disapprove, we should relinquish the right to enforce this disapproval. Once an area of privacy in matters of morality and immorality is conceded, Devlin argues, the right to approve or to condemn has been implicitly given up. Without such a right, even a murderer will only be apprehended and punished for purposes of public order; the immorality of such offences will be irrelevant because we will have relinquished our right even to find the act morally repellent.

How do legislators tune in to this collective moral judgement? How do they know they are not speaking for themselves and a relatively small group

of like-minded people? Devlin is on very difficult ground here, and his forthright answer is highly controversial. Legislators are to refer to the standard of 'the right-minded man', 'the man in the Clapham omnibus', or the conclusion that 'any twelve men or women drawn at random' would be expected to reach unanimously. It is the mass of experience embodied in 'the morality of common sense'. Most importantly, he distinguishes the reasonableness of these people from their rationality. The reasonable man 'is not expected to reason about anything and his judgement may be largely a matter of feeling' (Devlin 1965: 15). One problem here is that the assumption of unanimity in this context can scarcely make sense, given that we are talking about matters on which there is an unknown but presumably sizeable number standing out against the supposed consensus. Deeper problems, as we shall see, arise from the explicit abandonment of rationality in favour of feeling as the basis of moral judgements.

In the course of reaffirming the wider function of the criminal law, Devlin makes two telling points about the consequences of adopting the narrower Wolfenden conception of this function, as derived from Mill's 'no-harm' principle. First, it would overturn the established principle that consent by the victim is no defence in English law to any form of assault or murder. Such offences with consent can be committed without any threat or harm to the wider community. The reason a victim may not either consent beforehand or forgive afterwards is that a criminal assault is an offence, not merely against an individual, but against society. Second, if there is to be consistency, many other specific acts would have to be allowed:

> Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others.
>
> (ibid.: 7)

His argument here is that if consent between prostitutes and their clients, and between adult homosexuals, is made the basis of their legality, then consistency will demand that all of these other acts are legalised as well.

Devlin's main concern in this lecture was to argue for the continuing right of society to pass moral judgement on the behaviour of its citizens, and the right to use the law to enforce this judgement. His central argument for these rights is by his own description a conceptual one, which can be established *a priori*. In short, the argument is that a society is entitled to pass judgement on any of the activities (public or private) of the individuals of which it is composed, because a society is, by definition, a community of political and moral ideas. This is what makes a society more than an aggregate of individuals living on the same territory. Being thus defined as a community of common ideas or beliefs, it follows that those who are out of step with these beliefs are threatening the continued existence of society:

> Society means a community of ideas; without shared ideas on politics, morals and ethics, no society can exist.• 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, society will disintegrate.
>
> (ibid.: 10)

For Devlin, then, passing moral judgement and enforcing it with the sanctions of law is analogous to political judgement and suppression of sedition and rebellion; both are justified by the right of society to protect itself. This is his central argument for legal moralism, for the use of the law for the enforcement of moral norms. One point that should be noted is that this argument seeks to establish a conclusion diametrically opposed to that of Mill. Where Mill argued that there was an empirical link between a healthy and enduring society and allowance of maximum freedom to individuals in choice of moral principles and lifestyle, Devlin argues that it is a necessary truth that, without individual conformity with the consensus, society will collapse. He softens the authoritarian tone of his argument with his urging of legal restraint in the prosecution of immorality, but this makes no essential difference. The most he is conceding is that there is sometimes a case for tolerating moral 'depravity'; he is equally clear that this tolerance can be withdrawn whenever society feels sufficiently threatened.

Devlin's setting of the limits of such tolerance brings us back to the instinctive moral reactions of 'the reasonable man'. At which point can this reasonable tolerance of offensive behaviour be withdrawn? Devlin's central argument here is that, while toleration should be stretched well beyond the point at which most people feel moderate dislike and disgust, the limit is reached when the acts in question are perceived to represent a real danger to society. He argues that what must be present to justify depriving individuals of freedom of choice is a genuine and deeply felt 'intolerance, indignation and disgust'. Comparing sexual offences with cruelty to animals and sadism, he argues that the limits cannot be set by rational argument, but must depend on feelings of real abhorrence (ibid.: 17). This is the most notorious of Devlin's arguments, but it should be remembered that what he is actually arguing for here is maximum toleration. He is not, as is frequently assumed, arguing that anything that makes people sick should be criminalised. It is nevertheless a vague and highly subjective standard that he is proposing, which opens the door to the perpetuation of popular prejudice as the guiding force behind the use of the criminal law.

Hart's reply to Devlin

In 1963, H.L.A. Hart published the text of three lectures as *Law, Liberty and Morality*, in which he developed a qualified defence of Mill's liberalism, supporting the recommendations of the Wolfenden Commission and coun-

tering Devlin's critique of both. His main purpose was to clarify the issues at stake, and in so doing to argue that the use of the criminal law to enforce morals was deeply misguided. Much more in step than Devlin with the liberalising spirit of the early 1960s, Hart set out to undermine moral conservatism and to defend the Wolfenden contention that there is an area of private behaviour that should be no business of the criminal law.

Mindful at the outset of the vulnerability of Mill's libertarian position to a criticism of its dangerous implications, Hart took care to distinguish between coercion for the sake of enforcing society's moral norms, and coercion for the agent's own good. According to the version of liberalism that Hart was developing in these lectures, it is only the latter form of state coercion that is to some extent defensible. Society does have the right to prevent its members from harming themselves as much as from harming others, but it does not have the right to enforce conformity with collective moral standards. The particular example he has in mind here is the prohibition of the sale and use of hard drugs, which is justified on paternalistic grounds. In the name of liberty, Mill had opposed any state interference into such activities, but Hart sets a new limit to the 'no-harm' principle, which is in fact a more literal interpretation of this phrase. What he argues is that the proper reach of the criminal law stops at the point of tangible harm as such – to self or others – whereas for Mill it stops only at the point of harm to others. What Hart endorses in Mill is his defence of the right to follow one's own lifestyle; what he rejects is his insistence that this right has no internal limits.

With this modified version of Mill's defence of individual liberty to hand, Hart was able to confront Devlin's arguments on more solid ground. One of his main complaints about Devlin's case against liberty is that he blurs the distinction between paternalist law and what Hart now labels 'legal moralism'. This is the distinction between laws for the protection of people against themselves and laws that merely seek to enforce moral standards. It is easy to see how this distinction can be blurred and the issue confused. If behaviour deemed to be immoral is widely regarded as by definition harmful and self-destructive, laws prohibiting it will be seen as paternalistic and defensible. With this distinction now drawn clearly, however, it becomes a question of whether – as Devlin argues – society does in fact have the right to condemn actions as inherently immoral and to punish them solely as such, irrespective of their effects on others.

The question of whether society has such a right is a normative one. For Hart, employing Bentham's distinction, it is a question of critical rather than positive morality, and of normative rather than descriptive jurisprudence. It is not a question of determining whether this right already exists in common law; it is a moral question behind the campaign for legislative amendment to the law. Hart argues that there is a strong and unwarranted presumption in Devlin and other legal conservatives that the current state of the law is justified, by virtue of its natural evolution. Hart argues that if society is indeed, as Devlin believes, a community of political and moral

ideas, it is a contingent matter whether these ideas will stand up to critical moral scrutiny. Devlin in particular wrongly assumes that any society has the automatic right to protect itself when its morals are threatened, regardless of how defective or misguided these might be. In the past, the moral conventions of the day have justified slavery and the persecution of witches. Hart questions Devlin's assumption, even to the point of denying that a morally defective society is automatically justified in preserving its own existence, if it is grossly unjust in substance or if the steps taken to preserve it are abhorrent. If society does have the right to pass moral judgements on its citizens and to use the law to enforce these judgements, it is not by virtue of Devlin's conceptual argument from the positive morality of that society.

Perhaps the most important of Hart's criticisms is the distinction, which he dwells on only briefly, between the core morality of a society and its sexual morals. This is in fact the crucial point, because the limitations of the English language have always produced a tendency to conflate these two senses of morality and immorality. In the core sense of the word, 'immoral' simply means 'wrong'; the core morality as enforced by virtually any legal system worthy of the name includes all the central prohibitions against violence, theft and other anti-social behaviour. In the more specific sense of the word, 'immoral' refers to deviations from conventional norms governing sexual and sex-related matters. Hart's criticism of Devlin is that his implicit merging of these two senses of the words establishes an underlying assumption, quite unwarranted, that:

> all morality – sexual morality together with the morality that forbids acts injurious to others such as killing, stealing and dishonesty – forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole.
>
> (Hart 1963: 50–1)

When we are dealing with moral 'crimes', which do not actually affect or harm anyone else, the implication of this 'seamless web' assumption is that if these private offences are allowed to proliferate without threat or sanction by the law, then the core morality of society will also suffer.

This assumption that morality constitutes a seamless whole, with every aspect meshing together to form a unified model of personal integrity, is also related to Hart's distinction between what he sees as extreme and moderate versions of legal moralism. The extreme version he attributes to James Fitzjames Stephen, the nineteenth-century judge who had published a critique of Mill's *On Liberty* from a utilitarian standpoint, emphatically rejecting Mill's proposal for an area of privacy. Stephen's arguments for the punishment of all forms of 'vice' rested on his claim that it was the function of the criminal law to punish wrongdoing as such, regardless of whether it had any harmful effects. Stephen rejected Mill's 'no-harm' principle because it would remove this essential part of the function of the criminal law, the

duty to condemn vice. One of Stephen's main arguments for punishing purely 'moral' offences was based on the practice of judicial sentencing in a case that actually does involve harm. In such cases, he argued, judges invariably take into account not only the degree of harm or damage, but also the odiousness of the crime and its perpetrator. Variations in sentence reflect malice, responsibility and degree of temptation, over and above the actual nature and extent of the injury caused. Moral judgement and condemnation are inescapable. The implication is that the 'surfeit' part of the sentence is purely to reflect the moral revulsion felt by the judge, speaking for society; the conclusion is that the prosecution of vice solely because it is immoral is a function and duty of the law quite independently of whether any harm has been caused (Stephen 1874).

This argument is clearly invalid, because it trades on different senses of immorality and moral revulsion. What is condemned in a case of, say, aggravated burglary is quite different from what is condemned in unconventional sexual activity. Also, the immoral 'component' of the crime would not be punishable in isolation from the criminal act. Hart's refutation of the argument is less important than his use of it to draw a contrast with what he sees as Devlin's moderate version of legal moralism. The extreme thesis is that the state's right to punish wrongdoing is derived solely from its wrongness and excitement of public revulsion. The moderate thesis is that the state's right to punish wrongdoing is derived from its social dangers, that if it is allowed to go unpunished the society whose morals it is flouting will, by definition, begin to fall apart.

Hart's rejection of this supposedly moderate social disintegration thesis is based largely on his observation that it is expressed by Devlin as a conceptual truth, based on his definition of society as a community of ideas and moral values. If this were the case, any permitted deviation from these ideas and values would constitute not so much a threat as a *de facto* disintegration of this society or body of values. Apart from Hart's criticisms, already noted, that it is wrong to assume that every society is worth defending or that any measures taken to defend it are justified, he argues that the assumption in the first place that a society is simply identical with every aspect of its positive morality is highly dubious. There is no reason to suppose that societies cannot evolve morally, allowing more personal liberty and diversity of values, without losing the core morality that sustains them or without losing their essential identity.

Dworkin's critique of Devlin

Defending liberalism and toleration from a different angle, Dworkin's arguments against Devlin focused on the question of the foundations of the moral judgements made by or on behalf of the community as a whole (Dworkin l977b: ch. 10; 1989). Against Devlin's feeling-centred ethics, Dworkin argued that the minimal requirement for even granting an opinion

the status of 'moral position' or 'moral principle' is that it is based on reasons and satisfies demands for consistency. The important feature of the argument is his contention that some 'reasons' must be discounted if the moral case for legal intervention is to be taken seriously. To be excluded are prejudices posturing as judgements, personal emotional reactions, false propositions of fact and parroting the beliefs of others. If genuine reasons are produced, and they can be shown to be applied consistently, then there will at least be a moral case to be answered. Devlin's attempt to show that the legislator is obliged to act on behalf of the deeply held moral beliefs of the majority is undermined by his identification of 'the reasonable man' as the barometer for public opinion, because there is nothing reasonable about the criteria of 'intolerance, indignation and disgust'. These are precisely the kind of reasons that are ruled out in any other context for determining a sound moral judgement, so they should be ruled out in the context of personal morals as well. The mere fact of a moral consensus, if it is not based on reasons that will stand up to scrutiny, does not for Dworkin make it morally legitimate.

One common objection to Dworkin's argument is that it would also disqualify vast numbers of ordinary moral judgements on acts of gratuitous cruelty, which an average jury member will condemn primarily on the basis of angry indignation and disgust. Many statutes embody prohibitions originally based on this kind of popular revulsion. This is a mistaken objection, because most people in this position, jury members or legislators, would be able to give non-prejudiced reasons to support the emotional reaction, to explain why such acts should not be allowed.

The other key feature of Dworkin's critique of Devlin is his rejection of the democratic majoritarian argument for the right of a community to impose the moral views of one section – even if it is a very large majority – on the rest of the community. Drawing an analogy between 'the ethical environment' and the economic environment, he argues that just as the majority does not have the right to gather all economic resources to itself and leave the rest to starve, it does not have the right to dominate the ethical environment in such a way that the minority is completely deprived of the right to make its own impact on this environment. The majority in turn has no rights solely by virtue of being the majority; its rights to mould the ethical environment exist only in proportion to its numbers. This is defended by Dworkin as a democratic principle that works against and in tension with the democratic principle of majority rule.

Conclusion

Forty years on from the Hart–Devlin debate, various social factors in both Britain and the USA might seem to have changed the original issues beyond recognition. While one can say that there has been a decisive shift of opinion towards tolerance in private matters of sexuality, such that it is difficult to

imagine the 1960s legislation being reversed, the controversy about the state of the law on these and related matters, and the rights of the community to enforce its moral norms, has continued to evolve in ways not countenanced by the early protagonists. Nevertheless, the wrangle between Devlin and his critics created the framework in which the political and philosophical differences have continued.

Study questions

General question: To what extent, if any, should the criminal law be used to regulate private behaviour that does not conform with the moral norms of society?

Further study questions: Was the Wolfenden Report correct in its insistence that 'there must remain a realm of private morality which is, in brief and crude terms, not the law's business'? Do Mill's arguments in defence of liberty show that there is never any justification for laws that are aimed at protecting people from themselves? Is Devlin right to insist that there can be no theoretical limits to the authority of the state over the individual? Is Hart's defence of paternalism consistent with his criticism of Devlin's legal moralism? Is Dworkin right in claiming that Devlin does not have 'a moral position'?

Suggestions for further reading

The basic texts for the issue of the enforcement of morals are Mill (1972a), Stephen (1874), the Report of the Wolfenden Committee (1957), Devlin (1965) and Hart (1963). Other important contributions include Dworkin (1977b: ch. 10 and 1989), Basil Mitchell (1970) and Hughes's 'Morals and the Criminal Law', in Summers (1968).

Of the collections of relevant material, Wasserstrom (1971) is the established text. Kipnis (1977: section 2) contains several important items. The discussion in Gavison (1987: part III) of toleration and the harm principle is particularly useful. The articles collected in Dworkin, G. (1994) address this and a wider range of issues relating to liberty. Other useful commentaries and critical surveys of the Hart–Devlin debate and related issues can be found in Leiser (1973) and (1981), Lyons (1984: 178–93), Golding (1975: ch. 3), Feinberg (1973: chs 1–3), Dias (1985: ch. 6), Harris (1980: ch. 10) and Riddall (1991: ch. 14). For a close analysis of the problems of harm and distress, see Thomson (1990: chs 9–10). For specialist books on Mill's defence of liberty, see Ten (1980), Gray (1996) and Gray and Smith (1991).