

MORALS AND THE ENFORCEMENT OF VALUES

An Analysis of
the Hart - Devlin Debate

by

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ABSTRACT

Morals and the Enforcement of Values - An Analysis
of the Hart-Devlin Debate

This thesis attempts to discover out of the debate between Lord Devlin and H.L.A. Hart the theoretical basis of decision-making in cases where there is a conflict between individual moral freedom and social control. It is structured in the form of an analysis of the debate between Devlin and Hart concerning the principles for and against the enforcement of morality. There are five main chapters of the thesis and a short conclusion.

The first chapter, headed "The Hart-Devlin Debate", introduces and summarises Devlin's answers and Hart's criticism to the first two hypothetical questions which Devlin addresses to himself, namely, (1) Has society the right to pass judgement at all on matters of morals?, (2) If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it? It analyses Devlin's attempt to rationally convert the descriptive proposition that the majority have power to enforce morality to the normative proposition that society ought to enforce morality. There is an observation that the co-existing "right" of individual freedom is not debated by rational argument.

The second chapter under the heading "The Common Morality and the Feelings Test" sets out the feelings test as expounded by Devlin as a means to determine which rules of morality ought to be enforced. There is a specified list of the qualifications to the feelings test which Hart overlooks for the most

part. However I reach the conclusion that it is difficult to authoritatively interpret these qualifications or to give them any substance. Discussion then centres around Hart's objections that the feelings test is an abdication of reason and a source of potential injustice. These objections are not sufficient basis for rejecting the feelings test.

The third chapter, called "Moral Paternalism", attempts to isolate the difference in the views of Hart and Devlin by analysis of Hart's phrase "morality as such." Hart creates an artificial distinction between "paternalism" and "enforcement of positive morality," thereby attempting to explain which moral rules ought to be enforced by assigning these two labels. My conclusion is that the only rational distinction lies in the availability of empirical evidence to prove physical harm and non-availability of empirical evidence to prove moral harm. Hart has a stricter onus of proof than Devlin when it comes to proving harm to the individual.

However, it is difficult to sustain the distinction of physical and non-physical harm as the basis for decisions which we "want" to make. The distinction is rendered impotent in practice by finding elements of harm to society in the action of the individual and thereby justifying enforcement of morals by using Mill's principle of liberty. Concepts of private and public harm are easily used to cloak the real basis of the decision. My conclusion is that the real difference between the views of Hart and Devlin, behind all the "principles," is a difference of value-preference.

The fourth chapter, under the heading "Value Difference between Hart and Devlin" discusses the possible reasons for the differing value preferences. It questions whether value preferences can ultimately be traced to prevalent social conditions. There has always been historical debate concerning the mysterious balance between individual freedom and social control. In order to assist in identifying the personal values of Hart and Devlin, their respective theories are viewed in terms of three traditional intellectual antinomies. These antinomies involve the problem of choosing between

- (a) Public authority or a Platonic elite
- (b) Individualism or collectivism
- (c) Reason or faith; intellect or intuition

Both Hart and Devlin stand in definite historical intellectual positions and their theories can be compared to the writings of numerous legal and political philosophers. I agree with those writers who argue that a conflict between two ultimate values cannot be settled by reason. Can we argue that Hart's value preference for individual freedom in moral matters is subject to question due to modern social conditions?

The fifth chapter is given the name "The Irreversible Disaster Argument." This section analyses Devlin's original argument that society has the right to preserve its common morality. Justification of this argument is attempted in terms of the right of society to prevent "irreversible disaster." This is an attempt to derive a guiding principle from an extreme fact situation in order to assist to decide the deadlocked values. In times of emergency or threatened

disaster, the value of individual freedom ought to be subordinated to other values. An analogy is drawn between Devlin's arguments for the preservation of morality and current arguments for the preservation of the environment. However Devlin's arguments for the enforcement of morality, even in terms of the principle of irreversible disaster, can be met by several unanswerable objections. A short attack is made on Devlin's theory by a similar device of applying the theory to a possible interpretation of modern social conditions. However this criticism does not enable us to subordinate Devlin's value-preference either. The conclusion is that Hart and Devlin have different value-preferences and their pronounced theoretical principles only dress these preferences with the garb of rationality. Ultimately they are only able to state the theories which they develop to support their personal values and cannot explain why.

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THE HART-DEVLIN DEBATE

In our society, we are constantly searching for principles to assist the decision-maker answer the question, "what should I do?" One area of our search involves an attempt to reconcile the right of the individual to freedom with the right of society to interfere with the individual. A decision-maker, whether legislative or judicial, can well ask, "Upon what principles should I decide whether to interfere with individual freedom?" In a democracy he will usually be called upon to explain the reasons for his decision.

Lord Devlin addressed himself to this problem in the Maccabaeian Lecture on Jurisprudence which was delivered in 1959 under the title "The Enforcement of Morals."¹ To this lecture the English jurist Herbert Hart replied.² This jurisprudential debate discusses the problem of reconciliation of individual freedom with social control and emphasises the specific question whether morals should be legally enforced. Just how far has this debate provided assistance to the decision-maker? Have any decisive principles emerged in order to answer the question, "what should I do?"

Before discussing the theoretical consideration it is worthwhile to note that there is general agreement that two

¹Now included in a book called The Enforcement of Morals, by Patrick Devlin, London, Oxford University Press, 1965.

²"Law, Liberty and Morality," (1963) and "The Morality of the Criminal Law," (1965) by H.L.A. Hart.

practical considerations are relevant, though not necessarily decisive. Where society is considering some interference with the freedom of action of an individual, we should ask, inter alia:

(a) Will it be possible to enforce the "interfering" law with a reasonable degree of effectiveness?

(b) Will the attempted enforcement of the "interfering" law cause more harm than the benefits which could possibly be attained by enforcement?

There is a modern tendency to say that these practical considerations will often be decisive because of the inconclusiveness of theoretical principles. When it is argued, for example, that the laws restricting possession of marijuana should be abolished, is the argument based upon the practical reasons just mentioned, or a predominant value of privacy, or a theory of harm to the individual or to others, or a combination of these reasons? We are obliged to at least attempt to explain our decisions.

In order to discuss the theoretical considerations, Devlin sets out three questions addressed to himself:

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?³

³Devlin, p. 7-8.

In answer to the first question, Devlin notes that people do in fact speak as though there is a public morality. Even the Wolfenden Report⁴ "takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution."⁵ However it is always difficult to convert a descriptive proposition such as this into a normative proposition. The fact that there is a public morality cannot necessarily mean that there ought to be a public morality. How can Devlin turn a factual description into a right? We will see that the reasoning he chooses meets with convincing criticism from Hart.

While answering the first question, Devlin's arguments encompass the second question also. He states that "society is not something that is kept together physically; it is held together by the invisible bonds of common thought"⁶ and if the common thought is not enforced then there is a danger that society will disintegrate. Society accordingly has a prima facie right to enforce the common morality in order to ensure survival. Devlin, endeavouring to locate a "right," appeals to the most basic right of all--the Hobbesian right of survival and self-defense. Society, threatened with disintegration, has a right to defend itself by enforcing its common morality which is the essence of society. Why is it that Devlin does not rest

⁴ Report of the Committee on Homosexual Offences and Prostitution (Cmd. 247, 1957).

⁵ Devlin, p. 9.

⁶ Ibid., p. 10.

his argument on the superior power of the majority over the minority? The reasons that Devlin tries to avoid arguing in terms of power are that to base the justification for the enforcement of morals upon the brute force of the majority is not a satisfactory moral argument and would clearly pave the way for blatant abuse of majority power. In Rousseau's words "To yield to the strong is an act of necessity, not of will. At most it is the result of a dictate of prudence. How, then, can it become a duty?"⁷

It appears that Devlin also wishes to argue for a right of enforcement above and beyond the democratic right of a government elected by the majority. In a democracy, a minority has certain acknowledged rights qualifying the right of majority rule (e.g. at least equal protection and due process). Therefore to base the right of enforcement upon the reconciliation of democratic majority and minority rights is to restate the problem of the whole debate for the relationship of individual freedom and social control is a category within the broader relationship of minority and majority rights. The right of survival is unqualified; the right of a democratic majority to rule is qualified; Devlin tries to strengthen the case for the enforcement of common morality by fitting it into the former right.

Hart points out two major flaws in Devlin's arguments:

⁷Social Contract by J.J. Rousseau (New York: Oxford University Press), p. 172.

(1) If society, on the principle of survival, can enforce its common morality, then society will be able to oppose any moral change, whether good or bad, and merely preserve the status quo.

(2) There is no necessary causal relationship between a change in the common morality and a physical collapse of society. On the other hand, if Devlin is defining society in terms of ideas and morality, then he is merely stating a truism, namely that society has a right to prevent change of its common morality because otherwise its common morality will change. In Hart's words "...even if the conventional morality did so change, the society in question would not have been destroyed or subverted. We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance."⁸

However, the intellectual weaknesses in Devlin's argument that the enforcement of common morality is a strong right are subject to two qualifications. Firstly, Hart feels that Devlin's argument escapes complete demolition by some helpful confusion. "There is no evidence that the preservation of a society requires the enforcement of its morality "as such." His (Devlin's) position only appears to escape this criticism by a confused definition of what a society is."⁹

⁸Hart (1963), p. 52.

⁹Hart (1963), p. 82.

Secondly, just as Devlin has difficulty proving rationally that enforcement of common morality by society is a "right", both Hart and Devlin would have equal difficulty proving that the opposite and yet co-existent value in the debate, individual freedom, is a "right." It is true that both Hart and Devlin place high value upon individual freedom, that they feel it ought to be a fundamental right, that it is predominant among the natural rights of man. However, to argue rationally why individual freedom is a right is a traditionally difficult task. We end up discovering that this "right" is based upon feelings, values, precedent or natural law. Devlin's attempt to show that enforcement of the common morality is a paramount right is weak. However, we should realize that Hart does not argue the paramount value of the right of individual freedom on empirical or cognitive grounds-- he simply assumes it or perhaps bases it upon intuition.

In answer to the second rhetorical question,¹⁰ Devlin states that the law has a prima facie right to enter the field of enforcement of morality,¹¹ though having entered the field, actual enforcement of morals should only take place in limited circumstances.¹² Hart on the other hand says that the law prima facie has no right to enter the field of enforcement

¹⁰Devlin, p. 8.

¹¹Ibid., p. 11.

¹²Ibid., pp. 16-20.

of morality except where harm to others is proved.¹³

Devlin concludes, "I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality."¹⁴ However it is not clear what Devlin means by "power" because he does in fact set theoretical limits to the "right" of the State to legislate against immorality.¹⁵ Dean Rostow's description of Devlin's position in terms of Hohfeldian analysis is helpful to avoid this confusion between power and right. "The correct Hohfeldian way of putting Sir Patrick's thesis, I should think, would be to say that the state has the "power" to protect its public morality through the law; that the citizen has no "immunity" against such action; that the state, however is under the "duty" in exercising its power to enforce and respect certain equally real "rights" and "privileges" of its citizens, in accordance with the principles governing British lawmaking to which he addressed so considerable a part of his lecture; and that in some instances the state may have a "disability"; or perhaps may not have the "privilege" to qualify these rights and privileges of the citizen even in the name of self-defence."¹⁶

This Hohfeldian analysis of Devlin's arguments is

¹³Hart (1963), p. 5.

¹⁴Devlin, p. 12.

¹⁵Devlin, pp. 16-20.

¹⁶Rostow--The Enforcement of Morals, 1960, Cambridge L.J. 174 at 195.

helpful because it answers the first two questions in terms of power and throws the crux of the whole debate upon answering the third question. In terms of power, it is analogous to a situation where Devlin would say, "Yes, the state has territorial jurisdiction in all these morality cases and now must consider each case on its merits." Whereas Hart would say, "The state has no territorial jurisdiction in morality cases though this will require a pre-trial hearing to determine whether each particular case contains a morality issue." An answer in terms of jurisdictional power is rational but is an answer which initially avoids the moral correctness of the exercise of that power in specific cases. Devlin obviously tries to include the moral issue in his answers to the first two questions. But in fact it is not clear whether he has answered in terms of power or right. As shown before, he tries unsuccessfully to rationalise the existence of a right based on more than mere force.¹⁷

Facing the moral dilemma and the existence of rights cannot be stalled any further when Devlin attempts to answer the third question,¹⁸ "If society has the right to use law to enforce public morality, ought it to use enforcement in all cases or only in some; and if only in some, on what principles should it distinguish? Hart's answer at first seems clear

¹⁷ See previous discussion pp. 3-4.

¹⁸ Devlin, p. 8.

"...on the narrower issue relevant to the enforcement of morality Mill seems to me to be right."¹⁹ Mill's principle is found in his famous essay "On Liberty."

"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 sufficient warrant."²⁰

It was the use of this principle as adopted by the Wolfenden Committee²¹ that originally prompted Devlin into taking his position as stated in the Maccabaeian Lecture. Devlin argues that Mill's principle is only one guideline among others.

"The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin."²² The Wolfenden Committee put forward

"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

¹⁹Hart, 1963, p. 5.

²⁰John Stuart Mill, *Utilitarianism, Liberty and Representative Government (Everyman's)*, p. 72.

²¹Report of the Committee on Homosexual Offences and Prostitution, 1957.

²²Devlin, p. 22.

citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic independence.

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."²³

Although Devlin rejects Mill's principle as adopted by Hart as an absolute guide, he still considers it to be one relevant principle among other considerations. "Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the law-making power but to guide those who have to apply it."²⁴

²³ Para. 13.

²⁴ Devlin, p. 16.

THE COMMON MORALITY AND THE FEELINGS TEST

What are the general statements and guidelines which Devlin lays down to assist our puzzled legislator answer the question, "What should I do?" He ought to enforce, with certain qualifications, the moral judgements held by the hypothetical reasonable man who "is not expected to reason about anything and whose judgement may be largely a matter of feeling."²⁵ There is the immediate danger that this general criteria will be treated as an absolute principle and Devlin has taken pains to warn us that moral decisions cannot be made by following a single principle. Accordingly, the qualifications upon the enforcement of the common morality of the reasonable man are as follows:

(1) There must be toleration of the maximum individual freedom that is consistent with the integrity of society.²⁶

(2) As the limits of moral tolerance sometimes shift with changing fashion, the law ought to be slow to intervene in any new moral matter.²⁷

(3) As far as possible, privacy should be respected.²⁸

(4) The law should be concerned with the minimum and not with the maximum of morality.²⁹

²⁵ Devlin, p. 15.

²⁶ Ibid., p. 16.

²⁷ Ibid., p. 18.

²⁸ Ibid., p. 18.

²⁹ Ibid., p. 19.

(5) Before society can put a practice beyond the limits of tolerance, the common morality or feelings must make a deliberate judgement that the practice is injurious to society.³⁰

(6) The common morality which ought to be enforced must only be those moral rules the breach of which causes intolerance, indignation and disgust. Or, those moral rules, the breach of which would still cause us intense feelings of abomination even after calm and dispassionate consideration--"mere disapproval is not enough to justify interference."³¹

(7) Any law on matters of morality ought to be "deeply imbued with a sense of sin."³²

It is to this "feelingstest" of Devlin's that Hart reacts most strongly and it is here that we should look to find the core of disagreement between Hart and Devlin. Hart's objections are as follows:

(1) The feelingstest amounts to an abdication of reason to the mere feelings of the reasonable man. We should not surrender the process of decision-making to feelings and passion especially when such a vital value as individual freedom is involved.

(2) Devlin's hope is that the reasonable man will include the quality of justice in his feelings in most cases. Hart is not as willing to take this risk. The feelingstest

³⁰ Ibid., p. 17.

³¹ Ibid., p. 17.

³² Ibid., p. 24.

can be used as a method of preserving prejudices, bigotry and the status quo in moral beliefs. "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live."³³ --"To use co-ercion to maintain the moral status quo at any point in a society's history would be artificially to arrest the process which gives social institutions their value."³⁴

(3) The feelings test will involve enforcement of mere morality or "morality as such"³⁵ That is, enforcement of a moral rule for its own sake with little or no evidence that breach of the rule will cause harm to the actor or to others.

The spirit of Hart's objections is enticing as he apparently champions individual freedom and predicts the dictatorial abuses by the majority which are made possible if we agree with Devlin's feelings test. But as Hart enlarges upon his objections we find the apparent differences diminishing.

Let us now consider Hart's objections more fully.

(1) It can be argued that Devlin's feelings test does not amount to an unnecessary abdication of reason. It has a precondition of calm and dispassionate consideration of the issue before acting upon feelings.³⁶ Rostow defends Devlin at

³³Hart, (1963), p. 79.

³⁴Hart, (1963), p. 75.

³⁵Hart, (1963), pp. 18, 23, 25, 32, 41, 82.

³⁶Devlin (ix) of Preface

length concerning this criticism and concludes "Nothing in Sir Patrick's lecture would weaken the primary importance of detached and dispassionate scholarship, conducted at the highest level of reasonableness we can attain in the work of social reform, and the reform of law."³⁷ When empirical evidence is unavailable or inconclusive, and our reason still leaves us alternate courses of action, where do we turn? Devlin's answer is that we ought to apply the feelings test with its qualifications.³⁸ Devlin would argue that the fact that the feelings test plus qualifications can result in atrocity only shows that the test can be wrongly used and not that it is a false test. Likewise Hart would argue that the application of Mill's principle of liberty in the area of morals is subject to abuse. However such abuse in practice only shows that the principle is being wrongly used, not that it is wrong in itself. The problem is that neither principle has sufficient content to indicate when either is being wrongly used. Thus both Hart and Devlin have personal concepts of how each wants the principle of liberty and the feelings test respectively used. If the principle and test are not interpreted according to their own concepts then each will label it as a misuse or find an exception.

One difficulty which arises is that these enumerated qualifications can be looked upon as a mere sop for those

³⁷Refer to footnote 16 at p. 197.

³⁸Devlin, pp. 16-20.

who criticise the feelings test and fear destruction of individual freedom. Devlin himself inserts the qualifications because of his own uneasiness about a principle which stipulates the absolute enforcement of public opinion. The question is, "Do the qualifications have any substance?" It is true that they do require a procedural pause between passion and action in the hope that reflection and discussion will modify unjustified intolerance. A man can act immediately on sight to imprison a homosexual because he feels intolerance, indignation and disgust. But the qualifications require a reflective pause between the intolerance and the enforcing action. If the feeling of intolerance is not firstly subjected to the qualifications then the decision-maker is acting in procedural breach of the principle. However the qualifications offer no definite test as to what amounts substantively to unjustified intolerance. Once the procedural aspects are satisfied, the content is unfettered. As previously mentioned, the feelings test is not a principle of guidance at all if we must refer every case, or even the difficult cases only, to the author for interpretation.

Although he is sometimes ambiguous, Devlin expects that there ought to be some rational discussion before a decision to enforce common morality is made. "...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."³⁹ Devlin enlarges upon this point in the preface

³⁹Ibid., p. 16.

to his book which was compiled several years after delivering the original Maccabaeian lecture. "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."⁴⁰

(2) Devlin, like Hart, obviously realizes the dangers of unrestrainedly enforcing the feelings of the reasonable man or the common morality. History is full of examples of atrocity and injustice inflicted upon a minority because majority opinion dictated that it was right. The Spanish Inquisition and Nazi Germany are terrifying instances. That is surely why Devlin attempts to limit the operation of the feelings test by the qualifying principles enumerated previously. It has already been noted how difficult it is to find substantive meaning for these qualifying principles. They tend to beg the question of what amounts to the maximum tolerable level of individual freedom. Accordingly, this absence of a definite safety valve on the feelings test tends to substantiate Hart's fears. On the other hand Hart argues that because enforcement of feelings held by the majority is often a source of injustice, then feelings ought not to be a guide for enforcement. But because majority rule has been abused, this does not mean that as a matter of principle majority opinion ought not to be

⁴⁰

Devlin (viii) of Preface.

enforced. Abuse of a rule in practice does not necessarily mean that that rule ought not to exist. Fear that a delicate glass stopper will be broken is not a sufficient reason to keep it hidden while safely using the more solid decanter. As the glass stopper is a necessary and functional part of the decanter it should be used though with constant reminders of its true function and delicacy.

Just as enforcement of majority opinion is subject to abuse, so is individual freedom of action which by gradual process can undermine a value important to human life. In other words, both enforcement of morals and freedom should be subject to quality control, not exclusion. "...Hart cannot prove that the justification which Devlin offers for the enforcement of morals is illusory or outmoded; he can only appeal to our own moral sense that it is not worth the price."⁴¹ Perhaps it is possible today that our moral sense tells us that enforcement of morals is worth the price (see later under discussion of "irreversible disaster").

⁴¹ A.R. Blackshield, Sydney Law Review 1965-67, pp. 441 at 450.

MORAL PATERNALISM

(3) Hart points out on several occasions that Devlin's feelings test can involve the enforcement of mere morality or "morality as such."⁴² It is out of this criticism that I will attempt to explain a logical difference in the views of Hart and Devlin. What does Hart mean by "morality as such?" In other places he refers to it as the enforcement of morality for its own sake or the enforcement of positive morality.⁴³

To answer this question, we should firstly note that Hart, in opposition to Mill, says that in modern society we ought not to exclude paternalism as a motive for passing legislation.⁴⁴ But then Hart creates his own distinction within Mill's theory and says that Mill was correct to the extent that he opposed the use of the criminal law as a means of enforcing positive morality. Somewhere Hart sees a vital yet unstated distinction between paternalism and enforcing positive morality. "The neglect of the distinction between paternalism and what I have termed legal moralism is important as a form of a more general error."⁴⁵ It is difficult to immediately discover a rational basis for this distinction for the enforcement of positive morality is undoubtedly one form of paternalism.

⁴²Hart (1963), pp. 18, 23, 25, 32, 41, 82.

⁴³e.g. pp. 23, 20.

⁴⁴Ibid., pp. 31-32.

⁴⁵Ibid., p. 33.

Hart implies that there are certain moral rules which exist for their own sake. But no moral rule exists for its own sake; moral rules are expounded for the "good" of mankind even though certain moral rules may be mistaken. The concept of what is good for mankind will vary from group to group or even from person to person. Also, each group or person will have different moral rules in order to assist in attaining its individual concept of goodness. The fact that these moral rules are different or even in opposition, does not immediately concern this argument. The vital point is that the motive behind each moral rule is the "good" of mankind. The prescription of any moral rule is never motivated by a desire to cause harm though in fact moral rules may be bad and in fact cause harm. Therefore all moral rules, whenever and wherever seriously prescribed, are for the "good" of man in accordance with each respective person's definition of good.⁴⁶ When Hart says that morality "as such" should not be enforced, he cannot be saying that morality should not be enforced. Rather he is saying that morality which does not embody a certain concept of goodness which he personally supports should not be enforced. Morality "as such" should not be enforced, but morality should be enforced if it is the kind with which I agree. "...We do not have any moral

⁴⁶ For different modern concepts of "good" see "An Introduction to Philosophical Analysis" by John Hospers, p. 449.

obligations, prima facie or actual, to do anything which does not, directly or indirectly, have some connection with what makes somebody's life good or bad, better or worse...morality was made for man, not man for morality."⁴⁷ Therefore to enforce positive morality or morality as such is only to paternally impose a concept of right or goodness (which may be false) upon another individual. Hart has confused the issue by creating an artificial distinction between "paternalism" and "enforcing positive morality." It appears that the real distinction he is trying to make is between good paternalism and bad paternalism. The labels of "paternalism" or "enforcing morality as such" are rationalisations for a decision already made. The distinction which is the basis of a decision lies within Hart's own concept of good and bad.

In a later essay, "Morals and Contemporary Social Reality,"⁴⁸ Devlin discusses possible meanings to Hart's distinction between paternalism and enforcement of positive morality but finds it difficult to sustain such a distinction in practice as a conclusive or even helpful guideline. He concludes "If it is possible, which I doubt, to draw a theoretical distinction between moral paternalism and the enforcement of morality, it is not one that is relevant to the present argument. The issue is whether there is a realm of private morality and immorality that is not the law's business.

⁴⁷ Ethics, p. 37. William K. Frankena.

⁴⁸ This essay is also found in Devlin's book The Enforcement of Morals at p. 124.

Paternalism, unless it is limited in some way as yet unstated, must, as I have pointed out, make all morality the law's business."⁴⁹ Accordingly, the enforcement of morality as such is equivalent to "bad" paternalism. And "morality as such" includes those moral rules where there is no necessary and resultant harm when a breach of that morality takes place.

Now let us assume that Hart, as he purports to do, is using Mill's principle as his main guideline for determining whether morals should be enforced. For convenience, we can summarise Mill's principle of liberty--"Society should not interfere with the freedom of action of an individual unless that action is causing harm to others." But Hart is no longer willing in our modern society to apply Mill's principle in any area other than morals and he thereby immediately creates a distinction between moral harm and physical harm.

"In Chapter Five of his essay Mill carried his protests against paternalism to lengths that may now appear to us fantastic. He cites the example of restrictions of the sale of drugs, and criticises them as interferences with the liberty of the would-be purchaser rather than that of the seller. No doubt if we no longer sympathise with this criticism this due in part to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgement is likely to be clouded;

⁴⁹ Ibid., p. 137.

or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts."⁵⁰

Why is Hart willing to argue that the law ought to prevent physical corruption and yet not interfere with moral corruption? He approves of physical paternalism and yet disapproves of moral paternalism. Why is there a difference of motive and how do we distinguish between the two? It appears that the only rational distinction is that physical harm is far easier to prove in a law court than moral harm. We have a clear conception of what amounts to a physically healthy person and can also produce tangible evidence of physical harm. This is not so with moral harm. But once you approve of the state's paternal motive then disapproval of moral paternalism can only be logically distinguished on the basis of lack of empirical evidence. Hart does not elaborate upon this explanation and in fact only refers to it in passing with an historical reference to "secular harm"⁵¹ One recent reference to this distinction is found in the Report of the LeDain Commission.⁵² While discussing matters of principle the

⁵⁰Hart (1963), p. 32.

The right of modern society to embark upon a course of physical paternalism is certainly not undisputed. For example, see American Motorcycle Association v Davids, 158 N.W.R. (2nd), p. 72.

⁵¹Hart (1963), p. 23.

⁵²Interim Report of the Commission of Inquiry into the Non-Medical Use of Drugs, Chairman, Gerald LeDain.

Report makes a reservation which is based upon the ability to prove the existence of harm. "We simply say that in principle, the state cannot be denied the right to use the criminal law to restrict availability where, in its opinion, the potential for harm appears to call for such a policy."⁵³ It appears that the mere opinion of the state will itself be acceptable evidence of harm. And the Commission preserves the right of paternal action where in the opinion of society, there is a potential for harm to the individual. "The criminal law should not be used for the enforcement of morality without regard to potential for harm. In this sense we subscribe to what Hart refers to as the 'moderate thesis' of Lord Devlin. We do not subscribe to the 'extreme thesis' that it is appropriate to use the criminal law to enforce morality, regardless of the potential for harm to the individual or society."⁵⁴

The statements of broad principle made by the LeDain Commission can be summarized as follows:

(1) Moral beliefs ought only to be enforced where, inter alia, there is sufficient evidence available of potential or actual harm to individuals or to society.

(2) The opinion of society is prima facie evidence of the existence of actual or potential harm.

⁵³Ibid., Para. 442.

⁵⁴Ibid., Para. 444.

Hart states that a definite conclusion of Stephen's arguments⁵⁵ (and a possible conclusion of Devlin's arguments) is that "we may make punishable by law actions which are condemned by society as immoral, even if they are not harmful."⁵⁶ Here is the crux of logic in the debate--what does Hart mean by "harmful"? He can only mean "cannot be proved to be harmful." Whereas Devlin is ready to accept the strongly held feelings of the majority as evidence of harm, Hart says that he is not (though he does, at least at one stage, take the feelings of the majority into consideration).⁵⁷

In summary of matters of principle, the difference between Hart's and Devlin's views seems to come down to a different onus of proof. Hart appears to say that morally paternal action is prima facie not justified unless society can show that the individual action proposed to be interfered with is harmful to the individual or to others. How conclusively does society have to prove the harm before the prima facie rule against paternal interference is displaced? Absolutely, beyond reasonable doubt, or on the balance of probabilities? Hart's onus of proof for showing harm is a stricter onus. Hart purports to demand some physical manifestation of the harm; Devlin is willing to accept in some cases

⁵⁵James Fitzjames Stephen, author of "Liberty, Equality, Fraternity," London, 1873.

⁵⁶Hart (1963), p. 36.

⁵⁷Hart (1963), p. 41.

the intangible opinion of common morality. In other words, reason, "when given no more assistance from empirical evidence, ought to call upon feelings to assist in the decision-making process." But Hart would say "No--where the empirical evidence available does not lead us to a decision, we should not call upon capricious feelings; instead we ought to base our decision upon the existing presumption that individual freedom should prevail." Thus the existing presumption predetermines the decision in all difficult or contentious cases. This means that a decision, still based upon feelings and values, is made earlier and less overtly in our reasoning process in the form of a value-laden presumption.

Hart has difficulties in rationally sustaining his objections to the use of feelings as evidence of harm to society or to an individual. He notes that a breach of morality as such assumes a public nature when it is harmful to others as it then becomes a nuisance.⁵⁸ When empirical evidence of harm to the individual is insufficient, there may be sufficient evidence when the mere immorality affects others. "...If, in the case of bigamy, the law intervenes in order to protect religious sensibilities from outrage by a public act, the bigamist is punished neither as irreligious nor as immoral but as a nuisance."⁵⁹ This further supports the argument

⁵⁸ Hart, (1963), p. 41.

⁵⁹ Ibid., p. 41.

that justification for interference with the liberty of the individual's moral action depends upon the availability of empirical evidence of harm to the actor or to others. Hart, pursuant to Mill's principle,⁶⁰ wishes to limit the ground for interference to those cases where there is empirical evidence of harm to others. But the example of bigamy being a case where there is predominantly a nuisance to others makes us wonder how easy it will be to find elements of nuisance or harm to others in any action of an individual. If you look far enough you can convert every "private" act into a "public" act as every private act at least affects a person's attitudes as a member of society. For example, Graham Hughes,⁶¹ while discussing the fact that consent is not a defence to assault causing grievous bodily harm remarks how the concept of public harm can equally well be used as a justification for this particular imposition upon individual freedom. On its face, the non-availability of the defence of consent would appear to be predominantly protecting the individual from himself. However "public" harm also exists because

(a) there is the general loss to society of the services of the victim when serious bodily harm is inflicted,

(b) there is a consequent possible imposition on the public charge,

⁶⁰ See footnote number 20.

⁶¹ 71 Yale Law Journal, 1961-62, p. 662 at 670.

(c) the actor may become psychologically addicted to harming others,

(d) society is offended because it feels that consent to a serious injury is wrong.

The difference between a private and a public act is ultimately only a matter of degree. But perhaps we can define a private act as one which predominantly affects the actor and a public act as one which predominantly affects people other than the actor. Following these definitions it is difficult to agree with Hart that bigamy is a crime because it predominantly harms others by being a nuisance to their feelings. John Stuart Mill attempted to face this problem of every private act containing some element of public effect and concluded that he would prefer open paternalism rather than paternalism hidden behind a false distinction between public and private effect.

"The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.

In like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offence. No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is

a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law.

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear for the sake of the greater good of human freedom. If grown persons are to be punished for not taking proper care of themselves, I would rather it were for their own sake, than under pretense of preventing them from impairing their capacity of rendering to society benefits which society does not pretend it has the right to exact."⁶²

Mill's answer echoes in the realms of the common law of negligence. But it still begs the question for only with certain kinds of moral acts does an individual owe a specific duty of care to his neighbour. Naturally, society should only interfere where the individual has a specific duty of care and breaks it. To complete the circle--when does an individual owe a moral duty of care to his neighbour? He owes a duty of care to his neighbour in those cases where his moral action or inaction will predominantly affect others, that is, where his moral action is of a public nature. Once again we see how the "solutions" to a conflict have the unfortunate habit of restating the whole problem.

⁶² John Stuart Mill at p. 136 and p. 138. See footnote 20.

In summary, despite Hart's initial proposal to apply Mill's principle of liberty to decisions concerning the enforcement of morality, we soon find that Mill's principle is stretched beyond recognition. Hart's nuisance test and example of bigamy⁶³ blur the already awkward distinction so important for his argument between private and public harm. Mill realized that unless the distinction between private and public could be rationally preserved, his whole principle was considerably weakened as a means of assisting the decision-maker. The essence of Mill's principle would then become a plea to us "to think it possible that we may be mistaken."⁶⁴ Behind Hart's pronounced distinction between public and private, we find that the real distinction lies between private concepts of right and wrong.

⁶³Hart (1963), p. 41.

⁶⁴Devlin, p. 121.

VALUE DIFFERENCE BETWEEN HART AND DEVLIN

It is important to remember that the Hart-Devlin debate aimed at providing clear guidelines and principles for decision making in matters concerning the enforcement of morals. What principles emerge from the debate to assist in answering the question "what should I do?" Unfortunately, the principles which emerge are so inconclusive as guidelines that one main lesson is to beware of relying absolutely upon single principles. The difference between the views of Hart and Devlin emerges as a difference of value rather than of principle. In this context a "principle" is used in the sense of a proposition which can be objectively judged as true or false and which can be applied to a set of facts and a conclusion be logically deduced. The essence of a principle is that it purports to be logical and scientific in the explanation of its existence and application. A "value" is a proposition, idea or attitude which is believed in of itself quite independently of empirical or logical proof. For the purpose of analysis, here is a single principle which is an attempt to amalgamate both sides of the debate. (This by no means "solves" the debate but merely states a common principle so that we can recapture clarity and identify the real place of disagreement.) "Society should not interfere with the freedom of action of the individual unless he is causing harm to himself or to others." The real difference is that Hart sets out a stricter onus of proof to rebut the basic presumption of non-interference.⁶⁵ Why? Hart protects individ-

⁶⁵ See previous comment on p.24.

ual freedom basically because of a different value preference and because of his insistence that this preferred value shall predominate until displaced by sufficient empirical evidence. Hart clearly states, "I have also assumed from the beginning that anyone who regards this question as open to discussion necessarily accepts the critical principle, central to all morality, that human misery and the restriction of freedom are evils; for that is why the legal enforcement of morality calls for "justification" in the form of the wishes of the common morality."⁶⁶ Blackshield also comes to this conclusion when he says that "He (Hart) relies ultimately on two deep interdependent convictions which are beyond utilitarian or even rational justification. One is that individual liberty is an absolute ethical value; the other is the principle of justice that any punitive or other legal enterprise which cuts down this absolute value requires to be justified,"⁶⁷ The declared reason for Hart's value preference is the fact that the majority will enforce prejudiced moral opinions upon the minority.⁶⁸

Does Hart value individual freedom more highly than Devlin? Yes--to the extent that he is more protective of that value. But it is obvious that a great part of Devlin's

⁶⁶Hart, (1963), p. 82.

⁶⁷A.R. Blackshield, §. Sydney Law Review, 1965-67, p. 441 at 450.

⁶⁸Hart's value presumption receives strong support from Ronald Dworkin--See The New York Review Dec. 17, 1970. A special Supplement "Taking Rights Seriously." Dworkin argues that where the basic right of individual freedom is involved, the government cannot conduct experiments of deprivation based upon fears and feelings; it must only act to limit that right upon empirical evidence that the exercise of the right is causing harm.

original essay⁶⁹ emphasises the importance of individual freedom. Then where did the different value preferences come from? We can look for answers in education, psychology and sociology. In fact, at one point, Hart remarks that there is a persistent philosophy among English judges when dealing with the criminal law but then he says "These are sociological questions of great importance but as they are not the subject of this lecture I will spare you my amateur speculations on these topics."⁷⁰ But we can speculate in amateur fashion that Hart as an intellectual is loath to openly admit that such a vital value as individual freedom should be left to the whims of common morality. It is apparently an abdication of reason to mere feelings. And yet in the course of his critical analysis, he concludes in a disguised manner that feelings are and ought to be one consideration when making decisions about individual moral freedom.⁷¹ The difference in values is indicated by the undisguised and blatant manner in which Devlin, a judge well acquainted with the habits of juries, asserts that common morality ought to be an important guide to the question of whether certain moral standards should be enforced. It is a difference in style of life as much as a difference in values--they play the roles of the Progressive Intellectual versus the Solid Establishment. Devlin's theory is that of a

⁶⁹ Devlin, p. 16-20.

⁷⁰ Hart (1965), p. 36

⁷¹ Hart (1963), p. 41.

practising judge and therefore does not aspire as high as the more idealistic Hart. Devlin's attitude seems to be that human beings, who fear exploitation and desire a secure and efficient government, will try to prevent individual freedom predominating over the wishes of the majority. This Hobbesian attitude shows his doubts that individual men are consistently capable of reaching a level of moral integrity. Devlin casts innuendos about the faith of philosophers in the moral integrity of minority groups. He says that "social reformers are not as patient as philosophers and we have not waited for minority groups to attain moral integrity"⁷² and that those who over-emphasise individual freedom fail to realize that "the pimps leading the weak astray far outnumber spiritual explorers at the head of the strong."⁷³ Devlin's theory purports to be a practical and workable moral theory for fallible human beings. In his words, "For better or worse the law-maker must act according to his lights and he cannot therefore accept Mill's doctrine as practicable even if as an ideal he thought to be desirable."⁷⁴ Devlin's arguments seem to be both dangerous to individual freedom and to present a challenge to the process of intellectual decision-making. But Hart's criticisms, upon analysis, only confirm that there are

⁷² Devlin, p. 105.

⁷³ Ibid., p. 108.

⁷⁴ Ibid., p. 123.

certain limitations upon the effectiveness of scientific rationalism and naturalism in the area of moral decision.⁷⁵ "Hart is left (like Devlin) finally able to tell us only what he believes. He cannot tell us why. And this is only another way of saying that when it comes to "justice", neither judges nor philosophers quite know what to do."⁷⁶

As I have concluded that the real crux of the debate is a difference of values, then I should at least attempt to identify these values. This is not an easy task. It is difficult to define exactly what values Devlin is supporting as he purportedly argues for procedure rather than substance. That is, in the final analysis, he argues that strongly held public opinion, almost regardless of content or substance, ought to be enforced. Presumably public opinion tends to embody traditional moral values, clings to security and is slow to embrace any radical change. When there is conflict, tradition and public opinion are to be preferred over social changes and individual wishes. The difference of values between Hart and Devlin is only a matter of degree and discovering that difference is rendered difficult by the similar statements made by both of them. For example, in a later essay, Devlin says that "the true mark of a free society" is that "authority should be a grant and liberty not a privilege."⁷⁷ This state-

⁷⁵ See Ekman--Readings in the Problems of Ethics, p. 78.

⁷⁶ Blackshield at p. 453.

⁷⁷ Devlin, p. 103.

ment, together with the principles qualifying the feelings test, are very reminiscent of Hart's whole argument. Hart places a higher prima facie value upon the freedom and right of self-determination of the individual and a lesser value on tradition and public opinion. An important difference in attitude which has been previously mentioned⁷⁸ is the different belief concerning the capabilities of the average individual reaching a level of moral uprightness. Some insight into the thought process of Hart can be gained from his book "The Concept of Law".⁷⁹ Hart observes that social acceptance predominates in primitive societies as a source of authority whereas organized authority predominates in more highly developed societies. This distinction is expressed in terms of contrast between primary rules of obligation and secondary rules of recognition. Hart argues that the rules of social acceptance which predominate in primitive societies have the defects of uncertainty, unchangeability and inefficiency.⁸⁰ By his analysis, the remedy for these defects is to have secondary rules empowering individuals to make authoritative determinations or to have secondary rules to determine which of the primary rules are authoritative. Thus both historically and logically, Hart argues that norms of behaviour need something more than social acceptance before they can be considered

⁷⁸ See previous page 33.

⁷⁹ H.L.A. Hart, "The Concept of Law", 1961.

⁸⁰ Ibid., pp. 90-92.

to be law. They must be converted to secondary rules by some authoritative body which is itself governed by secondary rules. Transposing these ideas into this debate, it follows then that in Hart's opinion the beliefs of the public are not certain, flexible or efficient enough to amount to secondary rules and that public opinion alone is not an authoritative source of law.

It is helpful to look at the debate in the light of traditional schools of legal and philosophical thought. The arguments of both Hart and Devlin reflect different themes and it is easier to identify where each stands historically than it is to state exactly what inner values each one holds. In the writings of Rousseau⁸¹ some of the paradoxes of jurisprudence and political philosophy become apparent and it is within one of these paradoxes that the attitudes taken by Hart and Devlin can be located. Rousseau's theory is subject to many internal contradictions and he can be quoted to support almost any school of thought. This is partly because he attempted to reconcile the natural rights and freedom of man with absolute government by the people. This attempt failed and as a result Rousseau concluded with paradoxical statements such as "whoever shall refuse to obey the general will must be constrained by the whole body of his fellow citizens to do so:

⁸¹ Rousseau, "The Social Contract", Oxford University Press, Ed. Barker.

which is no more than to say that it may be necessary to compel a man to be free."⁸² Firstly, one vital issue which emerges from Rousseau's writing is the traditional problem of who ought to be sovereign in society, a wise dictator or public opinion? He attempted to answer this question by developing a concept of the ideal "general will" of the people. However he was never able to fully explain the relationship between the mysterious general will and the actual will or public opinion of the people. When faced with the constant problem of the actual will failing to reflect the ideal general will, Rousseau opted to take the risk of appointing an interim dictator as sovereign. This Wise Legislator would personally decide upon and enforce the general will until the public understood the general will and embodied it in their opinions. In Rousseau's words,

The general will is always right, but the judgement guiding it is not always well informed. It must be made to see things as they are, sometimes as they ought to be. It must be shown how to attain the good it seeks, must be protected against the temptations inherent in particular interests...Individuals see the good which they reject; the public desires the good which it does not see. Both, equally are in need of guidance... That is why a legislator is a necessity.⁸³

This is also the opinion that Hart has chosen though he does not discuss his dictator, wise legislator or wise judge. At

⁸² Ibid., p. 184.

⁸³ Ibid., p. 204.

one point Hart acknowledges that "a utilitarian" will have to apply critical morality in order to determine what rules of morality ought to be enforced.⁸⁴ He gives a hint of how important wise judges are to his theory in his book "The Concept of Law." There, while referring to the use of a judicial statement as an authoritative guide to the rules, Hart makes the statement that "the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges."⁸⁵ Hart lays down the principle of liberty as a guideline for moral government and this principle is in essence part of the general will or a part of the concept of justice. Now as long as Hart can personally stay alive to interpret this principle, all will be well. However, inevitably he must face the problem of finding incorruptible Platonic judges to interpret and enforce correctly this part of the general will. This is an awesome task for in Rousseau's words "there is needed a superior intelligence which can survey all the passions of mankind, though itself exposed to none: an intelligence having no contact with our nature, yet knowing it to the full."⁸⁶ If Hart offers us a lesser man then he is immediately subject to the same criticisms which he directed at Devlin's theory of government by public opinion. These criticisms would be

⁸⁴Hart (1963), p. 23.

⁸⁵Hart, "The Concept of Law", p. 95.

⁸⁶Rousseau, "The Social Contract", p. 204.

such as "Why should the prejudices and bigotry of a fallible human being be made sovereign in society?" and "How do we know that the corruptible individual in control will govern wisely?" Hart could reply that this wise legislator will be controlled to a certain extent by such rules as Mill's principle of liberty. However we have already noted⁸⁷ how such moral principles need to be continually referred to their author for substantive meaning and involve a very wide and interpretative discretion based ultimately upon personal values. When disillusioned with the search for incorruptible legal guardians to interpret his principle of liberty, Hart, like Plato in his later years,⁸⁸ would be compelled to enumerate detailed rules to explain the meaning of justice as embodied in that principle.⁸⁹

Devlin has taken the other possible path which branches off from the mysterious relationship between Rousseau's general will and the actual will of the people. This course is also a potentially dangerous one in its pure form and is also mystifying in any modified form. In the realm of moral government, Devlin, with some hesitancy,⁹⁰ is willing to take the risk that the actual will of the people will reflect substantially the ideal general will. He specifically rejects the concept of sovereignty vested in a Platonic elite as he believes

⁸⁷See previous p. 14.

⁸⁸Plato, "The Laws"

⁸⁹See John Hospers, "An Introduction to Philosophical Analysis", pp. 449-494 for a discussion of the problems of defining ethical terms in non-ethical language.

⁹⁰See previous pp. 11-12.

that the risk of injustice is greater in that case than where sovereignty is vested in public opinion. "The Platonic ideal is that the state exists to promote virtue among its citizens. If that is its function, then whatever power is sovereign in the State--an autocrat, if there be one, or in a democracy the majority--must have the right and duty to declare what standards of morality are to be observed as virtuous and must ascertain them as thinks best. This is not acceptable to Anglo-American thought. It invests the State with power of determination between good and evil, destroys freedom of conscience and is the paved road to tyranny."⁹¹ It is interesting to see that both Hart and Devlin are fearful of the same danger, the possibility of tyranny if either public opinion or an individual are given absolute authority. Devlin considers public opinion to be a lesser evil. "Society must be the judge of what is necessary to its own integrity if only because there is no other tribunal to which the question can be submitted."⁹² This is the choice that Rousseau would like to have made and in fact some of his writings give us the confusing impression that he did make public opinion the supreme authority in society. For example in "The Social Contract" he said

To these three kinds of law a fourth should be added and it is the most important of them all. It is to be found not graven on

⁹¹ Devlin, p. 89.

⁹² Ibid., p. 118.

pillars of marble or plates of bronze but in the hearts of the citizens. It is the true foundation on which the State is built, and grows daily in importance. When other laws become old and feeble it brings them new life or fills the gaps they leave untenanted. It maintains a People in the spirit of their Founder, and all unnoticed, substitutes for authority the force of habit. I refer to manners, customs and above all, opinion. This is a field unknown to our politicians yet on these things depend the success of all the rest.⁹³

However Rousseau ultimately sees the necessity for an interim wise legislator as he observed how often injustice and ignorance went hand-in-hand with the rule of public opinion. Devlin faces the same problem and cannot guarantee that the actual will or public opinion will be uncorrupted. Unlike Rousseau, he has no stated policy of education or reform other than references to the need for religious faith to provide a base for moral conviction. He states that "No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them..."⁹⁴ Devlin also exhorts public opinion to be careful and to reflect upon the importance of individual moral freedom before acting to restrict this freedom.⁹⁵ In other words, he is relying upon the wisdom of the public and the authority of their religious faith to embody justice in

⁹³ "The Social Contract" p. 220.

⁹⁴ Devlin, p. 25.

⁹⁵ Devlin, page (ix), pp. 16-19.

public opinion. And in any case, in a democracy, it is a lesser evil for injustice to be inflicted by public opinion than it is for injustice to be inflicted by an individual or elite group.

Where Devlin's theory suffers from the potential injustices inflicted by the enforcement of public opinion, Hart's theory is subject to the potential injustices inflicted by the "wise" individual or Platonic elite which interprets the meaning of phrases such as "individual freedom" and "harm to others". If we interpret Devlin's qualifications to the feelings test as being substantive, instead of merely procedural,⁹⁶ then Devlin also faces the same problem as Hart, that is finding a wise ruler to interpret the substance of the qualifications. If the personal values and wisdom of the wise legislator are subject to appeal or correction, then who is to make up the appeal court? If the appeal is based upon public opinion then we find ourselves discussing the other broad philosophical school of which Devlin is a representative. In this school, ultimate sovereignty is invested in public opinion. It is immediately apparent how easily one school of thought refers to the other apparently opposing school in an attempt to create a more just theory of law and government. However, the search for justice means that the theories lose coherence. Thus Hart finds himself unavoidably referring to public opinion as a

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See previous discussion on p.15.

source of authority⁹⁷ though in general he declares the potential evils of enforcing public opinion. Also Devlin, like Rousseau, could have called upon a wise legislator to liberate public opinion by applying a stated concept of morality or natural law. But Devlin is uneasily reconciled to his own theory that public opinion ought to govern without any pre-condition of justice. It is only when he realizes the extremes of injustice latent in a strict interpretation of his theory that he tries to slip across into the reassuring system of authority under a wise legislator. Hart suffers from the same problem. As Rousseau created ambiguities in his theory by trying to reconcile these two possible sovereigns, so both Hart and Devlin create similar ambiguities in their own theories. Ultimately, authority must rest with a single sovereign and it appears that ultimately Devlin chooses public opinion and Hart chooses a wise legislator. Hart only refers in passing to the problem of who would be ultimate sovereign in his theory⁹⁸ and would probably try to avoid the conclusion reached here.⁹⁹

The debate can be placed in a second broad category of intellectual thought which follows on directly from the paradoxical answers given to the question of "Who ought to be sovereign in society?" This category deals with the traditional antinomy between collectivism and individualism and asks the

⁹⁷Hart (1963), pp. 41 and 51.

⁹⁸Ibid., p. 80.

⁹⁹See p.39 concerning the difficulty of reaching any other conclusion.

question "Which is more important, the individual or the community?" "Whether the individual or the community is the ultimate value is a problem which was studied in all its principal aspects by Greek philosophers. To the issues as formulated by Plato, Aristotle and the Stoics thousands of years have added an infinite number of illustrations and variations but little that is essentially new."¹⁰⁰ Attempts to combine individual autonomy with the superior power of the community to create a coherent legal theory have always failed. For example, the theories of both Locke and Rousseau fail to explain how the supreme rights of the majority can be reconciled with the inalienable rights of the individual. Ultimately, in every theory of government, either the individual or the community will prevail. Duguit's theory of law reaches a collectivist conclusion similar to the theme of Devlin's essay. He says that a "rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organized."¹⁰¹ Such theories as that of Devlin's are open to the criticism that they may follow the course of Neo-Hegelian philosophy. Certain philosophers writing after Hegel's death glorified the abstract ideal of the state with the result that the individual was rendered utterly insignificant.¹⁰² This

¹⁰⁰ W. Friedmann, "Legal Theory", Fifth Edition, p. 88.

¹⁰¹ Duguit 2 Columbia L.R. 22 and Friedmann, p. 232.

¹⁰² Friedmann, pp. 174-176.

stream of philosophical thought has been identified with the extremes of Fascist Italy and Nazi Germany in the twentieth century. Therefore the possibilities of totalitarian abuse latent in Devlin's theory are an inevitable cause for criticism from Hart especially in the light of recent historical events. "For there are in the actual working of democracy many forces likely to encourage the belief that the principle of democratic rule means that the majority are always right."¹⁰³ Savigny and Ehrlich are also representative of one side of this antinomy. Savigny's "Volksgeist" and Ehrlich's "Living Law of the People" are ideas which are broadly mirrored by Devlin when he uses such phrases as "a nation's thought" and "accepted public standards."¹⁰⁴

On the other hand Hart reflects ideas from the historically individualist schools of thought. The Stoics first developed a legal philosophy expressing the idea of the individual as a reasonable being detached from the community in which he lives. After the Reformation, the individual emerged as an important entity in himself rather than being only a part of the larger social organism. This idea really blossomed with the propagation of the "inalienable rights of man" by Locke. Hart embodies such inalienable rights in his theory when he assumes the basic value of individual freedom.¹⁰⁵ Hobbes was also an

¹⁰³ See Hart (1963), pp. 79-81.

¹⁰⁴ Devlin, pp. 96 and 98.

¹⁰⁵ See Hart, (1963), p. 82.

individualist though he coupled this individualism with a theory that led to political absolutism.¹⁰⁶ Kant's categorical imperative was also based on the rational nature of an individual. But it is with the utilitarians, Jeremy Bentham and John Stuart Mill, that Hart finds the strongest bond of thought concerning the value of the individual. "Bentham's legal philosophy is an utilitarian individualism. His individualism inspired his numerous and vigorous legislative efforts, all directed towards the emancipation of the individual from the many constitutional restrictions and iniquities which impeded, in England at any rate, the free play of forces that was to give full scope to individual development."¹⁰⁷ Bentham measured the individual interest in terms of pain and pleasure and believed that the interest of the community consisted of a sum of the interests of all the individuals in that community. Hart also believes that the cumulative result of individual freedom will be the good of the community and he adopts "the critical principle, central to all morality, that human misery and the restriction of freedom are evils."¹⁰⁸ John Stuart Mill, basically an individualist, tried to reconcile individual and community interest by formulating his principle of liberty.¹⁰⁹ We have seen how inevitable confusion and paradox

¹⁰⁶Hobbes, "Leviathan".

¹⁰⁷Friedmann, "Legal Theory", p. 312.

¹⁰⁸Hart (1963), p. 82.

¹⁰⁹See previous p. 9.

arise out of this attempt to reconcile such opposing values.¹¹⁰
 Hart inherits these problems when he applies Mill's principle to the question of enforcement of morals.

A third traditional conflict can be identified in the Hart-Devlin debate. It can be broadly labelled as the conflict of Faith and Reason or narrowly labelled as a dichotomy between Intuition and Intellect.¹¹¹

"Time and again belief in the power of reason has been followed by distrust of reason and corresponding faith in instinct. Intellect is pitched against intuition, reflection against life. In philosophy, the rationalism of the eighteenth and the positivism of the nineteenth century analysing life and thinking intellectually, according to the principle of causality, have been followed by a widespread revolution. Its battle cry is instinct rather than intellect, the inner meaning of things, rather than their intellectual classification, the totality of life in its meaning and value rather than the analysis of individual phenomena according to cause and effect."¹¹²

This traditional conflict whether law is primarily a matter of intellect or intuition is present in the Hart-Devlin debate. Devlin's theory depends upon a historical distinction between knowledge and belief and between thinking and postulates. He rejects the optimism of nineteenth century thought that everything is capable of being known and understood by the human mind. Hart, in comparison, has more confidence in rationality and the ability of the human mind to make deductive decisions

¹¹⁰ See previous p. 14.

¹¹¹ Friedmann, "Legal Theory", pp. 83-85.

¹¹² Ibid., p. 84.

about critical morality. By logical application of Mill's principle of liberty, Hart argues that correct decisions can be reached. He goes into analytical definitions of terms such as "harm to others", "paternalism" and "the enforcement of morality" to show that the principle can be logically applied to a set of facts.¹¹³ Hart himself has remarked that one of the popular meanings of "positivism" is "the contention that a legal system is a 'closed logical system' in which correct legal decision can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards."¹¹⁴ In contrast, Devlin's theory is empirical to some extent as it is based upon the availability of evidence of public opinion and yet he wants public opinion to be shaped by an ultimate metaphysical authority.¹¹⁵ He could be labelled as a natural lawyer because of his hope that moral rules will be derived from belief in God. However his political theory leads him to reject the idea that moral values acquired by religious faith ought to be enforced. Due to practical considerations of locating a sovereign and the fallibility of individual human beings, he argues that only those moral beliefs held strongly by public opinion ought to be enforced. Hart on the other hand avoids a metaphysical

¹¹³ See for example Hart (1963), pp. 38-43.

¹¹⁴ 1958 Harvard L.R. Vol. 71, 593 at 601.

¹¹⁵ Devlin, p. 25.

natural law basis for deciding upon moral rules. In his book "The Concept of Law" he asserts that the natural law doctrine "contains certain elementary truths of importance for the understanding of both morality and law. These we shall endeavour to disentangle from their metaphysical setting and restate here in simpler terms."¹¹⁶ It is not clear whether Hart derives his moral values by non-cognitive or naturalist ethical methods.¹¹⁷ To classify the values of Hart and Devlin into ethical schools of thought would involve a complete study in itself and will not be undertaken in this paper. However whatever may be the method by which Hart derives moral rules, he certainly relies upon logic and a rational principle when trying to decide which moral rules ought to be enforced. My analysis of the debate leads me to conclude that ultimately a choice between moral values cannot rest upon reason. In the words of Oliver Wendell Holmes, "It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You cannot help entertaining and feeling them, and there is an end of it."¹¹⁸ Also Friedmann, while discussing the theories of Radbruch, comes to the conclusion that "legal relativism is therefore concerned with the ultimate meaning of legal systems but does not see its task in

¹¹⁶Hart, "The Concept of Law", p. 184.

¹¹⁷For different ethical schools of thought see Ekman, "Readings in the Problems of Ethics", Frankena "Ethics" or Hospers "An Introduction to Philosophical Analysis".

¹¹⁸Holmes, 32 Harvard L.R., (1918), p. 40.

suggesting a choice between opposite values. This choice is a matter for personal decisions; a matter not of science but of conscience. Relativism does not evade political decisions, but does not wish to give them a scientific cloak".¹¹⁹ Radbruch himself said "I have no fear of irreconcilable antinomies, to decide oneself is to live!"¹²⁰ Legal science and philosophy can reveal these antinomies, but cannot indicate a choice between them. This does not amount to an abandonment of the search for a hierarchy of values. It just means that the hierarchy of absolute values cannot be demonstrated scientifically. However it is vitally important that the conflicting values are stripped to their respective cores by scientific investigation in every case before declaring that the conflict is beyond scientific settlement. The school of Reason has not traditionally argued that logic and science are useless in moral matters, rather that they are inconclusive. Therefore in the next section, I will endeavour to examine whether an analysis of social conditions can assist in choosing between the values of individual freedom and social cohesion.

To begin with, can we throw any light upon the importance of individual freedom in our modern society? It seems that an understanding of our own values will give us a deeper insight into the process of decision making than will the

¹¹⁹Friedmann, p. 192.

¹²⁰Radbruch, 3 *Annaire de l'institut international de philosophie du droit*, p. 162.

exposition of general moral principles. On the one hand there are writers such as Herbert Marcuse¹²¹ saying that today the minds of most people have been so manipulated by modern social conditions and communications that majority opinion is no longer likely to reflect truth or justice. On the other side of the coin, it is pointed out that the climate of moral freedom has led to unwillingness to enforce moral rules upon individuals for "to claim infallibility is to take the path of fanaticism; to impose our own values on others makes us zealots and tyrants."¹²² In an age of moral relativism we often lose our nerve to impose our concept of "the truth" upon others--our convictions are only another limpid personal point of view. "How can we resolve our differences when the assurance of cognitive or moral certitude is only an illusion fathered by a wish?"¹²³ Both sides of the debate continue to be argued politically without apparent resolution.

The broader issue of the Hart-Devlin debate, namely, the relationship of individual freedom and social control, has often been discussed historically both in terms of general doctrine and specific values. John Stuart Mill said, "the practical question, where to place the limit--how to make the fitting adjustment between individual independence and social

¹²¹ Herbert Marcuse, "A Critique of Pure Tolerance", (Beacon Book).

¹²² Joseph Tussman, "Obligation of the Body Politic", p. 114.

¹²³ Ibid., p. 115.

control--is a subject on which nearly everything remains to be done,"¹²⁴ Law and morality have always endeavoured to serve these twin goals--public and private interest. Historically, the majority of men have been willing to emphasise social control above their desire for freedom as relative social peace and stability are obvious preconditions to individual freedom. We usually desire public security as a means to the later acquisition of privacy and freedom. This is a symptom of our basic Hobbesian fear¹²⁵ of exploitation by those who are more powerful. And here we find a variable which will directly influence the onus of proving harm. The evidence of harm necessary to rebut the presumption of non-interference with the individual will vary according to social conditions. In other words, the ideal balance between the values of individual freedom and social authority shifts in emphasis depending upon prevalent social conditions. Thus in extreme social conditions, individual freedom is restricted where there is a possibility that social disaster may result from the exercise of that freedom. We are willing to accept less empirical evidence of harm. Strict censorship during war is an obvious example. A recent example is the action of the Canadian government restricting individual liberty by legislation in order to suppress the activities of a separatist organization known as the F.L.Q.

¹²⁴ Mill, "On Liberty," p. 68.

¹²⁵ Thomas Hobbes, "Leviathan." Pelican Ch. XIII, pp. 183-188.

The words of the preamble of the emergency regulations¹²⁶ are similar to the spirit of Devlin's argument¹²⁷ that society has a right to preserve ideas and moral values:

Whereas it continues to be recognized in Canada that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;...

And whereas the Government of Canada desires to ensure that lawful and effective measures can be taken against those who thus seek to destroy the basis of our democratic governmental system, on which the enjoyment of our human rights and fundamental freedoms is founded, and to ensure the continued protection of those rights and freedoms in Canada.

Therefore, His Excellency the Governor General-in-Council, on the recommendation of the Prime Minister, pursuant to the War Measures Act, is pleased hereby to make the annexed regulations to provide emergency powers for the preservation of public order in Canada.

It has been argued that social conditions of his generation profoundly influenced the emphasis which Mill himself placed upon individual liberty.

The earlier Utilitarians did not regard liberty as the most important means leading to social happiness. The change in John Stuart Mill is intelligible in the light of the political developments of the time. The elder Utilitarians had been warring against privilege and the sinister interests of the few. They could easily persuade themselves that social distress and political abuses were the work of those minorities whom they were

¹²⁶ War Measures Act, Public Order Regulations, 1970, October 16.

¹²⁷ See discussion on pp. 3-4.

attacking. But Mill wrote at a time when much of this destructive work was done, when it was becoming apparent that the taking away of unjust privileges from minorities did not of itself give social happiness. Power had passed from an oligarchy to a democracy and now the Utilitarians saw that the democratic government interfered with liberty not less but more than formerly."¹²⁸

Devlin also notes that an emphasis upon one value may be a product of the social conditions of one particular generation. About Mill, Devlin says "His admonitions were addressed to a society which was secure and strong and hidebound. Their repetition today is to a society much less solid. As a tract for the times, what Mill wrote was superb, but as dogma it has lost much of its appeal."¹²⁹ I agree with Lindsay and Devlin that theories often reflect the political or social problems of the age in which they were written. Then which of Hart's and Devlin's theories is most applicable to modern society? Are we in a generation continually threatened with conformity and massive interference with privacy and freedom or are we in an age where cherished traditional values and authority are being undermined by an undue emphasis upon individual freedom? There are numerous writers,¹³⁰ both modern and ancient, who analyse social ills under one or the other or a subtle variation of these two classifications. The next chapter sets out an

¹²⁸ A.D. Lindsay, Introduction to John Stuart Mill, "Utilitarianism, Liberty and Representative Government," (p.xv), See also Hart (1963), p. 32.

¹²⁹ Devlin, p. 122.

¹³⁰ For modern examples, see writings of Herbert Marcuse and Joseph Tussman.

attempt to choose between the values of Devlin and Hart in the light of modern social phenomena and the present popular value response to the problem of pollution. I have chosen examples where it would seem to be obvious that individual freedom ought to be subordinated to public opinion. Then I will attempt to extract a guiding principle from the examples.

IRREVERSIBLE DISASTER ARGUMENT

Is it possible today to envisage social conditions which would alter Hart's basic value preference for individual moral freedom? Can we successfully argue that Hart's value preference for individual freedom is unrealistic and open to question in our modern-day situation? The Quebec Minister of Justice, Jerome Choquette, is an example of a person whose emphasis upon one value apparently changed due to prevailing social conditions. Taking office as a champion of individual freedom, Choquette is reported as now saying, "I remain a liberal, but a realistic liberal. Democracy has to find appropriate means to defend itself against organized crime and terrorist activity, and if we're not realistic enough to realise that situation, and if we want to keep preaching Great Principles of Freedom of the Individual, then we're missing the point."¹³⁰ In terms of the present analysis, Choquette would now require less empirical evidence of harm than previously in order to justify an encroachment upon the cherished value of individual freedom.

Let us look by way of analogy at the physical problem of environmental control. In this chapter, I take a stand with anti-pollution attitudes purely for the purpose of analysis in an attempt to find a clear principle in which individual moral freedom is subordinated to other values. Pollution is an

¹³⁰ The Province, Newspaper, Vancouver, 23rd January, 1971.

example of how an attitude of laissez-faire has changed into a popular demand for control of individuals. This amounts to an identifiable swing in the values held by the majority. The ecological disaster of pollution results from the failure of society to control disposal of waste materials and individual use of the environment. The result is a threatened upheaval to the whole of human life. The consequences of pollution will take years of dedicated work to repair. But only when the ecological deterioration reaches disaster proportions are we finally prompted to take any action to impose restraints and to repair the wreckage to nature.

The fact of pollution continued before our very eyes for years--but we were either unaware of the decline or refused to impose restraints on individual disposal practices because these restraints would be too difficult. For the sake of expediency, freedom of commerce and unwillingness to impose values, the ecological decline was classified as a problem for each individual to solve and not really as a problem justifying government intervention. The only difficulty is that we all breathe the same air, swim at the same beaches and enjoy the same beauties of nature. There is little empirical evidence to show that initially ecological decline causes harm to anything else than our senses and feelings. It is only later that, ecologically speaking, the lack of restraint of one person will affect another.

It is being wise after the event to say now that sufficient foresight coupled with determined restraining action would have at least lessened the disasters of ecological pollution. Some

would say that pollution is a necessary by-product of our progressive industrial society. However, when the necessary by-product threatens our enjoyment of life, and threatens the very existence of one important human value, then it is time to re-arrange our scale of values. Even a person who has individual freedom at the top of his hierarchy of values would also have aesthetic values somewhere on his scale. Now if certain aesthetic qualities are threatened, not only with damage, but with extinction or irreversible harm, then the hierarchy of values ought to be altered temporarily. Thus the irreversible disaster theory calls for some reconciliation of conflicting values, despite personal preferences and despite the lack of empirical evidence to prove that the harm will be irreversible. We will discuss later the problem of who has the authority to classify the facts.¹³¹

The words spoken by the advocates for environmental control have a surprising similarity to words and phrases embodied in Devlin's essays and repeat his argument in a different context. "An ethic philosophically, is a differentiation of social from anti-social conduct. An ethic ecologically, is a limitation on freedom of action in the struggle for existence....All ethics so far evolved rest upon a single premise that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his

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See p.64.

place in the community, but his ethics prompt him to co-operate perhaps in order that there may be a place to compete for."¹³² The possibility of irreversible disaster does exist in our society more than it did in the past. "...Given the density and intensity of life in the modern city one simply cannot leave the role of nature and the organisation of green places to chance or to the private domain."¹³³ We are warned against relying absolutely on basic rights or principles. "...The right to pollute has become a major philosophical and legal assumption; we tend to require detailed scientific proof of direct, personal damage to man as a prerequisite for even considering restriction of any right to pollute."¹³⁴ We have seen how Devlin's thesis makes similar observations in the moral realm. For example, "If we are not entitled to call our society 'free' unless we pursue freedom to an extremity that would make society intolerable for most of us, then let us stop short of the extreme and be content with some other name. The result may not be freedom unalloyed, but there are alloys which strengthen without corrupting."¹³⁵ Often we hear warnings of ecological "disintegration" unless restraints are imposed. "We will go down in history as an elegant technological society struck down by biological disintegration for lack of ecological

¹³² "Challenge for Survival 1968--Land, Air and Water for Man in Megalopolis," ed. Pierre Dansereau, p. 43.

¹³³ Ibid., p. 66.

¹³⁴ Ibid., p. 160.

¹³⁵ Devlin, p. 123.

understanding."¹³⁶

The popular argument continues that as environmental control is not an exact science, we must err on the side of limitation of freedom to pollute. This error will mean some unnecessary limitation of individual freedom until our understanding and knowledge increases. Can we argue in the same manner for enforcement of moral standards? That is to ask "Is the value preference as popularly embodied in the drive against pollution also applicable to the moral realm?" Hart would immediately answer "no". However this answer is too blatant and all-encompassing. There are circumstances when even Hart would want to answer "yes" but he then cloaks such cases under the principle of harm to others. The popular argument continues that because morality is not an exact science we must accordingly (in times of threatened disaster) err in favour of the value of social cohesion with some unnecessary limitations upon individual freedom until our moral understanding and knowledge increases. However one discouraging factor is that we do not seem to be capable of acquiring and then passing on to succeeding generations a lasting moral understanding to which we pay more than lip-service. Each generation struggles to acquire its own moral convictions by a painful process of trial and error.

¹³⁶

"Challenge for Survival", p. 154.

Where a change has the tendency to be disastrous or irreversible, it is obvious that we ought to take care lest that change take place. Therefore, where there is a danger that a change will be the beginning of the rot--or the first step in undermining a value which is basic to the enjoyment of human life, we ought to take steps to prevent that change. Here I am attempting to make a distinction between harm and irreversible harm or disaster. Harm, in this context, is the necessary evil which results from a policy of toleration of certain deviations from conduct considered to be good. But toleration does not require that you tolerate deviations which threaten the likelihood of the very existence of what is considered to be good. Irreversible harm is conduct which may lead to the eventual destruction of a concept of goodness. Naturally this "definition" begs the question "Who distinguishes and how do you distinguish between tolerable harm and irreversible harm or disaster?" The difference will always be a matter of degree. In a disaster situation, it is important to be wise before the event--especially as in a world which is an urban village it will become increasingly difficult to emerge from a disaster without incurable deformity. Dworkin, while discussing obscenity, reasons in similar terms. "...At some point in the deterioration of community standards the majority will not object to further deterioration, but that is a mark of the corruption's success, not proof that there has been no corruption. It is precisely that possibility which makes it imperative that we enforce our standards while we still have them.

This is an example--it is not the only one--of our wishing the law to protect us from ourselves."¹³⁷ Although I agree with this general principle concerning the prevention of irreversible harm, its use in practice will cause inevitable controversy. Each individual, group or majority will decide upon the application of the principle according to personal values and beliefs.

In the area of morals, Hart says that society will continue to exist if certain core morality changes; people will go on living. However, the quality of their life-style may be irreversibly lowered by the change. We understand the man who says "I am prepared to take the dangerous step of making a decision to enforce this moral rule thereby plugging one hole in the leaky dam of morality." The concept of preservation by enforcement of that which is valuable is reflected in the Interim Report of the LeDain Commission.¹³⁸ "The right of society to protect itself from certain kinds of harm. Without entering into the distinction between law and morality, we also subscribe to the general proposition that society has a right to use the criminal law to protect itself from harm which truly threatens its existence as a politically, socially and economically viable order for sustaining a creative and democratic process of human development and self-realization."

¹³⁷Dworkin, 75 Yale L.J. (1966) 986 at p. 1004.

¹³⁸Para. 443.

It is difficult to determine when a tolerated immorality will begin the rot or break the back of a prevalent moral value. And although tolerance of individual deviation is itself a moral virtue, if tolerance in specific instances may lead to irreversible loss of important moral values, then we should not take the risk. Be intolerant now and thereby prevent at least one possible means of destruction of those important values which we believe to be essential to human fulfillment.

Devlin did not originally (in the Maccabaeian Lecture) argue the case for enforcement of common morality in the express terms of avoiding some irreversible disaster. However this is the implication of his basic argument that society has the right to preserve itself and prevent undermining of core values which are the strength of society.¹³⁹ This is an important line of reasoning which should be argued when considering the question whether to enforce a certain moral rule. However it is one argument amongst others and, as we shall see, does not give decisive weight to either side of the debate.

We began by questioning the emphasis which Hart places upon individual freedom in the context of modern society. Has Devlin's original argument, interpreted in terms of irreversible disaster, cast doubts on Hart's value preference? The answer is "No"--for there are several unanswerable objections to the

¹³⁹ Devlin, p. 10.

irreversible disaster justification for the enforcement of morality.

(1) Who is to be the Platonic judge of which moral change is the beginning of the rot? We cannot prevent all moral change and neither do we want to--but who is to decide the correctness of the proposed enforcement?

(2) It can be argued that it is so important that individual freedom remain unrestricted that we must run the risk of irreversible disaster. "Rational morality must still insist on individual moral liberty and even if non-enforcement of morals is a threat to social survival, morality (or democracy) demands that we take the risk."¹⁴⁰

(3) What amounts to acceptable evidence that some irreversible disaster will probably occur? This restates the problem of whether the feelings of the common morality are acceptable evidence in most cases as the essence of preventing disaster is to act quickly at the first warning of deterioration. But immediately the theoretical limitations upon premature action must be added--there must be a clear and present danger and we ought to relate the gravity of the evil threatened to the likelihood of reaching that evil.

(4) Why should the disaster rationalisation be applicable in only our modern society? History has shown that mankind has

¹⁴⁰Blackshield indicates a similar value-preference to Hart. See p. 452.

survived through cycles of both good and bad moral change, and a disastrous moral change has usually been followed by revival or reformation. But this is a kind of moral fatalism which places us at the whim of unpredictable moral fashion. It seems obvious that we should at least attempt to preserve fundamental moral values. However someone could easily label the advocate of the irreversible disaster principle as a prophet of gloom and doom and point out the historic fact that some sense of disaster has always hovered over society. Even Plato said "...When I considered all this, the more closely I studied the politicians and the laws and customs of the day, and the older I grew, the most difficult it seemed to me to govern rightly. Nothing could be done without trustworthy friends and supporters; and these were not easy to come by in an age which had abandoned its traditional moral code but found it impossibly difficult to create a new one. At the same time law and morality were deteriorating at an alarming rate...."¹⁴¹

(5) Mill argues that "if the claims of individuality are ever to be asserted, the time is now, while much is still wanting to complete the enforced assimilation. It is only in the earlier stages that any stand can be successfully made against the encroachment....If resistance waits till life is reduced nearly to one uniform type, all deviations from that

¹⁴¹ Plato, Seventh Letter.

type will come to be considered impious, immoral, even monstrous and contrary to nature."¹⁴² Here Mill is using a similar irreversible disaster argument to justify preservation of individuality before he has empirical evidence that individuality will probably be destroyed. Early over-caution is more desirable than repenting at leisure when such an important value as individuality is involved. Thus we find that this attempt to rationally justify Devlin's value preference can backfire. The same irreversible disaster theory, implied in Devlin's essay, is here used to support the opposite side of the the debate. When a breach of a moral principle will eventually lead to more than harm, such as disaster or irreversible harm, then justification exists for preserving and enforcing one moral value in preference to other values. This principle ought to be applied, even though there is little empirical evidence that the disaster or irreversible harm will actually eventuate; the standard or proving harm has been lowered. "Better to cut out one possibly faulty eye than to risk the irreversible fires of hell" is a principle which can be equally well applied by both Hart and Devlin. Thus although both Hart and Devlin would agree with the irreversible disaster principle as I have set it out in this chapter, each has his own idea of when it ought to be applied. All we can say is that Devlin, being less tolerant toward individual deviation,

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John Stuart Mill, p. 105.

would invoke the principle more often than Hart. This is analogous to saying that Devlin's theory involves enforcing moral rules more often than Hart's theory. Thus although I agree with the principle, it does not ultimately help to choose between Hart and Devlin. The irreversible disaster argument raises the debate to another level but ultimately asks the same question, "When should morality be enforced by means of the law?"

At the beginning of this chapter, I asked whether it is possible today to envisage social conditions which would alter Hart's basic value preference for individual moral freedom? I have chosen a category of extreme situations under the heading of "irreversible disaster" and tried to formulate a principle that would enable a clear non-value choice between values. This attempt has proved to be unsuccessful and the principle can only be applied by using the same values as it is meant to distinguish. A similar assault can be made upon Devlin's value-preference in the light of modern social conditions. The assault would take the following form. As modern society is so diverse and fragmented in its beliefs and attitudes, a theory which depends upon the existence of some common beliefs and morality will have difficulty finding such beliefs. This will be especially true if Devlin's statement that no society has yet been able to teach morals without religion¹⁴³ is correct, for

¹⁴³ Devlin, p. 25.

modern society can certainly be labelled as secular rather than religious. It could then be argued that Devlin's theory should not be followed until there is a deep religious revival in our pluralistic society. If Devlin was once willing to take the risk that public opinion would embody justice on a majority of occasions, he ought not to take that risk now as public opinion has no unity or direction. This argument is similar to the reasoning of Herbert Marcuse¹⁴⁴ who says that the public is no longer capable of determining its own good. Therefore Marcuse, reminiscent of Rousseau, advocates that an interim Platonic elite ought to be empowered to determine and enforce the public good until the public is educated sufficiently to resume a government organized on democratic principles. Here the attempt to discredit Devlin's value-preference in modern society breaks down for at least two reasons. Firstly, Devlin would disagree with the analysis that a pluralistic society no longer has some common bonds of thought which public opinion will want to enforce. This is the same problem as existed with the irreversible disaster argument, namely that there is no authoritative body to classify the facts.¹⁴⁵ Secondly, Devlin clearly feels that Marcuse's solution of empowering a Platonic elite contains more risks of injustice

¹⁴⁴ See for example Herbert Marcuse "A Critique of Pure Tolerance".

¹⁴⁵ See previous p. 64.

than government in the area of moral enforcement by a diverse and wavering public opinion. Thus the application of Devlin's and Hart's theories to opposite and extreme interpretations of modern social conditions does not reduce either theory to absurdity.

CONCLUSION

Neither party to the debate finds a single principle which will assist the decision-maker without eventually relying upon underlying private values and attitudes. The irreversible disaster theory, although giving some insight into Devlin's position, can equally well be used to support Hart's arguments. Likewise, the analysis of modern pluralistic society does not easily produce a principle which can seriously question Devlin's value-preference. Once again, the arguments are rationalizations for values already chosen. The how does one find a meaningful principle to determine which of two values should prevail? Friedmann answers in the following manner. "The agony of the decision, the conscious choice between values which--like the claim to security from treason of the organized community and the claim to individual freedom of conscience and opinion--have equal intrinsic value, but have to be adjusted in a concrete situation--is the noblest heritage of homo sapiens. Legal philosophy can aid in the choice: it cannot and should not eliminate it."¹⁴⁶ I believe that at a certain stage, analysis is no longer helpful. The conflicting values can only be stated separately and a choice made by intuition. Intuition itself is unavoidably attached to psychology and theology. Then it comes down to a matter of political phil-

¹⁴⁶
Friedmann, p. 364.

osophy as to whose intuition ought to be given absolute authority.¹⁴⁷ Hospers, at the conclusion of an analysis of modern ethical theories asks an identical question, "How then are we ever to settle these disagreements about ethical facts, which may persist even after there is no longer any disagreement about non-ethical facts?"¹⁴⁸ At this point he replies that ultimately disagreements about ethical facts must be settled by intuition though there are several important matters which must be investigated before we reach that conclusion. However, having dealt with such factors as "our personal desires, our human preferences in our own behalf, wishful thinking, clever rationalisations and the like",¹⁴⁹ we are sometimes left with an unsolved conflict of values. Then, only by intuition can we either make a decision or select an ethical or philosophical school of thought. To Hart and Devlin, who place a strong emphasis upon either the value of individual freedom or social control, Mill's words taken from a different context seem to be very applicable.¹⁵⁰ "Rarely when two views are opposed does one contain all the truth and the other complete falsity. Far more common is it to find each view containing parts of the truth...in the human mind, one-sidedness

¹⁴⁷ See previous discussion pages 37-43.

¹⁴⁸ Hospers, "An Introduction to Philosophical Analysis", p. 492.

¹⁴⁹ Ibid., p. 493.

¹⁵⁰ John Stuart Mill, p. 105.

has always been the rule and many sidedness the exception. Hence, even in revolutions of opinion, one part of the truth usually sets while the other rises. Even progress, which ought to superadd, for the most part only substitutes, one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of the time than that which it displaces." ¹⁵¹ The paradoxical values, social control and individual freedom, cannot either exist meaningfully alone.

Today, the decision-maker still asks "What should I do to reconcile these two values?"

We will, as human beings desiring predictability in our affairs, continue to search for rules and principles to assist the decision-maker. We do not want to leave him unassisted or unrestricted and yet there is great difficulty in providing him with guidelines other than our own personal values. It is not an abdication of reason to admit this and then to endeavour to shape our personal values as they ought to be.

¹⁵¹ Mill, "On Liberty", p. 105.

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