LORD DEVLIN ON THE POLITICS OF ENFORCING MORALITY

by

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ABSTRACT

The purpose of this thesis is to explore Lord Devlin's approach to the enforcement of morals. The morals in question are those which are widely recognized as being held in common by particular groups of people and constitutes the morality of the society to which they belong. The enforcement is that coercion which society is able to bring to bear upon the individual, above and beyond that which inheres naturally in a social morality. Lord Devlin argues that the enforcement of this morality is not in any way dependent upon a moral appraisal of the morality itself: a consideration of its moral fitness for enforcement. Such considerations are rejected by Devlin as being an unacceptable manner of governing the enforcement of a society's morality. His critics, arguing the opposite, have attempted to show that, for various reasons, it is not acceptable for government to defer in such an uncritical fashion to the morality it is attempting to enforce. However, Devlin's critics tend to exaggerate and misinterpret the principle which underlies his approach to the enforcement of morals. They falsely assume that Devlin sees value in nothing other than the enforcement of a society's morality. In reality, Devlin believes that many values may need to be balanced against this one. This is the essence of a practical or political approach to the enforcement of morals, and it can only succeed if society is entitled to exclude from its politics certain considerations: those which deny that the enforcement of a society's morality has no value independent of the other values with which it competes. Devlin's focus on the politics of the enforcement of morality has certain similarities with the more contemporary concern of some with moral neutrality in politics.
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I would like to dedicate this thesis to my mother, father, and sister. Their constant encouragement, support, and tolerance has sustained me through a long, arduous, and, ultimately, rewarding journey. Additionally, I would like to thank professor Sam LaSelva for his patience and the scholarly example he sets. Lastly, I would like to dedicate this thesis to my late dog, Skye, whose companionship and presence is sorely missed.
INTRODUCTION

This essay is an examination of what I take to be a fundamental idea behind Lord Devlin’s views on the enforcement of morality.¹ The morality that Devlin is concerned about is not the private morality of individuals or other distinct groupings within society, it is the public morality of society itself; and presumably one which is common to, or shared amongst, its membership. As I see it, Devlin’s fundamental idea with respect to the enforcement of this morality, is that society’s authority to do so is not dependent upon its being a morality of a certain sort. The only questions over which he imagines that legitimate political differences may exist regard the degree or extent to which such enforcement should occur. There must be an exclusion from politics, in this matter, of the more radical sort of claim which states that enforcement should only ever occur if it is a morality of a certain sort. In this respect, Devlin is very much like some more contemporary political thinkers who think of rights in terms of immunities one ought to have from feeling the effects of certain considerations in politics. Only, in Devlin’s case, it is a right that belongs to society, not the individual: “society,” he says, “has a prima facie right to legislate against immorality as such.”² By this I take him to simply mean that society is free from having to consider whether the morality its members share is really one which they have the authority to enforce at all.

This right is meant to oppose the sort of politics that he saw being practised by the Wolfenden Committee, whose well known Report advocated a liberal

¹ The most important of Devlin’s works which relate to the enforcement of morals have been collected in his book, The Enforcement of Morals (Oxford University Press, 1965). However, other significant material exists in journal form, in addition to related books he has written on aspects of the judiciary.
² Devlin, The Enforcement of Morals, p. 11.
reform of the law in relation to sexual morality. The Committee’s reforms were justified with reference to the following general statement of political philosophy: “It is not the duty of the law to concern itself with immorality as such...it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious.” In Devlin’s view, the problem with such a principle is that it denies to society the authority to enforce those standards of conduct which it has seen fit to endorse as the way in which people ought to conduct their lives. As he notes, upon such a principle:

the criminal law cannot justify any of its provisions by reference to the moral law [ie. a society’s morality]. It cannot say, for example, that murder and theft are prohibited because they are immoral or sinful. The State must justify in some other way the punishments which it imposes on wrongdoers and a function for the criminal law independent of morals must be found.

He goes on to add that “the Wolfenden Report, notwithstanding that it seems to admit the right of society to condemn homosexuality and prostitution as immoral, requires special circumstances to be shown to justify the intervention of the law,” and that this is “wrong in principle.”

The error that Devlin sees in this manner of approaching the issue is not one that he considers to be unique to a liberal political philosophy, nor in any sense unavoidably associated with a particular political philosophy. Devlin, in many passages, has expressed a guarded approval of the very great weight that Mill attached to the value of individual liberty--arguably, the central concern of liberal

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3 See the Report of the Committee on Homosexual Offences and Prostitution (CMD 247) 1957 [hereinafter referred to as the Wolfenden Report].
4 Wolfenden Report, Para. 257.
5 Devlin, The Enforcement of Morals, p. 5.
6 Ibid., p.11.
politics. In fact, the Wolfenden Report, widely recognised for its liberal pedigree, is taken to task by Devlin in ways which would be inapplicable to a direct critique of Mill’s doctrine. Unlike the Wolfenden Committee, Mill would never have conceded that what passed for morality in a particular society was necessarily morality, properly speaking. Mill, fully aware of the force or coercion which inheres naturally in a widely held opinion, would never have granted that society had a right to condemn something as immoral, independent of considering what was being condemned. In his view, it is only when what is being condemned represents “a distinct and assignable obligation to any other person or persons” that “the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation in the proper sense of the term.”

However, Devlin is concerned with the politics of those who seem to concede that a society’s morality is genuine morality, yet are unwilling to accept that this furnishes sufficient grounds for its enforcement. It is this approach to the enforcement of morals, and not liberalism, or any other political philosophy in general, that is Devlin’s primary target. Such an approach does not seem to have an obvious name; probably because there is no barrier to its figuring in the politics of people of many different persuasions. Instead, it is more clearly defined by a name that one could generate for what Devlin puts in opposition to it: the authoritative independence of a society’s morality, as such. This is my rather awkward name for the way in which Devlin seems to regard a society’s morality; the status or esteem in which he feels it ought to be held by a government with the opportunity to enforce it. It attempts to express his view that it is wrong to think that society needs to import additional authority for the

purposes of enforcing its morality, beyond that which can be derived from common moral agreement alone.

A morality which is held in common by a society’s members is of supreme importance to Devlin. And a common morality is made no less important by its being non-traditional; though, no doubt, most of it will consist of traditional moral prohibitions and exhortations. What is important, to Devlin, in a society’s morality is not its character as a traditional morality (which it need not be entirely), but its character as an established morality. As Devlin puts it, “there is nothing inherently objectionable about the change of an old morality for a new one. Why then is the law used to guard existing moral beliefs? It is because an old morality cannot be changed for a new morality as an old coat for a new one. The old belief must be driven out by disbelief.” 8 It is establishment and the lack thereof, and not tradition, which is the supreme virtue that Devlin attributes to a society’s morality: “Whether the new belief is better or worse than the old, it is the interregnum of disbelief that is perilous.” 9 Devlin is critical of the sort of politics which takes no notice of moral establishment, or seems unimpressed with it. He is, in this respect, different than conservatives like Burke and Oakeshott, whose politics represent the sort of anti-rationalism that is required to defend the authority of a traditional morality. Despite certain similarities, Devlin’s politics (in a sense, anti-rationalistic) attempts to provide grounds for defending the authority of an established morality which may or may not be traditional.

It will be my task in the first chapter to discuss how Devlin goes about

9 Ibid.
defending a society’s morality in this way: how the authoritative independence of a society’s morality, as such, is a reflection of the importance he attributes to its character as an established morality. In the second chapter, I will explore some of the major criticism his views have received. I will attempt to argue that Devlin’s critics have misinterpreted his ideas to a certain extent, and that some of their criticism is misplaced. In the third and last chapter, I will explore the notion of excluding from politics (as alluded to above) certain considerations which are thought to have no moral weight. Here, I will attempt to interpret Devlin’s political philosophy as a particular conservative variant of a way of talking about politics and rights, which has recently received prominence in the liberal political philosophies of Rawls and Dworkin.
CHAPTER ONE
The Authoritative Independence of a Society's Morality

Lord Devlin is not willing to recognise that a society's morality could require additional moral support before its enforcement becomes a legitimate activity. One might say that he views a society's morality as having a certain authoritative independence. In his view, "If the reasonable man believes that a practice is immoral and believes also—no matter whether the belief is right or wrong, so be it that it is honest and dispassionate—that no right-minded member of his society could think otherwise, then for the purpose of the law it is immoral." However, as Devlin indicates here, the determination of what constitutes a society's morality is not necessarily straightforward. So, we must look at what he comprehends as a society's morality.

I. The Idea of a Society's Morality

Devlin identifies a society's morality with the morality of the reasonable or right-minded man. The significance of his morality is that it belongs to the sort of person that Devlin imagines to be typical, or representative, of a particular society—the sort of person that a court of common law relies upon when it seeks something to take as the nation's verdict: "For my purpose," he goes on to say, "I

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10 Devlin, p. 22-23.
11 Devlin's terminology has sexist connotations today, but it is clear in much of what he says that his various formulations of the putative "source" of a society's morality comprehends women in an equal manner. I will retain one such formulation throughout much of this essay (ie. the idea of the common man) because it is a helpful way of reminding the reader of Devlin's view that a society's morality ought to be a common one. Additionally, it is a term which has long played a part in critiques of elitism, which is the second of Devlin's two arguments. It is perhaps worth noting that, in another context, Devlin has been acutely aware of the inadequacies of another formulation he uses in this discussion: the idea of the juryman. "The jury," as he says, "is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class." See p. 20 in his, Trial By Jury (London: Stevens & Sons Limited, 1966).
should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous." Under these circumstances, Devlin feels confident that, for all practical purposes, this morality being offered up as society’s can be regarded as an established fact amongst its membership; the meaning of which is that it constitutes common morality, or reflects a collective moral judgement.

In Devlin’s view, being able to say that a particular item of morality is a common or collective one is essential to its identification with the morality of a particular society:

The fact that a majority of people may disapprove of a practice does not of itself make it a matter for society as a whole. Nine men out of ten may disapprove of what the tenth man is doing and still say that it is not their business. There is a case for a collective judgement (as distinct from a large number of individual opinions which sensible people may even refrain from pronouncing at all if it is upon somebody else’s private affairs) only if society is affected. Without a collective judgement there can be no case at all for intervention.

In other words, without commonality, there isn’t the publicity that is characteristic of genuine social condemnation of an activity. Devlin seems to say that the idea of social condemnation implies a mutual understanding amongst a society’s members that there is a meaningful distinction between what is public and what is private. There is a recognition that a coincidence of a large number

12 Devlin, p. 5.
13 Devlin uses the words “common” and “collective” in nearly an identical manner.
15 There is an interesting parallel here between Devlin and the republicanism of Kant, and less clearly, Rousseau. According to Werner Maihofer, it is the publicity of a society’s politics that makes for the possibility of a government which is representative of society as a whole and enforces the general will of its members. See his essay, “The Ethos of the Republic and the Reality of Politics.”
of private moral judgements does not thereby transform them into a single, public, one. Instead, there must be an intellectual understanding amongst a society's members that certain moral standards ought to be a part of everyone's private morality (or at least, to exist along side it); in other words, that they form part of a common morality. Devlin seems to say that, unless one can say with a fair degree of certainty that a given item of morality is common to a society's membership, society's basis for public condemnation dissolves; and talk of society's morality becomes a mask for some smaller, more exclusive, grouping, such as a majority.

Another characteristic that Devlin attributes to a society's morality, in addition to commonality, is the attitude which is taken towards conduct which departs from this standard. Devlin seems to think of a society's morality as constituting the limit of its member's ability to seriously imagine the possibility of moral diversity; it constitutes a common deficit of moral imagination which provides for a distinction between public and private categories of moral appraisal. Devlin illustrates with reference to the way in which a typical member of his society now tolerates religious diversity:

His attitude now is that a man's religion is his private affair; he may think of another man's religion that it is right or wrong, true or untrue, but not that it is good or bad. In earlier times that was not so; a man was denied the right to practise what was thought of as heresy, and heresy was thought of as destructive of society.16

A society's morality consists of judgements its members hold in common regarding good and bad, or as he sometimes says, evil. It represents the limit of their ability to make the subtler moral appraisals which allow for partial

acceptance of a rival position, and the acknowledgement that it may suit the moral natures of some, but not all, people.\textsuperscript{17} In Devlin's view, a society's morality consists of judgements condemning certain activities which its members would think preposterous to regard as serious avenues of moral exploration: to advocate such a case would be seen to make a joke or to be seriously naive. The latter is Devlin's charge against Mill. Mill, in his view, "did not really grapple with the fact that along the paths that depart from traditional morals, pimps leading the weak astray far outnumber spiritual explorers at the head of the strong."\textsuperscript{18}

In all but the rarest of instances, Devlin thinks of conduct which departs from a society's morality as conduct which would not bear the imprint of any sort of motivation recognisable as moral--a sincere and disinterested belief that "what is commonly regarded as vice is in truth a virtue."\textsuperscript{19} It is this aspect of what it means for society to have a morality that makes it hard for Devlin to conceive of anyone denying that society has the authority to enforce it: to do so, in his view, is to advocate a worthless freedom; one which is separated from all the conceivable moral objectives which give it value:

Freedom is not a good in itself. We believe it to be good because out of freedom there comes more good than bad. If a free society is better than a disciplined one, it is because--and this certainly was Mill's view--it is better for a man himself that he should be free to seek his own good in his own

\textsuperscript{17} I do not think that this is a form of obstinacy or disingenuousness, as has been supposed. Berlin (whose ideas permeate this passage in too great a way to cite specifically) has suggested that "we cannot pretend not to understand" the values of others. However, I do not see why this must be so; though I would concede that we should at least \textit{try} to understand the values of others. But it seems to me that, as surely as moral pluralism is a fact of human existence, so is the fact that it ranges farther afield in some than in others. All Devlin is saying is that when the limits of one's moral horizons are common ones, then a common morality is a concrete reality. See Isaiah Berlin, "The Pursuit of the Ideal" in \textit{The Crooked Timber of Humanity}, Henry Hardy, ed. (London: John Murray, 1990), p. 11.

\textsuperscript{18} Devlin, \textit{The Enforcement of Morals}, p. 108.

\textsuperscript{19} Ibid.
way and better too for the society to which he belongs, since thereby a way may be found to a greater good for all. But no good can come from a man doing what he acknowledges to be evil. The freedom that is worth having is freedom to do what you think to be good notwithstanding that others think it to be bad. Freedom to do what you know to be bad is worthless.\textsuperscript{20}

II. Affirming a Society’s Right to Enforce its Morality

However, Devlin realises that society cannot limit the liberty of its members simply on the ground that there is a common estimation that certain sorts of liberties are worthless. He is aware that that there is a tradition of thought derived from Mill, which he interprets in the following way: “What Mill demands is that we must tolerate what we know to be evil and what no one asserts to be good. He does not ask that in particular cases we should extend tolerance out of pity: he demands that we should cede it for ever as a right.”\textsuperscript{21} Against such a view, Devlin mounts two different sorts of attack which are intended to show that the more extreme form of tolerance, which deprives society of the authority to enforce its common morality, is misguided and intolerable itself.\textsuperscript{22} What these arguments attempt to show is that, for the purposes of enforcement, it should be enough to simply show that the morality in question is a common one.

\textit{i--Common Morality and Social Preservation}

His first argument concerns an important connection which he alleges to exist between society and common morality, as such; or more particularly,
immorality, as such. In his view, immorality represents, to the degree to which it
is practised, the subversion of the common morality from which it constitutes a
deviation. In short, it is in the nature of all immorality to subvert the common
morality to some degree. And on the assumption that "society may use the law
to preserve morality in the same way as it uses it to safeguard anything else that
is essential to its existence," Devlin reasons that immorality ought to be
regarded as analogous to conduct which falls under the law of treason:

Society is entitled by means of its laws to protect itself from dangers,
whether from within or without. Here again I think that the political
parallel is legitimate. The law of treason is directed against aiding the
king’s enemies and against sedition from within. The justification for this
is that established government is necessary for the existence of society and
therefore its safety against violent overthrow must be secured. But an
established morality is as necessary as good government to the welfare of
society...society is justified in taking the same steps to preserve its moral
code as it does to preserve its government and other essential institutions.
The suppression of vice is as much the law’s business as the suppression
of subversive activities....

In other words, government’s role as a punisher of immorality is as
legitimate as its role as a punisher of subversive activities. According to Devlin,
"whether society should have the power to restrain any activity depends on the
nature of the activity." And both these activities, he maintains, are of the
nature of something that society must control and regulate; for which reason
government assumes the role of a punisher of the activities in question, with the
non-specific right of enforcement this entails. Devlin makes this point in the
following passage, putting particular emphasis on what his view does not entail:

I do not assert that any deviation from a society’s shared morality
threatens its existence any more than I assert that any subversive activity

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23 Ibid., p. 11.
25 Ibid., p. 113.
threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.26

And the reason why neither can be put beyond the law are for two reasons hinted at above in mentioning the assumptions behind Devlin’s analogy between immorality and treason. The first reason has to do with the very practical issue of how a society is able to preserve its common morality. Devlin does “not suppose that any secular society has ever existed which sought to control vice simply by passive resistance and good works.”27 There is need of an additional instrument, to which society requires a ready access, if it is to be able to ensure the preservation of its common morality. As Devlin puts it: “a man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained. The two instruments are those of teaching, which is doctrine, and of enforcement, which is the law.”28 Specifically, the law is able to do this by controlling the spread of immorality and the slow subversion of common morality it represents. As Devlin explains, more so than the good of the individual who is being punished, the law is:

...concerned as much or more with the good of those who might be led into evil by example or temptation. If the evildoer himself is beyond reform, the threat of punishment may deter and to that extent prevent the spread of the vice; or if beyond deterrence, imprisonment can at least put him out of the way of others he might influence.29

26 Devlin, p. 13.
27 Ibid., p. 106.
28 Devlin, p. 25. Here, in addition to the enforcement of common morality, Devlin is showing support for the activities of an official religious establishment; due to his belief that religion is how most people receive the morality they hold in common with others. However, he does not pursue this idea in any greater detail, so I will leave it aside.
29 Ibid., p. 110.
However, the far more important reason Devlin gives for why immorality cannot be put beyond the law has to do with his idea that common morality is necessary, or essential, to the existence of society. What he appears to mean by this is that, taken as a whole, the morality that the members of a particular society hold in common is the source of whatever order is to be found amongst them. And that their society, and indeed any society, consists of the order that is derived from this source: without it there would only be, in Burke’s phrase, “the dust and powder of individuality.” In short, one might say that the morality that is held in common by the members of any society constitutes the terms of its existence. It's what supplies them with the order out of which their society is composed; and to that extent, it is essential to their existence. At least this is what Devlin seems to intend in the following passage:

I return to the statement that I have already made, that society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

It is this need that every society has for the morality which binds its members together that warrants, in Devlin’s mind, the general right it has to legislate with respect to immorality: what I have been calling government’s legitimate role as a

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31 Devlin, p. 10.
punisher of immorality. And it is a role that Devlin does not see as being affected by particular aspects of the morality one finds doing the job in a particular society. As Devlin observes:

...polygamy can be as cohesive as monogamy and I am prepared to believe that a society based on free love and a community of children could be just a strong (though according to our ideas it could not be as good) as one based on the family. What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference.32

In short, items of common morality contribute to the order that defines society, not out of some praiseworthy aspect of them, but simply out of their being a particular point upon which disparate individuals are in agreement. One may disapprove of the particular terms which account for a society's existence but this changes nothing with respect to their role in this endeavour. As Devlin observes, soberly: "Unfortunately bad societies can live on bad morals just as well as good societies on good ones."33

**ii—The Problem of Rationalist Government**

The second reason why Devlin thinks that society has the authority to enforce its morality, regardless of the sort of morality it is, has to do with what I have called the problem of rationalist government. In Devlin's view, the idea that common moral agreement, in and of itself, does not provide society with the authority for its enforcement, is a principle of governance to which society cannot be expected to abide. Devlin thinks of governance in accordance with such a principle as rationalism—a disposition to regard a society's morality as inherently unfit for enforcement on its own.

32 Ibid., p. 114.
33 Devlin, p. 94.
In his view, it is characterised by the belief that the only sort of morality that society may consider enforcing is that which correspond to what some regard as absolute, or universal, truth. Or, if not quite this, some more general, or independent, standard which lies beyond common morality as it is (what is taken for moral truth in a particular society), and corresponds to some one’s idea of common morality as it ought to be. In other words, common morality, as it is, is not in and of itself eligible for enforcement by government. It can only become eligible to the extent that it is attended by certain, of what Devlin calls, “special circumstances” which “justify the intervention of the law;” and which are a reflection of the degree to which common morality, as it is, corresponds with common morality as it ought to be.

Devlin sees the concern with absolute truth in morals as peculiar to philosophy. In his view, “natural to the philosopher” is the idea that “a man who is seeking a moral law ought also to be in pursuit of absolute truth.” However as we have seen, Devlin’s doctrine ascribes a role to government in defence of a morality which is esteemed on the grounds that it is largely an established fact, or as we have been saying, that it is common morality. The truth of this morality is regarded by Devlin as irrelevant because it performs an essential function within society. In his view, “it is not necessary that their [ie., a society’s members] appreciation of right and wrong, tested in the light of one set or another of those abstract propositions about which men forever dispute, should be correct...What the lawmaker has to ascertain is not the true belief but the common belief.” This view, as Devlin observes, does not sit well with

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34 Devlin, p. 11.
35 Devlin, p. 93.
36 Ibid., p. 94.
people of a philosophical or speculative frame of mind:

It reduces morality, they feel, to the level of a question of fact. What Professor H. L. A. Hart calls rationalist morality, which I take to be the morality embodied in the rational judgement of men who have studied moral questions and pondered long on what the answers ought to be, will be blown aside by a gust of popular morality compounded of all the irrational prejudices and emotions of the man-in-the-street.37

What Devlin is actually saying is that the philosophically minded are concerned with absolute or universal truth in morals and not with what is simply taken as true within a particular society, due to its being a common opinion. The common man—the putative source of a society’s common morality—is notorious, so this view goes, for his failure to rely adequately upon reason in his moral deliberations. As Devlin freely admits, the common man “is not expected to reason about anything and his judgement may be largely a matter of feeling.”38 This, to the philosophically minded, is a defect in common morality which disqualifies it from the sort of uncritical general acceptance by government that Devlin has in mind. In their view, if I understand Devlin, the only morality which government may properly ally itself with in this manner is one which is universally and absolutely true for all people at all times--common morality as it “ought to be.” The philosophically minded will not tolerate government’s involvement with a morality which only exhibits the appearance of truth, due to its being held in common by the members of a particular society--common morality, as it is, is not good enough.

In other words, if government is to ally itself with any morality at all, it must defer in matters of morals to the judgement of the philosophically minded, on

37 Devlin, p. 91.
38 Ibid., p. 15.
the assumption that the "opinion of the trained and educated mind, reached as its owner believes by an unimpassioned rational process, is as a source of morals superior to the opinion of ordinary men." However, Devlin objects to this point of view on a number of grounds. For one thing, he doubts that it is possible to achieve the degree of agreement amongst the philosophically minded which is required to make a collective endeavour like government work:

After centuries of debate men of undoubted reasoning power and honesty of purpose have shown themselves unable to agree on what the moral law should be, differing sometimes upon the answer to the simplest moral problem. To say this is not to deny the value of discussion among moral philosophers or to overlook the possibility that sometime between now and the end of the world universal agreement may be reached, but it is to say that as a guide to the degree of definition required by the lawmaker the method is valueless.

And not only is it valueless because it doesn't allow government to work. It is valueless because it would be somewhat negligent for those in government to become so enamoured of the possibility of absolute truth in morals, and so convinced of the common man's moral fallibility, that they abandon the workable basis of common moral opinion their society already has. As Devlin puts it: "philosophers may philosophize under a shadow of perpetual doubt but the governors of society cannot do their duty if they are not permitted to act upon what they believe." The preservation of a society's common morality requires that those in government be prepared to accept and act upon its various provisions; we cannot, as Devlin says, "forever condemn ourselves to inactivity against evil because of the chance that we may by mistake destroy good." This is a risk that every society must be permitted to take if it is to be allowed to

39 Devlin, p. 93.
40 Ibid.
41 Ibid., p. 122.
42 Devlin, p. 123.
preserve its existence. We can demand that government act upon the highest standards so as to not take this risk on society’s behalf needlessly, but, in Devlin’s view, those who are not willing to take this risk at all "should not be playing an active part in government." 

The second reason why government should not defer to the judgement of the philosophically minded in matters of morals goes to the heart of Devlin’s concept of democracy. In his view, even if it were possible for them to reach some sort of common agreement, it would be unacceptable for government to ally itself with their morality because "a free society is as much offended by the dictates of an intellectual oligarchy as by those of an autocrat." In his view, to make the enforcement of a society’s morality entirely dependent upon the sanction of an intellectual elite would violate a fundamental condition of democracy, without which it would be hard to imagine that a society is free:

Not that all men are born with equal brains—we cannot believe that; but that they have at their command—and that in this they are all born in the same degree—the faculty of telling right from wrong: this is the whole meaning of democracy, for if in this endowment men were not equal, it would be pernicious that in the government of any society they should have equal rights.

Here, Devlin is saying that democracy is a form of political equality which is founded upon the idea that it unacceptable for government to give more weight to the judgement of some people over others. This is because it is believed by democrats that the seat of that judgement which is morally relevant to the conduct of government is an equal endowment in all people. In short, “educated men cannot be put into a separate category for the decision of moral questions.”

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43 Ibid., p. 90.
44 Ibid., p. 93.
45 Ibid., p. 100.
46 Ibid., p. 94.
In Devlin’s view, when government enforces a society’s morality in accordance with the wishes of an intellectual elite, it makes the mistake of thinking that the alleged defects in the common man’s mode of moral judgement have no place in a democracy. And when the philosophically minded complain that such deference has not occurred, they are equally mistaken because “it is naive for such a man to reproach judges and legislators for making what he deems to be irrational law, as if in a democratic society they were the agents only of reason and the controllers of a nation’s thought.”47 In Devlin’s view, it is remarkable to believe that government can behave as such, and yet remain true to the democratic idea which protects society from the Platonics of a philosophical caste:

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 it thinks best. This is not acceptable to Anglo-American thought. It invests the state with the power of determination between good and evil, destroys freedom of conscience, and is the paved road to tyranny.48

So, as Devlin sees it, were a government to defer, in matters of morals, to the judgement of the philosophically minded, it would be acquiescing in a tyranny of elite opinion. The philosophically minded, who cannot bring themselves to accept and concur with the morality of the common man, are resident aliens

47 Devlin, p. 96.
48 Ibid., p. 89. Michael Walzer has also criticised the sort of politics that Devlin sees philosophers as responsible for. Plato is seen as an example of the “heroic” sort of philosopher who “detaches himself from the community of ideas in order to found it again;” a practice which he puts at odds with democracy and the people’s claim to rule. However, unlike Devlin, Walzer is explicit in his recognition of another approach to philosophy which is “contemplative and analytic; those who participate in it take no interest in changing the community whose ideas they study.” See Walzer’s article, “Philosophy and Democracy,” Political Theory 9, No. 3 (August, 1981), pp. 379-399.
within the society in which they find themselves. Their morality is a "rationalist" morality that reflects their supreme ability to suppress the baser faculties of emotion, and correct for errors of reasoning: fatal defects that plague the moral judgements of the common man, and all but eliminates any chance of his morality bearing any degree of correspondence to a level of truth beyond the one created by common agreement in the society to which he belongs. As I understand Devlin, to deny that society has the authority to enforce its morality, on the grounds that morality ought not to bear the defects to which it is prone, is effectively subjecting society to the morality of the philosophically minded and their preoccupation with degrees of truth which lie beyond the existing degree their society finds satisfactory.

So, for reasons having to do with the conditions which allow for governmental action, a duty that the governors of society owe to the governed, and a fundamental requirement of democracy, government should never defer entirely to the moral judgement of the philosophically minded. Truth, and the employment of reason, are important but they are not all important. To some extent, the governors of society will have to bring themselves to associate with, and act upon, standards of morality which are admittedly particular and true in a relative sense. If government assumes that its can have nothing to do with a morality that is not universal and absolute, then it must be prepared to accept the charge that it is unworkable, negligent in its duties, and nothing short of a tyranny of elite opinion.

III. A Caveat on Society's Right to Enforce

Even though Devlin thinks that society is justified in assuming the authority
to enforce its morality—common morality, as it is—and rejecting the suggestion that common agreement, alone, does not provide the grounds to do so, he is cautious about what to conclude from this. For one thing, he does not accept that by showing that this authority exists, he is thereby committed to the view that enforcement (beyond that which inheres naturally in a society’s morality) is automatically indicated. When asked, in an interview, “which aspects of these common ideas are ones that the laws must punish...,” he responded in the following way:

I think you put the thing the wrong way round. I do not say the law must punish; what I say is that you may not say that the law may not in any circumstances punish. Do not ask me, therefore, to start by defining the sort of immorality that the law must punish, because I am simply saying if morality is essential to society you cannot keep the law out of the matter altogether.49

Additionally, in the same vein, he says that: “[I]t is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter.”50

This was the problem that Devlin say with the political philosophy of the Wolfenden Committee: “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. The Report finds it in the principle that the criminal law exists for the protection of individuals....”51 However, Devlin finds this formulation too restrictive because it falsely assumes that society needs no protection beyond the protection of its members as individuals. “The true principle,” he says, “is

51 Ibid., p. 22.
that the exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together.”52

The problem with formulations of the sort that the Wolfenden Committee put forth is not that concern is being shown for the legitimate interests of individuals. Rather, it is that the concern is absolute, uncompromising, and, worst of all, specified in a detached manner from all conceivable circumstances. It stands in the way of what should be government’s paramount concern where immorality is concerned; that of striking the best possible balance between the two principle interests it has to consider. “Morality,” Devlin says, “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.”53 And the basis of this conflict is identified in the following: “Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its locus standi. It cannot be shut out. But the individual has a locus standi too; he cannot be expected to surrender to the judgement of society the whole conduct of his life.”54

The inherent demands of this balancing situation mandates the general authority implied in the idea of government as a punisher of immorality, and the authoritative flexibility this entails. For, “whether it should exercise the power at any given time in its history depends on the situation at that time and

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52 Ibid.
53 Ibid., p. 16.
54 Devlin, p. 15.
requires a balance to be struck between the foreseeable danger to society and the foreseeable damage to the freedom and happiness of the individual." To adhere rigidly to a preconceived specification of the interests of either party is to risk a balance that all sensible people may find far from desirable. As Devlin illustrates: "You may argue that if a man's sins affect only himself it cannot be the concern of society. If he chooses to get drunk every night in the privacy of his own home, is any one except himself the worse for it? But suppose a quarter or a half of the population got drunk every night, what sort of society would that be?" In other words, government cannot be hamstrung, as it is in Devlin's example, by a preconceived specification of an individual's interests which resists all modification in light of changing circumstances which seriously effects the public interest. Rather, government's conduct in the realm of immorality should be governed by, what Devlin thinks of as, "practical" considerations; which are dictated by the needs that are brought to light in the course of seeking the best possible balance between the interested parties. They are, referring back to Devlin's example:

...based on an estimate of what can safely be tolerated whether in public or in private, and shifting from time to time as circumstances change. The licensing laws coupled with high taxation may be all that is needed. But if more be needed there is no doctrinal answer even to complete prohibition. It cannot be said that so much is the law's business but more is not.

The essence of Devlin's "practical" approach to the enforcement of morals is, I think, that it is political: the question to be asked is to what degree should a given item of common morality be enforced; and not, under what circumstances does

55 Devlin, p. 113.
57 Devlin, p. 113.
society have the authority to do so. The latter approach is that of the Wolfenden Report: it makes a society's authority to enforce its morality entirely dependent upon a coincidence between its prohibitions, and those of a morality of individual harm prevention. However, the same situation could exist for any other sort of value, or moral consideration, which is at odds with the full scale enforcement of a society's morality—a situation known as incommensurability. Devlin is not specifically in dispute with the traditional liberal concern with individual liberty. He is concerned with a broader disposition to deny that the enforcement of a society's morality is a competing value, to be thrown into balance with those with which it competes; a situation, the hallmark of which, is the denial that common agreement on moral matters is sufficient to justify enforcement alone. Devlin, for the two reasons that we have considered, thinks that one should not make such a denial because society has a legitimate interest in the enforcement of its morality, regardless of what it is.

However, even though society ought to remain flexible with respect to the enforcement of its morality, it is still possible to formulate some general statements, or principles, concerning the extent to which enforcement should take place; so long as they are a reflection of very settled and established views regarding the relative importance of the value of enforcement, relative to other values with which it conflicts. In Devlin's view, "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."58 What Devlin means is that they are to be of such a non-controversial nature that they can be safely excluded from the practical forum of politics, and administered

without compromise.\textsuperscript{59} This is because no compromise is needed since they represent instances where the degree to which a society's morality should be enforced is largely agreed upon.

This is the meaning of Devlin's often misunderstood view that "nothing should be punished by the law that does not lie beyond the limits of tolerance;"\textsuperscript{60} a point he thought could be identified by feelings of "intolerance, indignation and disgust."\textsuperscript{61} It is easy to overstate the significance of the language being used if the context is not understood. It merely represents Devlin's attempt to develop a test or formula for gauging the way his particular society would estimate the relative importance of individual liberty with respect to the common morality with which it conflicts. One may think that his formulation of this point is too crude, but this doesn't seem to alter the fact that some such formulation is a legitimate activity. As he says, "they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice."\textsuperscript{62}

Devlin has a few other principles of the exact same nature, but they have been totally ignored in all of the critical literature. Without going into details, which are really only pertinent to his impression of English society in his day, it is

\textsuperscript{59} Devlin's seems to think that some principles--such as Mill's harm principle, and that put forth by the Wolfenden Committee--contain important values, which ought to be balanced against the value he attributes to the enforcement of a society's morality, but that their formulation as principles is too extreme to be an acceptable guide in these matters. He values politics as a way of giving expression to important values which are unacceptable as principles. As I will argue in the last chapter, Devlin wishes to exclude from politics, altogether, considerations in this matter which resist modification to a form which is not offensive to society.

\textsuperscript{60} Devlin, \textit{The Enforcement of Morals}, pp. 16-17.

\textsuperscript{61} Ibid., p. 17.

\textsuperscript{62} Ibid.
worthwhile noting that these principles are further examples of values which have been largely reconciled within his society to the competing value placed upon the enforcement of their common morality. He states, for example, that "as far as possible privacy should be respected." Devlin argues that the "general sentiment that the right to privacy is something to be put in the balance against the enforcement of the law," allows for a limited extension of this principle to be put in balance against the enforcement of morality. Clearly, he believe that the strength of this view depends entirely upon the degree to which it accurately reflects the general sentiment of his society. Likewise, Devlin recommends the principle that "the law is concerned with the minimum and not the maximum" of moral exertion. Similarly, the basis for this is his belief that "we all recognize the gap between the moral law and the law of the land." Of course, there could be societies that did not make such a distinction, so clearly Devlin derives the strength of such a principle from the fact that it accurately reflects the views of his society.

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64 Ibid., p. 19.  
65 Ibid.  
66 Ibid.
CHAPTER TWO
Devlin’s Critics

In examining some of the principle arguments that have been levelled against Devlin’s ideas, I will consider what appears to be three categories of criticism. Although there will be some overlap, I believe that they are distinct enough to merit treatment on their own. The first category concerns criticism of Devlin’s claim that common morality, as such, is essential to the existence of society. This, we will recall, was the basis of Devlin’s claim that society has the authority to enforce its morality as a general matter, and not in those few instances where certain special circumstances are present. Critics in this category are attempting to show that, for various reasons, Devlin’s concept of social preservation is unable to provide the authority he desires. I will call this the argument of Misplaced Fears. A second category concerns a critique of Devlin’s periodic references to democracy, and his attempt to derive from this a doctrine of anti-elitism. I will call this category, Democracy’s Misuse. The last category of criticism is slightly nondescript. Various critics have seen Devlin as siding too closely with the common man; to the point where he seems to become unaware of the dangers of irrationalism and the modest and achievable role that reason and intellect can play in government. I will call this the argument of Reasonable Elitism.

I. Misplaced Fears

The one critic who has dwelt the longest on this first category of criticism is H. L. A. Hart. In his view, Devlin has not presented the necessary grounds for holding that any standard of conduct which is held in common by a society’s...
members is eligible for enforcement. As we will recall, Devlin thought that he had, for the twin reasons that some degree of enforcement is required if any morality is to be preserved, and that common morality, as such, must be preserved because it constitutes the terms of a society’s existence. The only real question for Devlin, then, is what criteria, as a general matter, will result in government achieving the best degree of enforcement.

However, Hart disputes these two pillars upon which Devlin advocates such uncritical deference to the moral judgement of the common man. For one thing, he criticises Devlin for assuming that society is unable to preserve its common morality without legal enforcement. Far from being the self-evident fact that Devlin makes it out to be, Hart thinks that it is a theory “requiring the support of empirical facts, and there is very little evidence to support the idea that morality is best taught by fear of legal punishment.” In addition, speaking more of sexual morality, he considers it very unlikely that legal enforcement would be found to be a “significant factor in preserving the general sense” that certain practices are immoral. The most that he expects legal punishment to be able to bring about is conformity out of fear, and this, he suggests, “contributes nothing to the general sense that these practices are morally wrong.” This, although he does not directly say so, is apparently due to his belief that what is morally valuable in conformity to a code of conduct is “voluntary restraint, not submission to coercion, which seems quite empty of moral value.”

It is perhaps worth noting that Devlin does not expect common morality to be

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67 Ibid., p. 58.
68 Ibid., p. 67.
69 Ibid., p. 68.
70 Ibid., p. 58 (italics in original).
preserved through legal enforcement because he thinks that this is a good way in which it can be taught, or to convey the sort of lesson that would lead one to conform in a voluntary way. As was noted above, Devlin expects this task to be performed by moral teaching; which can be derived from various sources, most notably, in his view, religion. He is aware that the law is the wrong instrument for this task: "If the whole dead weight of sin were ever to be allowed to fall upon the law, it could not take the strain. If at any point there is a lack of clear and convincing moral teaching, the administration of the law suffers." Instead, legal enforcement is required for the preservation of common morality, as such, because, in Devlin's view, "we have not yet got rid of that troublesome minority who will yield only to compulsion." There is, apparently, always to be found people whose sense of the import of what they have been taught is not great enough to bring about voluntary compliance. Since Devlin regards a failure to comply with common morality, as such, as inherently subversive of it, some degree of legal enforcement is required in order to establish a level within which the spread of immorality is compatible with its continued existence.

This brings us to Hart's second point of criticism, because the more important reason Devlin gives for thinking that common morality, as such, is eligible for legal enforcement is his view that it is essential to the existence of society. Without this premise, the mere fact that common morality requires legal enforcement for its preservation does not seem to justify government considering it eligible for such in every case. We will recall that Devlin holds the view that societies are composed of, or consist of, the order that one finds

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71 See note 15 of this essay.
72 Devlin, p. 23.
73 Ibid., p. 105.
amongst a particular group of people, and that common morality, as such, is esteemed as the source of that order. This leads him to regard a society's common morality as, to use my phrase, the terms of *its* existence; and on these grounds it seems intelligible to him that they should be regarded as essential: something that society must preserve if it is to exist and therefore eligible for government enforcement.

However, Hart does not accept Devlin's argument. He once again accuses Devlin of treating as self-evident something which is nothing more than a hypothesis, and which requires confirming empirical evidence before it can be accepted. As he puts it, Devlin's notion of the way in which common morality, as such, is essential to a society's existence "seems to constitute a highly ambitious empirical generalization about a necessary condition for the existence or continued existence of a society, and so give us a sufficient condition for the disintegration of society."74 As Hart observes, other than vague references to historical experience, Devlin neither offers the required evidence nor shows any appreciation that evidence is needed. In Hart's view, the sort of evidence needed to establish a causal connection between immorality, as such, and social disintegration is of two sorts. Either historical study of actual societies that have disintegrated (which he thinks is unlikely to supply useful generalizations) or social psychological evidence. The latter could possibly provide support for the notion that all morality is linked in such a way in people's minds that immorality in any given area, no matter how innocuous, must engender immorality in all areas; making all social life impossible.75

75 Ibid., pp. 260-262.
With reference to this last point, it is interesting to note that Hart accepts the proposition that common morality, as such, is essential to the existence of society when society is conceived in a general way to mean a degree of social order that no society can do without. "It is of course clear," in his view, "(and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others." According to Hart: "Hobbes and Hume have supplied us with general characterizations of this moral minimum essential for social life: they include rules restraining the free use of violence and minimal forms of rules regarding honesty, promise-keeping, fair dealing, and property." These, Hart maintains, are to be found as part of the common morality of any society because, in their loss, society would no longer possess the "main conditions which make it possible and worthwhile for men to live together in close proximity to each other." Such, however, cannot, at least without empirical evidence, be said of the remainder which consists of "moral rules which may differ from society to society," and "relates 'neither to vital interests of society not to a minimum of justice.'"

In effect, Hart is accepting Devlin's claim in the most general of senses. He is saying that the utilitarian moral minimum of Hobbes and Hume constitutes the terms of existence for a society whose members are all people at all times: it is a universal definition of society. No doubt Hart would regard the preservation of this morality as essential to the existence of a society so conceived. However, as seen above, he has yet to be convinced that the same can be said for a more

76 Hart, Law, Liberty, and Morality, p. 51.
77 Hart, Essays in Jurisprudence and Philosophy, p. 258.
78 Ibid., p. 257.
79 Ibid., p. 258.
exclusive definition of society: one which does not attempt to be universal, but is
admittedly particular in membership. One whose terms of existence, in addition
to what is required for social order generally, includes certain moral standards
that need not be part of every society. In short, the problem Hart has with Devlin
is not so much that he considers common morality, as such, the terms of a
society’s existence—ie., that he thinks it is appropriate to define society in terms of
common morality. In fact, Hart accepts as “quite plausible” a “definition of
society as a body of men who hold certain moral views in common.”

The problem instead seems to be that Devlin’s definition of society is too narrow and
exclusive; that it includes amongst its essential morality prohibitions against
certain practices which other societies have found perfectly congenial.

No where, to my knowledge, does Hart suggest why the burden of proof
should be higher, or more empirically demanding, for a society which is defined
in terms of common moral standards that are not exclusively universal. Perhaps
sensing this omission, Hart criticises Devlin’s narrow, or less than universal,
deinition of society from another angle. Here, the problem is not that some of
the terms of common morality used to define society are particular historical
contingencies but rather, that Devlin’s definition is too extensive, specific and
precise, where it really should be general and nondescript. As Hart sees it, Devlin
“appears to move from the acceptable proposition that some shared morality is
essential to the existence of any society to the unacceptable proposition that a
society is identical with its morality as that is at any given moment of its history,
so that a change in its morality is tantamount to the destruction of society.”

In Hart’s view, this “latter proposition is absurd”\(^8\) because it would prevent us from being able to say “that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place.”\(^8\) However, this would be more compelling criticism if this was what Devlin was actually saying. Devlin is not saying that a change in a given item of common morality means that society has ceased to exist, anymore than a change in, say, the moral rules regarding what constitutes fair-dealing would destroy the minimal form of society Hart accepts. For Devlin, it is a matter of degree, as he illustrates with reference to the rule of a game:

I would venture to assert, for example, that you cannot have a game without rules and that if there were no rules there would be no game...If I am asked whether a change in the rules means that one game has disappeared and another has taken its place, I would reply probably not, but that it would depend on the extent of the change.\(^8\)

Devlin, we will recall, only held that immorality, as such, was of its nature capable of threatening the existence of society. By which he meant that it would have to spread to a certain point before one could effectively say that the morality in question had disappeared. Devlin’s claim is that if this same morality is used to define society--if common morality, as such, constitutes the terms of its existence--then society will disappear as well. It may well be true that Devlin’s view of human nature is too negative and that society would not likely see the mass exodus from its common morality that is feared, but this is a different matter. It belongs more as a consideration governing the use of the law and not as a count against its use altogether.

Staying with the theme of social definition, Hart’s last angle of attack is to

\(^8\) Ibid.
\(^8\) Ibid., pp. 51-52.
\(^8\) Devlin, see note p. 13.
suggest that if a less than universal definition of society is to be maintained, one should dispense with making the sorts of claims that he thinks require empirical evidence altogether. Instead, one must:

...adopt some variant of the claim that when groups of men have developed a common form of life rich enough to include a common morality, this is something which ought to be preserved. One very obvious form of this claim is the conservative thesis that the majority have a right in these circumstances to defend their existing moral environment from change.  

In instances such as these, Hart concedes that it would not be absurd to identify society with common morality, as such. This is because claims of this sort attempt to preserve society in an entirely different sense:

Of course, very often the expressions 'society', 'existence of society', and 'the same society' are used in [ways which] refer to a form or type of social life individuated by a certain morality or moral code...A society in the sense of a form or type of social life can change, disappear, or be succeeded by different forms of society without any phenomenon describable as 'disintegration' or 'members drifting apart'.

In effect, Hart is saying that if one persists in using a definition of society which includes non-universal terms of morality amongst its essential terms, then one must modify the sort of claim being made. One must abandon dramatic descriptions of what a failure to preserve this morality would mean in favour of more banal scenarios: this is all that one is entitled to if one is unable to muster the empirical data that is allegedly required. Hart and others have detected Devlin’s apparent use of the conservative thesis and have been critical of his use of this as well. However, I will consider their criticism later since their formulation of the conservative thesis is that it is a version of majoritarianism in morals and corresponds more to my third category of critical reaction: Devlin’s

85 Hart, Essays in Jurisprudence and Philosophy, p. 251.
appeal to popular government.

I will conclude this first category of critical reaction by considering the view put forth by Richard Wollheim.\footnote{Richard Wollheim, “Crime, Sin, and Mr. Justice Devlin,” *Encounter*, November, 1959, pp. 34-40.} In many respects, his critique of Devlin’s claim, that common morality, as such, is essential to the existence of society, is more radical than Hart’s. For whereas Hart was prepared to concede that some common morality may be thought of as such—either in terms of a moral minimum, or as applying to a diluted notion of society—Wollheim suggests that we should not concede Devlin’s claim to any degree because it is antiquated:

Over the last three hundred years it has been characteristic of the civilised parts of Europe—their pride, some would say—to develop a theory of politics which is in radical contrast to Devlin’s. According to this theory the identity, and the continuity, of a society resides not in the common possession of a single morality but in the mutual toleration of different moralities. This theory is called Liberalism.\footnote{Ibid., p. 38.}

Wollheim then goes on to say that “those who find Liberalism for one reason or another acceptable must reject the conception of society on which the whole of Devlin’s argument depends.”\footnote{Ibid., p. 39.}

Wollheim doesn’t give us any reasons for why we should whole heartedly endorse the political perspective which rejects Devlin’s claim altogether; other than his assurance that, despite “uncompromising rivals,” it “still is the theory of most ‘uncommitted’ thinkers in mid-twentieth-century Europe.”\footnote{Ibid., p. 38.} So, on the assumption that the political theory which accepts Devlin’s claim is largely bereft of intellectual respectability, he proceeds to defend the liberal view of society from the one avenue of attack to which it is still vulnerable. This is the claim

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\footnote{Ibid., p. 38.}
that a liberal society indeed does have a common morality, as such, and that it
consist of the very toleration that marked it off from the other. "For toleration is
a moral principle or idea, and why should we not therefore, in accordance with
Devlin's theory, characterise the Liberal society as a society that finds its moral
identity in the common or generally accepted principle of toleration?"90 We
can't, according to Wollheim, because toleration is apparently not the right sort
of moral principle. The right sort of morality is apparently one which is "rich
and comprehensive enough for conformity to it to result in behaviour of a
uniform kind over a fairly large area of human activity."91 As he sees it, this
must be the case because the problem posed by a society's possession of a
common morality is "how much of this behaviour is to be enforced by the
law."92 Now, toleration as a common morality could never pose this sort of
problem because, in his view, it is not capable for a society which consists of
nothing but people tolerating the moral differences amongst themselves to
exhibit uniform behaviour. As he puts it: "toleration cannot be seen as a
morality conformity to which issues in uniform behaviour. A society can be
marked by universal toleration and yet display no common pattern of
behaviour: for what is tolerated may in each case be different."93

However, if this is true, then it would mean that a society which ceased to be
marked by toleration would not be subjected to a loss in its liberal character, and
this seems almost unbelievable given the terms upon which Wollheim defined
the Liberal society. Perhaps what he really means is that toleration is the
supreme value amongst the common morality of a liberal society; so much so

90 Ibid.
91 Ibid.
92 Ibid., p.39.
93 Ibid., p. 39.
that whatever else its members may hold in common is barely worth mentioning. Whereas, amongst the common morality of Devlin’s sort of society, toleration may be valued to some extent, but in a weak and attenuated form which eliminates any presumption in favour of moral diversity. Devlin certainly seems to hold this view:

I am not one of those who believe that the only function of law is to preserve the status quo. There is always a host of new ideas galloping around the outskirts of a society’s thought. All of them seek admission but each must first win its spurs; the law at first resists, but will submit to a conqueror and become his servant...New policies must gather strength before they can force an entry: when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.94

Whether Wollheim would accept the modification of his critical position, I cannot say. Suffice to say, the sorts of criticism we have considered in this first category have shown that perhaps Devlin is not in such fundamental opposition to his critics as is sometimes supposed. The differences, though still considerable, may be more of degree than anything else. I will turn now to the second category of criticism.

II. Democracy’s Misuse

We will recall that part of Devlin’s claim, that a given society’s morality is eligible for enforcement in its entirety, is grounded upon an appeal to what is acceptable in a democracy. Specifically, he suggests that a government which makes the eligibility of common morality dependent or conditional upon its degree of correspondence with reason or some more general standard purporting to be absolute moral truth, or at least common morality as it ought to be, is not

acting democratically. It is a tyranny of elite opinion and nothing that a free society ought to tolerate. Instead, government must content itself with common morality, as it is, and find some measure of honour in the fact that, in doing so, it becomes the guardian of a society's right to preserve its existence—which, in Devlin's view, affords government the only basis from which it can enforce standards of morality upon society in a non-tyrannical fashion.

Now, some of Devlin's critics have been alarmed by what they see in this view. According to H. L. A. Hart, Devlin is showing "vestiges of the confusion" that a belief in democracy is liable to inspire. As he puts it: "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. This is a misunderstanding of democracy which still menaces individual liberty..."\(^95\) The misunderstanding is a result of a "failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted."\(^96\) This, as Hart reminds us, was a point that Mill was very passionate about. Mill's view, that the individual should be absolutely free to exercise the demands of his character, short of injury to others, was offered as a fundamental condition of social freedom, regardless of the sort of government that a given society may be under.\(^97\) Mill recognised that in practice democratic government, or the rule of the people, almost certainly meant the rule of the majority; and though it offers more security for the people's freedom than any other form of government, it still exposes minorities

\(^95\) Hart, *Law, Liberty, and Morality*, p. 79.

\(^96\) Ibid.

to the tyranny of the majority. In Mill’s view, unless the freedom sought by a minority is harmful to others, its suppression by a majority is an abuse of power.

This point is well taken, but I do not think that it is quite so applicable to Devlin’s views as Hart would think. For one thing, the morality that Devlin is concerned about is not merely the morality of the majority of a society’s members. Instead, he is referring to a morality that a society’s members largely hold in common; a morality that one can, without exaggeration or insult to some minority, consider to be the morality of a given society. This is why he often uses monogamy as an example. We all know that it is not the only form of marital union, and that some people will be indifferent to the institution altogether, but the important point for Devlin is that there is not likely to be anyone who seriously believes that the alternatives have any moral merit. It is on points such as these, where a society’s members have reached the limit of their moral imagination and the possibilities of moral pluralism have vanished, that a common moral opinion is effectively in place. In such instances, if I understand Devlin, there will still be people who deviate from these standards but the freedom they seek is a worthless freedom; as it is all but impossible to imagine that they (unless they are joking or naive) regard it as distinct moral pathway.

Devlin’s point is, I think, that, while this does not necessarily mean that such a minority should suffer at the hands of the majority, it does mean that the majority’s morality retains its authority for the minority. For example, we wouldn’t think that habitual or career criminals deserve to be exempt from the law they violate: if theirs is a way of life, it is beyond our ability to imagine it as
one which possess any moral merit. The presence of such a minority does not require the majority to amend or reconfigure the morality that they are attributing to society as a whole. It will certainly have a bearing upon the matter of government enforcement, but it does not affect its authoritative standing with government. Government ought to recognise it as common morality and treat it with the respect that democracy requires.

This brings me to the second way in which Hart’s criticism is not directly applicable to Devlin. For, the respect that Devlin thinks the common man is due in a democracy is not to “dictate how all shall live.” He makes no immediate call for common morality, as such, to be translated into law. Instead, he is saying that a democratic or popular governmental institution must consider it sufficient for the purposes of enforcement that a given standard of morality meets with common approval. The eligibility of such a standard for enforcement cannot be made to depend upon its degree of correspondence with some one’s idea of the sorts of standards that should be meeting with common approval. Devlin considers such an attitude in government, not only impractical and potentially negligent, but nothing short of tyranny. According to Devlin, If any one is being dictated to it is the common man, whose moral credentials have been so severely impugned by the enemies of particular, yet common truths, that his social freedom is in doubt.

However, according to Ronald Dworkin, this is a severe misconception. In his view, Devlin is mistaken on this point because he misunderstands the nature of the common morality that a democratic government is obliged to respect: “What is shocking and wrong is not his [Devlin’s] idea that the community’s morality
counts, but his idea of what counts as the community's morality." Devlin advocates that a democratic government should defer in an uncritical way to the moral judgement of the common man; that it ought to be enough for the purposes of eligibility that a given standard of morality is a common one. According to Dworkin, here, Devlin is using "morality" in a very specific sense: "It is true that we sometimes speak of a group’s "morals," or "morality," or "moral beliefs," or "moral positions," or "moral convictions," in what might be called an anthropological sense, meaning to refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals." However, Dworkin thinks that the legislator in a democracy cannot defer in an uncritical way to this anthropological morality. When told that a "moral consensus exists," he or she "must test the credentials of that consensus." The legislator must subject this morality to the critical scrutiny of a deeper, more fundamental, portion of his community's morality, the only portion which the democratic legislator is bound to respect:

A legislator who proceeds in this way, who refuses to take popular indignation, intolerance and disgust as the moral conviction of his community, is not guilty of moral elitism. He is not simply setting his own educated views against those of a vast public which rejects them. He is doing his best to enforce a distinct, and fundamentally important, part of his community's morality, a consensus more essential to society's existence in the form we know it than the opinion Lord Devlin bids him follow.

According to Dworkin, the "conventional morality" we all share contains various standards and criteria which form the "background" of moral argument,

99 Ibid., p. 61.
100 Ibid., p.68.
101 Ibid., p. 69.
and which we rely upon to “enforce the difference between positions we must respect, although we think them wrong, and positions we need not respect because they offend some ground rule of moral reasoning.”\textsuperscript{102} In other words, whether he knows it or not, part of the common man’s morality includes various criteria for distinguishing between a genuine moral position and, what one might call, a false moral position. In Dworkin’s view, when we are cognizant of these criteria we tend to use the term “morality” in a different sense which may be contrasted with the merely descriptive anthropological sense: “we also use some of these terms, particularly “moral position” and “moral conviction,” in a discriminatory sense, to contrast the positions they describe with prejudices, rationalizations, matters of personal aversion or taste, arbitrary stands, and the like.”\textsuperscript{103} On Dworkin’s view, it is part of our conventional morality, a deep background assumption that the common man is presumed to accept, that positions which can be shown to be founded upon these sorts of reasons have no moral weight--i.e., they are not genuine moral positions.

However, it is not simply because a good deal of the anthropological morality the democratic legislator receives may be, in fact, of this false variety that he or she must screen it and test its credentials. This, as Dworkin appears to realise, does not seem to justify such a procedure by government. There is no reason why the common man could not say: “So what if our opinions lack what is required to properly call them moral without offence to the various cannons of moral reasoning, they are common opinions we feel passionate about and as free people we do not have to tolerate a government that feels free to anoint them here and there by standards we do not understand.” Instead, Dworkin seems to

\textsuperscript{102} Ibid., p. 62.
\textsuperscript{103} Ibid., p. 61.
fortify the conventional morality we are all supposed to accept with some further items of political morality which would seem to justify the governmental procedures he advocates. According to Dworkin, if the anthropological morality were found to be deficient in the ways specified, "the principles of democracy we follow do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality." 104 Nor, he goes on to say, would the "bulk of the community then be entitled to follow its own lights, for the community does not extend that privilege to one who acts on the basis of prejudice, rationalization, or personal aversion." 105 In our community, whether the common man is aware of it or not, "the distinction between these and moral convictions in the discriminatory sense, exists largely to mark off the former as the sort of positions one is not entitled to pursue." 106 These, then, are elements of our conventional political morality—presumably accepted by the common man as the background of moral argument—which the legislator in a democracy should enforce, through a process whereby he or she screens the anthropological morality which is alive in the streets. He or she should be able to do so without fear of being seen as an intellectual tyrant because, presumably, the common man realises that the opinions he thinks are moral are only entitled to respect in a democracy if he can show that they are moral in a discriminatory sense.

By way of criticism of Dworkin's views, I could repeat that Devlin's claim is not that a democratic government must enforce common morality, as such. It is

104 Ibid., p. 68.
105 Ibid.
106 Ibid.
only that such a government must regard it as being eligible for enforcement in its entirety. The extent to which it does is left up to the initiative of those who are entrusted with political power by a popular vote. Devlin treats this as a separate issue, and some of his critics (as we shall explore in the last category of criticism) have had a lot to say about this. If Devlin were making the stronger claim for democracy that Dworkin seems to assume—that common morality, as such, must be enforced—then his criticism would be quite damning. However, Devlin’s appeal to democratic government is an argument against screening common morality for disqualifying errors, it argues against a government that only accepts the authority of common morality in an edited form. In this context, it is hard to see how Dworkin’s views would not satisfy Devlin’s notion of intellectual tyranny. Certainly the screening he proposes suggests that it is not enough, for the purposes of being considered eligible for enforcement, that a standard of conduct be commonly regarded as wrong. For him, it must be wrong in the discriminatory sense that legislators are encouraged to solely regard.

Additionally, I do not think that Dworkin can escape the charge of elitism by claiming that he merely asks the legislator to enforce a deeper and (for reasons he never explains) more important portion of common morality, as such. The reason, I believe, is as follows: a common morality that people are totally ignorant of does not exist; common morality only exist in actually being held in common. However, it is possible, I suppose, that there could be deeper portions of a common morality which are applied haphazardly, or whose injunctions are not fully understood all the time. But, if this is claimed, then Dworkin’s screening procedure would have to be performed by members of the society who are not inclined to error in this way. Yet, this would certainly be elitist because it
would mean that there are some people within any community who are uniquely qualified for legislative duty: those with uninterrupted access to the community’s deeper, more fundamental, moral commitments. Lastly, the notion that a society could have deeper items of common morality which are of the political nature Dworkin describes is most assuredly something that the people are completely ignorant of—and hence, has a dubious claim to existence—because if they were not, there wouldn’t be any reason for the common man to have moral opinions that he thought worth submitting to his government in an unscreened form. Or, to put it differently, presumably he would know that his government ought not to defer in an uncritical manner to his unscreened morality, in which case he ought to feel it an imposition when they do.

III. Reasonable Elitism

It is, of course, always open for some one to claim that a certain amount of elitism is justified in government, democratic or otherwise. One could argue that the very serious nature of the business of legislating for a society requires that political education—and other considerations relating to the idea of intellectual preparedness for government—have a certain place in our political thought. Or, like the utilitarians, one can start with the premise that legal coercion and the deprivation of individual liberty are inherently objectionable and therefore require special sorts of reasons for their justification; reasons that it is fair to assume many people might be ignorant of. As Hart puts it, “the use of legal coercion by any society calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good.”

107 The idea of political education has been explored by Michael Oakeshott in his essay of the same name. Mill, in thinking about representative government, has explored the idea of intellectual preparedness.

On this view, the legislator must have recourse to a certain moral calculus which, like any skill, may need to be acquired to some degree. To the extent that its possession is thought to make one especially qualified for legislative duty, it may be seen as a modest form of elitism which many people would likely accept. In the simplest sense, the defenders of this view are making a plea for a legislative method where the legislator is governed by something more than the emotions and feelings of the common man; if there is any reasoning at the root of his emotions and feelings it is not reason enough to recommend them to the legislator as the sole guide to his actions, nor can we assume that what reasoning there is is the embodiment of a coherent value which may then be considered in relation to others. In refusing to be governed by whatever degree of reasoning may or may not lie behind emotion and feeling, government fights off a degree of irrationalism which would make the utilitarian moral calculus (at least the truncated sort described above) an impossibility.

One common theme amongst Devlin’s critics is that he seems to embrace, at a crucial stage, a degree of irrationalism in government which is totally unacceptable. Or, to put it differently, he is rejecting at a crucial stage certain modest levels of elitism in government which are totally justifiable, through an all too uncritical deference to the moral judgement of the common man. The crucial stage in question concerns the rigours of the method by which common morality as such is translated into law. Devlin is seen to be advocating a suspension of the method which they believe to be appropriate for government to follow in favour of a simple attempt to pair the law up with items of common morality exhibiting the requisite depth of feeling. In Hart’s view, “this plainly is no adequate substitute for a reasoned estimate of the damage to the fabric of
society likely to ensue if it [immorality, as such] is not suppressed.”

In Hart’s view, Devlin’s method is substandard as a guide for the legislator because it fails to ask basic questions which are well within the power of reason to answer. In his view, “it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society.” No matter how intense the feeling behind a common moral judgement, Hart suggests that government should not avoid asking the sorts of questions to which answers are needed before one can sensibly recommend using the law:

First, we must ask whether a practice which offends moral feeling is harmful, independently of its repercussion on the general moral code. Secondly, what about repercussion on the moral code? Is it really true that a failure to translate this item of general morality into criminal law will jeopardize the whole fabric of morality and so of society.

However, this method does not end here. For even if a case for enforcement can be made out, thinkers like Mill and Hart would still want to be sure that the practice in question was not something which might be better enforced by the weight of social opinion, knowing full well that there is no point to having a cure which it worse than the disease.

As was noted earlier, this method being described is associated with utilitarianism and the thought of Jeremy Bentham. As one critic, Graham Hughes, has put it: “Lord Devlin’s thesis is so very disquieting because it constitutes an attack on the whole Benthamite position of rational debate about public decision making.” On Hughes’ interpretation, one of the hallmarks of

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110 Ibid.
111 Ibid.
this rational method is the insistence that we "do our best to express our disgust in the language of values."\textsuperscript{113} There must be a clear articulation of the values which are at stake as government proceeds to consider legislation. This is done, not to eliminate irrationality, but to maximize rationality; the former is admitted to be impossible: "The element of irrationality that inheres in any value judgment inheres in this method also and the method is advanced therefore not because it is wholly rational but because it is as rational as you can get and frankly confesses its irrational aspects."\textsuperscript{114} According to Hughes, the common man's feelings of disgust should not serve as a guide to legislation because they are difficult to "state in the form of a defensible value judgment."\textsuperscript{115} The only conceivable exception Hughes contemplates is a situation where ignoring the common man's strong feelings "would lead to disturbance of a kind more harmful than the prohibition in question."\textsuperscript{116} Therefore, the feelings of the common man will at times limit and impede a government's legislative options, but this is but "one factor to be considered" and "it can never replace careful investigation of the social consequences of conduct and criminal prohibition."\textsuperscript{117}

There is, then, according to some of Devlin's critics, a rational method of legislative contemplation that does not make outrageous claims on behalf of human reason. It is rational because, more than anything else, it is thorough in its consideration of all the sorts of questions we know ought to be asked; we cannot be faulted for those we did not know to ask, unless for some reason we ought to have known. Devlin, on the other hand, is seen to be dispensing too

\textsuperscript{113} Ibid., p. 676. 
\textsuperscript{114} Ibid., p. 682. 
\textsuperscript{115} Ibid., p. 676. 
\textsuperscript{116} Ibid., p. 682. 
\textsuperscript{117} Ibid.
quickly with this reasonable method and potentially sacrificing important values it serves to protect. It is enough for him that the common man’s feelings are intense enough and that the law’s use reflects the degree of usage the common man considers appropriate.

However, as I understand him, Devlin does not doubt that the sort of method that liberals and utilitarians bid government to follow is rational. Nor does he doubt that there are other values to consider in addition to those which are secured by the enforcement of common morality, as such. As I noted earlier, Devlin’s approach to the enforcement of a society’s morality is that it should be a practical, political, affair. There should be a consideration of the various values which compete with the value that Devlin thinks society may legitimately attach to the enforcement of its morality. However, he thinks that reason has outstayed its welcome when it becomes resentful of having to make concessions to a figure like the common man; whose inarticulateness and coarse faculties are scarcely thought to warrant a case for political equality.

It is, I think, a misinterpretation to think that Devlin is denigrating reason and exalting feeling and emotion without adequate compensation. His concern is to show that there is a point at which reason is purchased at too high a price. It is perhaps unfortunate that Devlin did not do more to dispel the perception that there was some special significance to the formulation he used to mark the point at which members of his society would likely draw the line between individual liberty and authority—“intolerance, indignation, and disgust.” This is nothing more than a rough formula that he thought the legislator could apply with confidence in his particular society, it is not meant to suggest that feeling and
emotion have some intrinsic moral worth. What does have intrinsic moral worth is the morality that a society's members hold in common; not because it is the height of reason, but because it is the product of common reason. In Devlin's view, when common reason is not thought to provide sufficient grounds for some degree of enforcement the price is too high, regardless of the intellectual pedigree of those who say the opposite. This is not to abandon a rational method of legislative contemplation, it is merely to say that there are morally relevant limits to such a method.
CHAPTER THREE
Politics and the Art of Exclusion

Lord Devlin’s approach to the enforcement of morals is that it is a practical affair, by which I understand him to mean that it is a political affair. Government, on this view, must determine the extent to which it will enforce a society’s morality on the assumption that the value in doing so must be balanced against other values which argue in the opposite direction. Its character as a political affair is threatened when these latter values assume an importance, in the minds of some, which makes the thought of compromise and partial victory a distasteful scenario; when the flexibility inherent in a political context is exchanged for rigid formulations and set asides which define or predetermine political decisions, in which they have an interest, for all time. Devlin attempts to preserve the political character of this affair by investing society with a right, or an unconditional authority, to enforce its morality: a kind of assurance that society will always have the authority to enforce its morality to some degree.

The implication of this view is that government, when considering the enforcement of a society’s morality, must exclude considerations from its deliberations which deny (implicitly or explicitly) that society has this authority. These considerations—which I have called rationalist—are to be excluded from politics; they have no moral weight in that context. In this respect, Devlin is much like some contemporary political thinkers for whom political exclusion is an important practice, though for very different reasons. Before exploring these ideas and their similarity with Devlin’s, I need to clarify his position a little further.
I. Devlin's Version of Political Exclusion

Devlin's political thought is anti-political, in a certain respect, at the level of institutionalised politics: his view of the way in which government should behave with respect to rationalist criticism of a society's morality is like a lone common law judge, who risks squandering his social usefulness and tolerability to the public if he is wooed by moral ideas the people do not endorse. The sort of compromise and accommodation to one another's point of view that is the daily fare of politics should not occupy government where a society's morality is being criticised in this fashion. As he puts it (referring once again to the example of a society whose morality provides solely for monogamous marriage) "it would be useless for him [an advocate of polygamy] to stage a debate designed to prove that polygamy was theologically more correct and socially preferable...."

In other words, government should turn a deaf ear to the rationalist critic who has seen the moral possibilities beyond the boundaries of his society and the limits of its common moral imagination. Devlin's view protects politics at an entirely different level; a level that is pre-institutional and largely unconsciously participated in. It is not a rational politics in the sense that there is a public airing and exchange of opposing points of view and rival considerations. It is simply the mutual accommodation and general alignment which occurs when the members of a given society come to live their lives in the same way, out of the common conviction that this is as it ought to be. Not the whole of their lives, just enough that there is now a common order where before there was none.

\[118\text{ For Devlin's view of way in which it is proper for judges to make law, see his essay, "Judges and Lawmakers" in } \textit{The Modern Law Review.}\]

\[119\text{ Devlin, p. 9.}\]
However, to many this notion of politics will seem paltry and uninspiring, barely worth even calling it by the name. And indeed it is, I merely call it a form of politics—or a certain level at which something like it occurs—in order to contrast it with what we normally think of as politics: “Politics as an institution is the conflict of differing interests (whether ideal or material) in an acknowledged mutual context. Politics as an activity is the conciliation of these differing interests in the public context created by a state or maintained by a government.”120 Crick’s point in this passage is that the sort of freedom which is politics is totally dependent upon the order that government provides: “Politics cannot exist without government any more than freedom can exist without order: freedom is always freedom within a context.”121 Now, Devlin seems to be saying that government should not provide this context for politics when the disputants are the common man and the rationalist critic: the self-government that society has already achieved is government enough. The sort of consensus that a conciliation between these two interests would represent is a moral order that society would not recognise, and its imposition upon society is something that Devlin has tried to argue against. In his view, government is wrong to feel as though it is under any sort of obligation to cede any ground to the rationalist critic, so long as the force of his criticism continues to derive from the view that, properly speaking, the common man’s morality is not true or genuine morality. As Devlin puts it, “it is much easier to obtain the repeal of a law by persuading the law-maker that on balance it is doing more harm than good than by denouncing him as a meddler who ought to be minding his own business.”122 Of course, if he were to do this, he would no longer be a rationalist (in Devlin’s

121 Ibid.
122 Devlin, p. 117.

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sense) but a more practical minded person with whom Devlin thinks that government may permit the common man to deal. It is an idea like this which lies behind J. F. Stephen’s view that government ought to accept that society is “competent to decide that gross vice is a bad thing” and that it ought not to encourage a politics where the “state” is required to “stand bandying compliments with pimps.”

In Devlin’s view, there are limits to the sort of politics that society ought to engage in. When this limit is reached, it ought to withhold the extension of government any further in order that politics becomes an impossibility; the institution is no longer needed because it is only sought by people who dislike a common judgement that society is content with because it is not perfect or absolutely true. At points where its members have reached a common moral judgement, society ought to hold to the order that has been realised and the degree of government that has brought them to that point. Sometimes it is the task of government to make sure that government does not get out of hand and conjure-up work to be done that no one subject to its authority is asking to be done. Government, on this view, must sometimes shut its doors, cancel further political debate, and defend the political decisions that government has brought forth to that point. On such occasions, as Devlin seems to suggest, it does not particularly matter if the level at which government has enabled a political decision to occur is an arena ruled by emotions, feelings, or any other irrational faculty of apprehension, all that matters is that society seems to have established the rules from which a common order is derived. It is the occasion in which Michael Oakeshott has found it most appropriate to recommend a conservative

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disposition throughout government. I will quote it in full because nothing so succinct can be found in Devlin’s work:

Government, then, as the conservative in this matter understand it, does not begin with a vision of another, different and better world, but with the observation of the self-government practised even by men of passion in the conduct of their enterprise; it begins in the informal adjustments of interest to one another which are designed to release those who are apt to collide from the mutual frustration of a collision. Sometimes these adjustments are no more than agreements between two parties to keep out of each other’s way; sometimes they are of wider application and more durable character, such as the International Rules for the prevention of collisions at sea. In short, the intimations of government are to be found in ritual, not in religion or philosophy; in the enjoyment of orderly and peaceable behaviour, not in the search for truth or perfection.124

According to Devlin, government’s task with respect to the morality that society’s members share is, not to encourage further politics, but to rule; which, to Oakeshott, means being like “the umpire whose business is to administer the rules of the game, or the chairman who governs the debate according to known rules but does not himself participate in it.”125 This is what I think Devlin means when he encourages government to accept society’s morality at face value and claim a general right to enforce it to some degree. If there is any politics at this stage, it is not politics with the rationalist, but more practical-minded people whose only dispute is over the degree of government’s involvement with society’s morality, not that it is involved with it at all. The general idea is that innovation is sometimes called for in the way in which government regards a society’s morality; political decisions must be made so that the degree of

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124 Michael Oakeshott, “On being Conservative,” in his Rationalism in Politics (London: Methuen, 1962), p. 188. There are, of course, significant difference between Oakeshott and Devlin; even within the passage quoted. Where Oakeshott is illustrative is in the general character he ascribes to government when it is confronted with the fact that to, some extent, society has successfully been able to govern itself.
125 Ibid., p. 187.
enforcement best reflects the views which abound throughout society. But Devlin draws the line at the innovation which would result from a political decision between the common man and his rationalist critics. Here, government's newly amended views would not be a reflection of views one could find in society but an imposition from beyond imposing unwanted change; and if one accepts that the conservative style of governing is appropriate in these circumstances, then, in Oakeshott's words, one "will have nothing to do with innovations designed to meet merely hypothetical situations."\textsuperscript{126}

If I am right in my interpretation of Devlin, then we may think of him as advocating the view that certain considerations, which he identifies as rationalist, are to be excluded from politics. The extent to which a society's morality is enforced should be a question which is off limits to those who claim that reason—or some other source of intellectual apprehension—prevents them from accepting that societies can muster some authority to enforce their morality on their own; enough authority, at least, to sanction some degree of enforcement. Such views should have no moral weight in a political context, and this leaves government with nothing to do but to enforce the common morality it already has, and make such practical adjustments as would best reflect the prevailing opinion as regards the appropriate degree. This political exclusion of rationalist considerations is the consequence of Devlin's views (as described in chapter one) concerning the authoritative standing that the common man's morality ought to have in government.

\textsuperscript{126} Ibid., p. 190.
II. Rawls' Version of Political Exclusion

However, this practice of excluding certain sorts of considerations from politics is not unique to Devlin. More recently, it has been advocated by thinkers, like John Rawls and Ronald Dworkin, for very different reasons. In their more contemporary versions of it, both have sought to exclude from politics the sorts of considerations which represent violations of the moral neutrality that justice demands. In both their views, a political philosophy like Devlin's would, in many instances, fail the test of moral neutrality; even though the morality being enforced is a common one, which supposes that contrary moral examples only exist beyond society in the imagined reality of a philosopher, though they may have had, or have, a real-world incidence far removed in space and time. Views like Devlin's fail the test of moral neutrality because they allow a politics which may result in government enforcing standards of morality which are associated with a particular conception of the good and the way in which life ought to be led. In short, they do not take seriously a fact of the human landscape that Isaiah Berlin has identified as moral or value pluralism. "That is, the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathising and deriving light from each other."  

A political philosophy like Devlin's does not deny that moral pluralism exist. Instead, he says there are limits to the political significance of this fact. In

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127 It is important to note that there will be a great deal of overlap between the morality that Devlin wants to enforce because it is held in common, and that which a liberal, say, will consider acceptable to enforce for various reasons which show it to be superior to any alternatives. On points of overlap, the liberal would likely say that, though the item of morality is something that should be enforced, government does not gets its authority to do so from its being held in common.

128 This is a steady theme in Berlin's work, but see in particular his essay, "The Pursuit of the Ideal" in The Crooked Timber of Humanity, Henry Hardy, ed. (London: John Murray, 1990).

129 Ibid., p. 11.
particular, when the members of a given society have reached the limit of their ability to, in Berlin's words, "by the force of imaginative insight, understand...the values, the ideals, the forms of life of another culture or society, even those remote in space and time." In other words, when there is what we have called a common morality; a common inclination amongst a society's members to, in various areas, only seriously consider a single moral pathway. This is not to say that such people cannot have an intellectual understanding of other moral options they may be excluding, it is only to say that they are hypothetical possibilities which mean nothing to them. On Devlin's view, it is entirely acceptable that government enforces this morality and exclude from its politics the sorts of considerations that would require a government to dwell upon all the moral possibilities that it is denying its members, either as groups or individuals.

However, if I understand the moral neutrality in some contemporary strains of liberalism, politics must not tolerate any sort of consideration which puts limits upon the various moral options that individuals and groups may endorse as a particular path to the good life. For example, it would not be acceptable to assert, as Devlin frequently does, that a society's politics may condemn polygamy on the grounds that monogamy is the only marital form that society seriously considers as part of a morally valuable way of life. According to Rawls, a political decision into which something like this was incorporated would lack the characteristic "political" features that a conception of justice requires. As he puts it: "We hope that this political conception of justice may at least be supported by

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130 Ibid., p. 10. On the following page, Berlin claims that "we cannot pretend not to understand" the values of others. However, this seems patently false given the fact that our understanding depends upon a variable human faculty like imagination, and we are all familiar with people in whom it is all but non-existent.
what we may call an 'overlapping consensus,' that is, by a consensus that includes all the opposing philosophical and religious doctrines likely to persist and to gain adherents in a more or less just constitutional democratic society."\textsuperscript{131}

In other words, a political decision, in order to be just, must not prejudge the moral diversity of which human beings are capable by incorporating controversial beliefs about the good-life: beliefs which are derived from philosophical and religious speculation concerning the "truth about an independent metaphysical and moral order."\textsuperscript{132} Such beliefs are unavoidably particular conceptions of the good—as one could imagine Mill thinking, they are congenial to the particular natures of some, but not all—and as such, cannot, on Rawls' account, form the basis of "informed and willing political agreement between citizens viewed as free and equal persons."\textsuperscript{133}

According to Rawls, it is a "basic intuitive idea assumed to be implicit in the public culture of a democracy,"\textsuperscript{134} that the members of society are free and equal: that they have "capacities for a sense of justice and a conception of the good."\textsuperscript{135} The suggestion seems to be that they have an implicit, mutual, understanding of their common circumstances: they know that moral pluralism is a defining fact of the moral landscape, and they are aware that the only justice which is realisable, without the "autocratic use of state power,"\textsuperscript{136} is one which arbitrates from a moral position which is independent of the particular moralities which

\textsuperscript{132} Ibid., p. 230.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid., p. 234.
\textsuperscript{135} Ibid.
\textsuperscript{136} Ibid., p. 230.
some, but not all, find congenial to their natures. In short, justice demands an
“original position” of choice and deliberation where the fairness of the various
benefits and burdens that a political decision imposes (or distributes) can be
assessed in a morally relevant way—i.e., is it the sort of thing that would result in
willing acceptance amongst people who were so situated as to be totally ignorant
as to how they would personally fare under its terms.\textsuperscript{137}

Therefore, it is to accord with the demands of justice that government must
exclude from its politics the sort of metaphysically derived considerations which
would present obstacles to the willing and informed acceptance of free and equal
people. Government must practice, as Rawls calls it, a “method of avoidance,”\textsuperscript{138}
whereby the political decisions it enforces are free of the sort of considerations
which would represent an unjust overlapping consensus. Moral neutrality is the
policy of a government pursuing justice in politics; through the practice of
avoiding the enforcement of controversial standards of conduct which belong to
a private realm of choice and opinion, and not the public realm of politics and
justice.

\textsuperscript{137} Rawls discusses his concept of the “original position” in many works, but the fullest treatment of
it can be found in his book, \textit{A Theory of Justice} (Harvard University Press, 1971), chap. 3. It is
important to note that this work predates the article cited earlier which, along with some others,
seems to modify the thesis found in his book. There is, in the later articles, an emphasis on the
practical realities of politics, which he fears were not detected in the original, and which led to a
tendency to attribute to him metaphysical assumptions he would wish to avoid. What is not clear
is how radically he has departed from his earlier thesis. Richard Rorty has applauded the later
Rawls for successfully evading communitarian critiques which posed real problems for the original
(see his essay, “The Priority of Democracy to Philosophy” in his book \textit{Objectivity, Relativism, and
Truth.}). However, I am not familiar with anything in Rawls’ later work which requires significant
modification of the original. He simply seems to be saying that justice as fairness is not some
metaphysical fantasy but something which is clearly exemplified and embedded in the realities
which are observable in effective consensus building.

III. Dworkin’s Version of Political Exclusion

A somewhat similar view has been advocated by Ronald Dworkin. In his view, politics must be purged of the sorts of considerations which government cannot enforce without violating an individual’s right to treatment as an equal (or as he sometimes prefers, his or her moral independence.). In his view, this means that:

[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.\(^1\)

Much like Rawls concept of the original position, Dworkin’s understanding of equality is that it specifies the terms of a morally acceptable distribution of the various goods, resources and opportunities that government has occasion to enforce.

According to Dworkin, the principle of equality requires that “resources and opportunities should be distributed, so far as possible, equally, so that roughly the same share of whatever is available is devoted to satisfying the ambitions of each.”\(^2\) Equality, much like justice as fairness, resists prejudging the moral diversity that human beings are capable of; it is morally neutral. There is, in Dworkin’s view, no other way of respecting the principle of equality in distributions without following a policy of moral neutrality. As he put it, “any other general aim of distribution will assume either that the fate of some people should be of greater concern than that of others, or that the ambitions or talents

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of some are more worthy, and should be supported more generously on that
count.\textsuperscript{141}

Therefore, respect for equality requires that government endeavour to treat
each of its members to an equal share of what it has to distribute. According to
Dworkin, this is enough to justify democratic institutions in a general way.
Democracy is justified because of its greater tendency, over all other forms of
government, to enforce utilitarian political decisions; which in theory are
egalitarian in nature, or otherwise correspond favourably to the notion that each
person is to have one vote only (i.e., an equal distribution of political power).\textsuperscript{142}
However, utilitarian political decisions, or decisions regarding the general
welfare of society, are liable to corruption from an inegalitarian tendency to
process certain votes which Dworkin thinks of as embodying a form of double
counting.\textsuperscript{143} Sometimes, when trying to reach some decision as to the general
welfare, political decisions may incorporate, views people have regarding the
moral worth of the particular way of life (or aspects of it) that others affirm—an
external preference—rather than confining themselves to a strictly personal
preference, which would limit the moral weight of their personal moral views
in the utilitarian calculus to a single vote.\textsuperscript{144}

In Dworkin’s view, a government that enforced a political decision regarding
the general welfare, which reflected some degree of reliance upon external
preferences, is not treating its members as equals. Without some corrective

\textsuperscript{141} Ibid.
\textsuperscript{142} Dworkin, Taking Rights Seriously, pp. 275-276.
\textsuperscript{143} Ibid., pp. 276-277. See also chapter 9.
\textsuperscript{144} Dworkin makes the distinction between personal and external preferences, and the corruption of
the egalitarian character of utilitarianism, in several places, but most notably, chapter 9 of Taking
Rights Seriously.
measures that would eliminate such a reliance, government is acquiescing in a politics which subjects some of its members to a loss of their moral independence. Therefore, Dworkin feels that there is need for a “scheme of civil rights whose effect will be to determine those political decisions that are antecedently likely to reflect strong external preferences and to remove those decisions from majoritarian political institutions altogether. Dworkin, like Rawls, wants to exclude certain sorts of considerations from politics which violate the moral neutrality that is demanded by a moral requirement which is independent of the particular moral pathways that people of different natures may affirm.

Both Rawls and Dworkin share with Lord Devlin the view that government is able to secure important values when it excludes certain considerations from politics with which these values are incompatible. Rawls seems to argue that metaphysically derived conceptions of the good present obstacles to the realisation of a conception of justice in the appropriate public or political sense; something which is essential to sustain the notion of “social cooperation on the basis of mutual respect,” the only alternative to which is, apparently, the autocratic use of state power. Dworkin, in a similar vein, seems to argue that particular conceptions of the good (or, say, of what would make one happy), which include an external judgement upon the moral worth of others and what conduces to their happiness, corrupts an important egalitarian element in political decisions intended to arrive at some conception of the general welfare for society; an element that government cannot deny without admitting that the moral well being of some is more important than that of others.

Devlin, as I maintain, seems to be squarely in this pattern. He seems to argue that a politics, which includes intellectual diagnoses of the various ways in which a society’s morality forfeits the sort of respect that is required for its enforcement, is morally intolerable. Such rationalist considerations in politics manifests a negligent disregard for the social bonds which account for a society’s existence; and, a disposition toward the common man which is incompatible with the standing he ought to have in a democracy. In Devlin’s view, government should exclude these rationalist considerations form politics; they ought to be regarded as having no moral weight unless modified to reflect a principled acceptance of a society’s general right to enforce its morality. For Devlin, where a society’s morality is concerned, politics ought to only consist of disputes amongst practically minded people regarding the appropriate degree of its enforcement, and not those making the more radical claim that this morality has no inherent authority for government at all.
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