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Revisited: Absolutism and Ambivalence

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Patrick Devlin's *The Enforcement of Morals* Revisited: Absolutism and Ambivalence

Nicola Lacey*

Abstract: In the mid-1960s, the so-called 'Hart-Devlin debate' was generally regarded by criminal law theorists as having resulted in an unambiguous victory for Hart. Yet in a special issue of *Criminal Law and Philosophy* in 2013, marking the 50th anniversary of the publication of H.L.A. Hart's *Law, Liberty and Morality*, well over half of the contributors regarded Devlin as having had the better of key aspects of the argument. In this paper, I revisit Patrick Devlin's *The Enforcement of Morals*, assessing the importance of the context in which it was written, and evaluating its legacy for criminal law scholarship today. I argue that, notwithstanding its flaws, Devlin's text has played a key role in the development of the field. I also raise questions, however, about how far the text should remain a key focus in the ongoing discussion of whether and in what ways criminal law should enforce morality.

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Author's Note:

In early 2020, just as I was beginning to think about how to approach this essay revisiting Patrick Devlin's famous text, I was approached by Beatrix Campbell, a journalist and writer whom I had known for some years through our mutual feminist commitments. She asked if I would be willing to talk to her about Devlin's 'debate' with HLA Hart, explaining that she was working on a project which involved Devlin, the details of which she was not yet able to disclose. A few months later, Campbell's article appeared in *The Observer* newspaper.¹ It revealed that Devlin's daughter Clare had recently disclosed to the Independent Inquiry on Sexual Abuse that her father had abused her from the ages of seven to seventeen.

The quality and significance of Devlin's text call, of course, for assessment on their own terms. Had I been assessing not *The Enforcement of Morals* but rather, say, a book on the technicalities of contract law, I might not have felt constrained to prepare this prefatory note. But, for two reasons, I decided that it was right not only to include reference to this shocking fact, but also to say something about the ways in which it may have affected my reading of the text.

First, and most obviously, as many readers will already be aware, *The Enforcement of Morals* mounts a trenchant case for the deployment of criminal law to uphold community morality, and moreover does so in terms which are particularly concerned – one might almost say, preoccupied – with sexual morality. In assessing the place of this text in the canon of 20th Century criminal law scholarship, it seems only right to pose the question of how the reader should respond to what, on the face of it, seems to be an instance of an author's stunning hypocrisy, or radical psychological splitting and denial, or possibly both. In particular, the revelation arguably raises some tricky questions for those of us deciding on allocating readings to students some proportion of whom – as we now understand – will themselves have been the subjects of sexual abuse.

Less obviously, but equally importantly, my aspiration was to assess Devlin's text in its own terms, but also to place it in its social, historical and intellectual context. The social history of attitudes to sex, as well as to sexual violence, in the latter part of the 20th Century is not only marked by radical changes, but also littered with spectacular revelations of double standards and hypocrisy, particularly among elite men. The underlying attitude of extreme entitlement – still, alas, rife among the ruling class today – raises important questions about the authority of the criminal law, as a coercive body of standards largely crafted and interpreted by people unlikely to feel the force of its controls themselves. Conversely, institutions such as churches and schools have long themselves been sites of the abuse of power. We cannot know how far any experience of abuse shaped Devlin's own personality, let alone whether any such abuse triggered a cycle of repression, denial and repetition of the kind increasingly understood by psychologists. But these things, alongside many others considered in this essay, form part of the context in which *The Enforcement of Morals* was written, and that in which it has been received.

¹ <https://www.theguardian.com/uk-news/2021/jul/25/our-silence-permits-perpetrators-to-continue-one-womans-fight-to-expose-a-fathers-abuse> accessed 13th December 2021

As a feminist and a criminal lawyer, Clare Devlin's disclosure presented me with an insoluble dilemma. On the one hand, there was the demand – albeit posthumous in this case – of the presumption of innocence; on the other, there was the dismal history of scepticism about sexual abuse victims' testimony. There was no way of squaring the circle between, on the one hand, giving due weight to the fact that the disclosures have not been, and cannot be, examined subject to criminal standards of proof and, on the other, avoiding, ignoring or adding to a tradition of prejudiced scepticism about abuse disclosures – extremely painful as they are for those who make them, on this occasion with the support of five siblings. The only way of avoiding this dilemma would have been to abandon the project. But that, too, seemed wrong, given that I remain of the view that the text is a significant one for the evolution of thinking about criminal law. Hence my decision to proceed.

It also seemed important to add the note for reasons of authorial transparency. Inevitably, Clare Devlin's disclosure has cast its shadow over my interpretation of the text. In particular, it sensitised me to any inklings of hypocrisy or double standards in Devlin's articulation of his views. But it also helped me to put my finger on something which had already struck both Devlin's biographer and some of his most astute observers – notably the late Robert Stevens (Stevens 1979: 459-468). This is a certain elusiveness, an ambiguity or opaqueness in many of the positions he adopted, on matters ranging from the substantive conclusions of the Wolfenden Report, through the constitutional scope for judges to develop the common law, to the very conception of morality which he argued the law should enforce. Here his relationship to Catholicism is of particular interest, given the explicit invocations of Christian morality throughout the text. A Catholic by upbringing, Devlin abandoned his training for the priesthood and renounced his faith; his wife, conversely, converted to Catholicism and their five children were raised as Catholics. Towards the end of his life, he rediscovered his faith, in the words of his wife, “and really the violence of it, as if it had been pent up all these years” (letter from Madeleine Devlin, quoted in Sackar 2020: 236), asked to see a priest and took the Rites of the Church, but declined to take Communion – a sacrament available in Catholic doctrine only to those who do not believe themselves guilty of ‘grave sin’ – “because I am not worthy”. Cardinal Basil Hume, writing an admiring epilogue to his posthumously published memoir, wrote, ‘An all-loving and all-forgiving God will be the best judge of that’ (Devlin 1996: 162).

THE ENFORCEMENT OF MORALS²

In 1959, the influential senior judge, Patrick Devlin, gave the Maccabean Lecture in Jurisprudence at the British Academy. In September 1957, the Wolfenden Committee, in its report on homosexuality and prostitution, had argued that certain areas of private morality were ‘not the law’s business’ and that, in particular, homosexual conduct between consenting adults in private should no longer form the object of criminal prohibition. Devlin used the occasion of his lecture to attack not so much the Wolfenden Committee’s substantive conclusion as the general statement of principle from which that conclusion proceeded. Indeed, he denied the very possibility of any such general principle, as opposed to the striking of a balance between the claims of morality, liberty and privacy [19]. In his view, the law’s approach should be to show toleration of the maximum freedom that is consistent with the integrity of society, prohibiting only immoralities which call forth a ‘real feeling of reprobation’; and privacy should be respected as far as possible. Social morality, he argued, was a seamless web: once any part of it was weakened, the whole fabric was threatened, and with it the social order which a distinctive – in his view Christian – morality helped to bind. That originally Christian morality he saw as having developed as part of the fabric of society, creating a bridge between morals and politics: a political sedimentation of moral ideas, to be identified in patriarchal terms of the view of the reasonable or right-minded man in the jury box. The punishment of certain kinds of ‘private’ immorality – practices such as bigamy which gave rise to widespread indignation or disgust – was accordingly the proper business of the criminal law, and could be justified in the same way as the punishment of treason: as wrongs which threaten the social order as a whole. Since ‘a recognized morality is as necessary to society as, say, a recognized government’, it follows that ‘society has a *prima facie* right to enforce it and to legislate against immorality as such’ [7-8]. While the preponderance of examples in the lecture concerned sexual morality, Devlin’s argument was a more general one. For example, he took the invalidity of consent to murder or actual bodily harm in English criminal law – described as one of the ‘great moral principles on which society is based’ [6] – to prove that criminal law in fact does venture well beyond the public order/harm to others rationale articulated by Wolfenden. Moreover, the Wolfenden Committee itself, Devlin argued, assumes a role for criminal law in enforcing morality, as disclosed by its references to reframing the law so as to continue to prevent ‘the corruption of youth’ and to proscribe living from ‘immoral earnings’.

Devlin’s trenchant position swiftly elicited an equally sharply drawn riposte, in the pages of *The Listener*, from H.L.A. Hart, Professor of Jurisprudence at Oxford (Hart 1959).³ Devlin’s views were anathema to Hart’s liberal principles. The fact that they bore

² All page references in square brackets are to the 2009 Liberty Fund edition of *The Enforcement of Morals*.

³ For obvious reasons, I defer discussion of most of Devlin’s interlocutors until my treatment of the significance and legacy of his text. But I touch here on Hart’s engagement with his lecture, for two reasons. First, Hart’s liberal riposte was articulated in an article and a short book, *Law, Liberty and Morality* (Hart 1959; 1963) published between the delivery of the Maccabean lecture and the publication of *The Enforcement of Morals*, the preface and last three chapters of which are framed in counterpoint to Hart’s views. Second – and for this very reason – Devlin’s and Hart’s texts have been retrospectively constructed as ‘The Hart-Devlin debate’ – making it virtually impossible to assess Devlin’s text without giving some account of Hart’s contrasting position.

specifically on an issue with which he had a deep personal empathy probably spurred his determination to make a public response (Lacey 2004: 221; 259). In July 1959, he gave a talk, 'Immorality and Treason', on BBC radio. The talk was subsequently published in *The Listener*. Drawing on Mill's famous assertion that the only justification for invoking coercive power – particularly the state's criminalising power – over a member of a civilised community was the prevention of harm to others, Hart countered Devlin's claim that mere offence to conventional morality amounted to a harm sufficient to justify bringing private conduct within the purview of state control. Social morality was not, he argued, a seamless web, damage to which could be equated to treason. Rather, it should be viewed as a number of parts, and the question of whether legal enforcement was compatible with liberal principles assessed in relation to each separate part. The broadcast and publication immediately attracted a large amount of attention, turning Hart into something of a public figure. Though, unlike several colleagues including Freddie Ayer, he did not publicly associate himself with the Homosexual Law Reform Campaign – something he was to regret in later life – members of the movement remember his *Listener* article as being 'the nearest thing which we had to a manifesto' (Lacey 2004: 221). Its arguments became the cornerstone of a wide-ranging debate about the proper limits of state power – a debate which was to gather momentum as the social changes now associated with the culture of the 1960s found their way onto the public agenda. The essay also sketched out the framework for a more elaborate development of Mill's liberalism, a project which Hart had the opportunity to pursue four years later, when he was invited to give the Harry Camp Lectures at Stanford.

In the three Stanford Lectures, Hart argued, as against Devlin and the Victorian judge and advocate of criminal law codification James Fitzjames Stephen, that democratic states are not entitled to enforce moral standards for their own sake. With the exception of certain special cases where paternalistic legislation can be justified, the state should respect individual freedom, intervening only to prevent or punish the commission of tangible harms. In the first lecture, Hart delineated this central question, returning to Devlin's analogy between the enforcement of morality and the punishment of treason, which he had attacked in his *Listener* article. He then used this critical analysis to illustrate the difference between Mill's liberal position, that coercion should only be used to prevent harm to others, and Devlin's conservative stance, that a society which fails to enforce its common morality by means of law risks disintegration. In the second lecture, with his US audience in mind, he took as his focus the wide range of American offences dealing with aspects of sexual behaviour. He drew attention to the dearth of empirical evidence on how these offences are enforced, while criticising the huge discretionary powers which their existence accorded to the police. He then launched into an assault on Devlin's argument that the historical fact that states have regularly passed legislation such as laws proscribing cruelty to animals shows that experience has held the legal enforcement of morals to be socially important.

These examples, Hart insisted, can be explained in terms of other rationales: a utilitarian concern with animals' suffering or a paternalistic concern to protect the vulnerable. In relation to paternalistic legislation which limits individual freedom in the interest of the welfare of the vulnerable, he went on to argue that Mill's trenchantly anti-

paternalistic stance could be modified without fundamental revision of the harm principle. And, he argued – in stark contrast to Devlin’s patriarchal position – this was appropriate: given changing ideas of human nature, it was no longer justifiable to judge the issue, as Mill had done, on the assumption that all citizens have ‘the attitudes, knowledge and capacity for self control of a middle aged man’. It was right, for example, to allow a limited place for protective legislation not only in relation to the young or mentally incompetent but also in fields such as compulsory seatbelt laws or the regulation of drugs. He defended a form of physical paternalism, limiting people’s freedom in order to prevent them harming themselves. But he maintained that this was distinct from moral paternalism or the legal enforcement of morality ‘as such’: so-called ‘legal moralism’. He also conceded that states could be justified in prohibiting public nuisances: where, for example, a public display of obscenity causes offence, there may be a harm-based rationale for proscription. Taking a yet more controversial example, he went so far as to accept that where the religious associations of marriage are strong, bigamy might become a matter of public concern justifying criminalisation. The assessment of harm, however, had to be a rigorous one, for otherwise such public nuisance legislation may amount to the oppressive practice of proscribing behaviour merely because the majority is against it. And it was always necessary to produce evidence for the harms allegedly caused by offensive behaviour, and for the positive effects of using criminal law to enforce prevailing mores. The line between a harm-based rationale and physical paternalism on the one hand and legal moralism on the other must, in short, be preserved.

In the final lecture, Hart indicted Devlin’s position that the criminal law should be used to proscribe any immorality to which the ‘man on the Clapham omnibus’ would react with ‘intolerance, indignation and disgust’: this, he argued, was an extreme form of legal moralism. In the absence of any empirical evidence that a failure to enforce morality would lead to social collapse, Devlin’s argument amounted to the proposition that any widely held public prejudice justified criminalisation, and that any change in common morality constituted, conceptually, a ‘disintegration’ of the social order. In Hart’s view, Devlin – without adducing any empirical evidence – exaggerated the power of law as a socially stabilising and educative force. What good, he asked, can outweigh the cost in human misery of enforcing morality? Social moralities can be multiple and mutually tolerant: they do not have intrinsic worth; rather, their value is to secure happiness for individuals. A truly moral attitude is distinguished not by any particular substance but by its formal value: self-control, impartiality, reciprocity are ‘universal virtues’, but they can be mapped onto many different moralities. Their value cannot, however, be preserved by legal coercion: it is voluntary rather than coerced compliance which is morally valuable. There were lessons here, too, Hart argued, for democratic theory. Mill’s concern with the dangers of majoritarian democracy does not make him anti-democratic. Representative democracy may be the best form of government yet it is still subject to moral criticism; the majority should rule but this does not entail that they are always right. Devlin’s argument, Hart concluded, belonged to the ‘pre-history of morality’: an era which celebrated conformity through fear, the gratifying of hatred through retributive punishments, symbolic denunciation of immorality, moral conservatism. In its place, he argued, we should put a

firmly Enlightenment and liberal vision of tolerance, a concern with human suffering and a respect for human freedom, tempered only by limited paternalism.

The book which came out of the lectures, *Law, Liberty and Morality*, is written with a passionate intensity which stands out among Hart's work. It remains, nearly sixty years after its publication, one of the resounding late 20th Century statements of rationalist, principled liberal social policy, articulating a vision of a social democratic state which should use the criminal law sparingly in the interests of individual liberty. That said, Hart's argument was not without its flaws. He impeached Devlin for failing to provide any empirical evidence to support his contention that the enforcement of a society's morality is necessary to preserve social stability. Yet Hart himself provided no psychological or sociological evidence for the empirical claims which he made.⁴ A further weakness was the fact that his all-important limiting condition – the specification of what counts as harm – is not self-defining. Is, for example, depression or anxiety caused by drug-taking, or anxiety, fear or offence occasioned by witnessing public displays of obscenity, to count as harm which justifies state coercion? Indubitably, these psychological states are unpleasant – cause disutility – for those who experience them. But if the harm principle is to act as a constraint on the overall pursuit of utility, as Hart, like Mill, assumed, then it must have some independent specification. Without such specification, the boundary between physical and moral paternalism is fragile, and Hart's position vulnerable to the argument that any form of offence caused by others' conduct – Devlin's 'intolerance, indignation and disgust' for example – counts as harm. Yet, beyond the persuasive call for a reasoned debate about whether something should count as harm, Hart gave little in the way of such specification. A similar argument may be made about the distinction between public and private matters, with the bigamy example which Hart himself used illustrating that many issues have both public and private dimensions: an impact on public standards and on private interests. The burden of the argument was clear: a special value should be attached to human freedom. But the precise framework for a freedom-based constraint on the pursuit of utility was still forming itself in his mind, and would not find clearer expression until later in his career (Hart 1979).

Hart was not, in any event, to have the last word. In a series of essays, Devlin continued to develop his ideas, and six years after the Maccabaeon Lecture, he republished the original lecture alongside six further essays elaborating his thesis and indeed expanding it across the terrain of the common law. He prefaced this book – *The Enforcement of Morals* – by explaining the intellectual journey which had produced the text: a journey from a consequentialist position to a moralist outlook sceptical of a clear separation between crime and sin. He mounted a robust defence of the limits of rationality as a basis for determining morality, which in his view should rather be regarded as primarily a matter of feeling; and he underlined the importance of an appeal to a conception of reasonableness epitomized by the figure of the juror, whose most eloquent champion he had long been (Devlin 1956).⁵ Contrary to Hart's assertion, his appeal to the reaction of 'intolerance,

⁴ In a later essay, Hart highlighted the importance of further investigating these questions empirically (Hart 1967).

⁵ Note that Devlin's canonical text on the jury (Devlin 1956) is supremely untroubled by the stark class and gender bias of jury composition at the time he was writing (1966 edition: 22-3). The 'man on the Clapham Omnibus' whose views determine Devlin's view of the popular morality which should be enforced by criminal law was,

indignation and disgust’ was, he emphasized, intended to mark a limit on what the law should criminalise, rather than a prescription for criminalization. He also made the interesting disclosure that, until reading Hart’s rejoinder, he had not encountered the relevant writings of Stephen (Stephen 1874), an omission which he had since made good. And he set out his aspiration to expand his analysis so as to assess the proper influence of ‘the moral law’ in areas beyond the criminal law.

In this paper, I shall focus primarily on Devlin’s discussion of morality and criminal law. But a brief survey of his views about other areas of the common law provides important intellectual context, and helps to draw out some of the main themes and ambivalences which mark his position on the criminal enforcement of morality. In relation to tort, Devlin argues in Chapter II that moral guilt depends on ‘state of mind’ [34] rather than ‘extent of damage’: it follows that tort law is not an area of law with a moral purpose. Likewise, he argues that the expansion of criminal law into the area of what he calls ‘quasi-crime’ – what we might today call the ‘regulatory offences’ – is in effect a corruption of the proper moral purposes of criminalization, attenuating as it does the important relationship between ‘real’ crime and sin. And yet he toys with the idea that a ‘neighbour principle’ such as that famously articulated by Lord Atkin in *Donoghue v Stephenson*⁶ could provide a nascent underlying moral basis for at least part of tort law; and at the end of the chapter suggests, in an apparent contradiction of his earlier remarks, that a duty of compensation or reparation for harm caused might reconcile tort law with ‘the moral law’. Note that, in this chapter as elsewhere, references to morality veer between the popular standards identified by the reactions of the reasonable juror and appeals to ‘the moral law’ which suggest a more objectivist understanding of morality, presumably grounded in the Christian ethics and doctrines to which the text makes frequent reference.⁷

In Chapter III, Devlin moves on to the law of contract. Opening with a dogmatic assertion that ‘no one can sensibly deny... the relationship between the law of England and the moral law’ [43] – followed by the (false) inference that one who sees law as concerned with social order and discipline is for that reason ‘naturally indifferent to its moral content’ [*ibid*] – Devlin argues that contract law is founded in principles of good faith and fair dealing, but that these are less fully realised in the common law, which has been decisively shaped by the conditions of commerce, than in civilian systems. Inequalities of bargaining power left unresolved by contract doctrine do not, in his view, raise questions of morality [50]. But while only the criminal law, he argues, can be used to enforce moral standards, we can reasonably expect other areas of law to reflect society’s disapproval of non-criminal immorality [52]. This, he notes, is reflected in the rule that illegality renders contracts unenforceable. He worries that this has an adverse impact on innocent parties – an arbitrariness which may undermine obedience to law; though general compliance ‘says much for the English moral character’ [55-6].

accordingly, really a man, rather than male through linguistic convention. It follows that the populist conception of morality animating Devlin’s argument is a patriarchal one.

⁶ (1932) UKHL 100.

⁷ Cf. Hughes, who remarked on ‘Lord Devlin’s casual shifts from general references to morality to specific references to “sin”, “Christian morals” and the “moral law”’. (The “moral law” is an ambiguous term which seems to attempt to get the best of both worlds, by being free of overt theological implications, but at the same time obliquely implying authoritative attributes by the use of the word “law”’) (Hughes 1961: 662).

In Chapter IV, Devlin tackles the law of marriage, conceived primarily as a state's licence to create a special legal relationship by either marriage or, post-divorce, remarriage. Of particular significance in this chapter is the insistence on a conception of marriage deriving from Christianity – the more objective, more spiritual and less populist conception of morality referred to above. In Devlin's view, the state's formal position as respondent in a divorce – as opposed to judicial separation – petition reflects the recognition of marriage as more than merely a contract: the 'institution of marriage is the creation of morality' [61], and the regulation of marriage and divorce 'bind more closely to the moral law than any other'. But in terms of how that 'moral law' is specified, Devlin moves back and forth between appeals to ideas of right and wrong that prevail in society, and appeals to 'good' and 'evil' and the sacred, Christian background of the marriage vow, while deploring the law's conflation of temporal and spiritual in this area. Notwithstanding a number of references to changing social values, frequent prefatory comments such as 'it would be universally argued that' and assertions that even 'free-thinking men' would regard Christian marriage as 'the right model' [63] give the sense of a commentator strikingly confident of the rectitude of his views.

Devlin's views about the links between law and morality, then, stretched well beyond criminal law, albeit in uneven ways and not always in consistent terms. His book's central argument however, and the one for which it is most famous, is its argument that it is indeed the job of the criminal law to protect social cohesion by enforcing morality, along with its insistence on the analytic link between crime and sin, and its rejection of the notion of an area of 'private morality' beyond the scope of the law. And in the last three chapters of the book, Devlin returns to this central theme, engaging more closely with Hart, Mill and Stephen, elaborating his ideas, but also adding to the ambiguities which they reveal.

In Chapter V, Devlin takes up a theme which had been given some prominence in Hart's rejoinder: that of the relationship between democracy and morality. Freedom of conscience, he observes, sets up a new challenge for the state: how to determine which conception of right and wrong the law should enforce in the context of the 'vacuum that is created when society no longer acknowledges a supreme spiritual authority' [92]. Mill's and Austin's responses to this challenge were to de-moralise law; his preference is to re-moralise it, but in a formally secular way via a populist definition of morality: the views of the jury man. But there are limits: jury nullification of excessive state power is a key constitutional safeguard: 'the lamp that shows that freedom lives' (Devlin 1956: 164). In *DPP v Shaw*,⁸ the majority in the House of Lords went too far in giving the jury a positive as distinct from a negative role in defining the offence of conspiracy to corrupt public morals, and Devlin agrees with Hart in deploring the uncertainty which this decision implied in the definition of an offence which could lead to severe punishment. Once again, appeals to an objective, Christian morality are juxtaposed with recognition that popular morality evolves over time. In this chapter, Devlin expresses his view in terms of the criminal law's role in being the 'guardian of a [moral] heritage and not the creation of a system' [89]: but, in a significant concession, he allows that there should be no legal enforcement of moral standards on which there is a difference of moral opinion in society.

⁸ (1962) AC 220.

In chapter VI, Devlin focuses in particular on Mill's defence of liberty, and on Hart's modification of Mill's harm principle. Again emphasizing that his popular definition of morality would not 'freeze' moral standards but rather implies that the law must change alongside changes in the reasonable man's views, Devlin moves between utilitarian and absolutist, moralist voices: 'vice as an infectious disease' [106]. In what is in effect a 'slippery slope' argument, he contends that Mill's attempted distinction between tangible and intangible harms ignores the fact that even intangible harms can damage social fabric by weakening core social morality. Here Devlin shifts between assertions about what the law should be, and descriptions of what the law is [108-11], along with plentiful empirical claims (for which no evidence is offered). A utilitarian argument about the likely ineffectiveness of law as a tool to enforce morality under conditions of disagreement is advanced as a better prescription for the legislator than the claim that certain areas are 'not the law's business'.

In the final chapter, a testy riposte to Hart which has generally been acknowledged to land some telling blows on the latter's modifications of Mill, while failing to make much headway in clarifying his own position, Devlin draws on certain aspects of contemporary criminal law to advance two main arguments. First, pointing to the role of moral considerations of blameworthiness in sentencing, he rejects Hart's distinction between the justification for criminalization – the 'general justifying aim' – and the criteria of distribution of punishment, which argued for a utilitarian (and hence, in Devlin's view, demoralised) conception of the general aim of criminal justice yet allowed that moral criteria of responsibility and fairness enter into the assessment of liability to and amount of punishment (Hart 1959). In Devlin's view, Hart's adoption of, as it were, a principle of 'retribution in distribution' amounted to a concession that the justification for criminalization, as well as for punishment, rested on moral foundations. To say that the institution of criminal justice was merely a regulatory one, geared to social order, with morality having no bearing on what should be criminalized, but at once to maintain that the distribution of its penalties should be governed by moral considerations, was, he contended, simply illogical.

Second, Devlin pointed to the limits to the defence of consent in contemporary criminal law. Here he seized on Hart's modifications of Mill's original articulation of the harm principle in his concession that certain forms of physical, as opposed to moral, paternalism could be justified. In Devlin's view, not only were the contours of justified paternalism under Hart's scheme unclear: the very line which Hart attempted to draw was chimerical. In conceding the justification for certain instances of paternalism, Devlin argued, Hart was in effect torpedoing Mill's harm principle, and with it, the idea that there is a realm of private morality which is 'not the law's business'. Better, Devlin argued, in significantly utilitarian mode, to accept that the role of criminal law is constrained only by a balancing assessment of whether law can indeed achieve its ends at reasonable cost. In an argument in which many commentators have acknowledged the power of Devlin's critique, he threw out a challenge to Hart to articulate his views on how the law should deal with bigamy, abortion, bestiality and incest, speculating that it would be hard to do so without espousing a degree of legal moralism. The legal moralist stance, he concluded, was closer to 'contemporary social morality' than was Mill's harm principle' [139].

Before leaving Devlin's text, and moving on to consider the crucial ways in which the context in which it was written and published may have shaped both the text itself and its reception, let us note some of the key questions raised by his argument, and the various ambiguities which mark the text itself. Many of these have become the key objects of the substantial secondary literature which has accumulated on the book, and on the 'debate', in the half century since its publication.

First, while Devlin prefaces the book by charting his own retreat from a utilitarian outlook and embrace of a moralist one, the utilitarian voice resurfaces insistently at key points throughout the text. For example, at various points Devlin acknowledges that the case for criminalizing immoral conduct turns in part on the likely efficacy of the prohibition and that, conversely, likely inefficacy arising from a lack of social consensus militates against criminalisation. He makes this point in particular in relation to male homosexual conduct, and articulates it in terms of the importance of balance between danger to society and the extent of restriction of individual freedom, against the background of shifting levels of toleration. Indeed the very 'disintegration' thesis itself, if interpreted as an empirical claim about social cohesion rather than a definitional claim about the identification of a society with its morality, has a utilitarian foundation. This should come as no surprise: Devlin was a man who, according to his own memoir, believed all his adult life that choices should be based on the hedonic aim to 'obtain the greatest enjoyment out of life' (Devlin 1996: 73). But it sits uneasily with the moralism shaping most of the text.

This ambiguity relates closely to a second tension in his view of morality – something which has been a key point of contention in the subsequent assessment of the text. On the one hand, we have the language of 'the moral law'; of sin and of evil; the claim that 'without the support of churches the moral order would collapse' [EF 23]; the assertion of the Christian roots of the morality which criminal law does, and should, enforce, all of which suggest a 'real' or authoritative basis for moral judgments. On the other, we have the vision of morality as 'a question of feeling': as defined, patriarchally, by the reasonable man in the Clapham omnibus or the jury room. Rhetorically, we have a blend of high moralism and an appeal to common sense. As Richard Wollheim memorably put it, Devlin veers between 'anthropological' and 'absolutist' views of morality (1959: 23). This strange combination of absolutism and populism is a distinctive and perplexing aspect of Devlin's text.

Alongside these two related ambiguities sits a third, already touched upon: the ambiguity as to whether Devlin's claim that without criminal enforcement of morality, society would disintegrate, is an (implausible) empirical claim for which no evidence is advanced; or a definitional claim about the identification of a society with its particular moral order, perhaps suggesting a natural law position which is not developed.⁹ As many commentators from Hart onwards (Hart 1967) have noted, the latter interpretation, while freeing Devlin from the burden of evidence, seems to imply a radical conservatism. Yet this is at odds with Devlin's own frequent acknowledgments of incremental social and

⁹ The lack of a stable conception of morality underpinning his view, in my opinion, makes it hard to draw out any such coherent underlying theory of law.

attitudinal change – acknowledgements that seem to imply that there is no intrinsic value in the preservation of any particular morality. Again, the tensions between a popular and a more objective invocation of Christian morals, and between utilitarian and moralist stances, seem to underlie this ambiguity.

A fourth ambiguity has to do not so much with the source of morality but with the scope of the morality that Devlin has in his sights. While references to Christian ethics and to proscriptions against killing and other widely recognized offences, like the framing of the central argument, suggest a general concern with the enforcement of morals, many of the specific examples suggest a particular concern with sexual morality. This, of course, may be explained by the immediate context of the original essay – the 1957 Wolfenden Report on offences in relation to homosexual conduct and prostitution. But, as several commentators have noted, the language of ‘intolerance, indignation and disgust’ – redolent as it is of Stephen’s resounding Victorian moral rhetoric – seems particularly evocative of typical negative emotive reactions to deviations from sexual norms. Relating back to the ambiguity about the nature of morality already discussed, these emotive reactions sit alongside an appeal to the more measured notion of ‘reprobation’ – in an emotion/reason tension arguably typical of the retributive tradition.

Finally, note a seeming ambiguity – or perhaps one should say shift – in Devlin’s substantive position. In his evidence to the Wolfenden Report, he voiced his support for the liberalization of the law on homosexuality. In the preface to his text, he maintains that his change of view has to do with the Report’s reasoning, rather than with its actual conclusion. Yet at various points in the text [8, 18, 87, 97] he implies or even states a discomfort with that liberalization. Soon after the publication of his book, to the consternation of some of his friends (Sackar 203- 4), he signed a letter to *The Times*, joining seven other members of the House of Lords in voicing support for a motion in favour of reform. This seeming ambivalence is a consequence of his view that, in cases of lack of consensus, the law should not step in – a point on which the law-maker ‘does not need the assistance of moral philosophers’ [90]. At the time of his original essay’s publication, at least, the vilification of homosexuality in popular morality remained rife, and this indeed explains the length of time which passed between the Report and the enactment of the liberalizing Sexual Offences Act 1967. But this is one of many areas – including his ambivalence about whether quasi- regulatory crime can be rationalized morally in terms of a neighbour principle, or whether it is a corruption of the ‘real’ criminal law [26] – in which, as Joel Feinberg put it, Devlin’s text displays a ‘strangely uneven quality’ (Feinberg 1987b: 27).

These are just a few of the text’s central ambiguities. It is tempting to draw an analogy with Robert Stevens’ acute interpretation of Devlin’s posture as a judge: rhetorically, a conservative who minimized the creative role of the common law judge; in substance, one of the most creative judges of the mid 20th Century, notwithstanding his extraordinarily brief tenure on the Judicial Committee of the House of Lords (Stevens 1979: 459-468). Was this a lack of self-knowledge? Self-deception? Hypocrisy? Biographical determinism is to be avoided. But these fascinating contradictions litter Devlin’s life: the conservative establishment figure who roundly (and to the detriment of his career) criticized the government in his report on the Nyasaland (now Malawi)

emergency (Sackar 129-150), and who was a forthright public critic of judicial failures following miscarriages of justice proceeding from police malpractice;¹⁰ the man who enjoyed many lifelong friendships yet also possessed a capacity for enmity and even cruelty;¹¹ the staunch moralist who took advantage of the limits of defamation law to wreak posthumous revenge on his *bete noir*, Reginald Manningham-Buller, by publishing a personal attack on his handling of the Bodkin Adams prosecution (Devlin 1985); yet who according to his biographer felt entitled to bend the procedural rules in his own conduct of the case (Sackar 2020 223-236; 77-104);¹² the judicial conservative who took on the founding judicial role at the activist Restrictive Practices Court, as well as a number of other high profile public appointments including chairing the Press Council and who, in a mere three years on the House of Lords bench, transformed several areas of the common law.

SOCIAL, HISTORICAL AND INTELLECTUAL CONTEXT

It is impossible to evaluate the significance of Devlin's book independent of its context. As Graham Hughes noted of the debate in 1962, 'General jurisprudential discussion does not often become the concern of a wide audience.... But occasionally a controversy is, or is thought to be, of such central importance or of such practical implication that it breaks out of the cloister and becomes a subject of general notice' (Hughes 1962: 662). In this section, I will consider the bearing of both the social context in which the original lecture and later book was written and appeared, and the intellectual context of criminal law scholarship of the time. Both, as we shall see, are of importance to the significance of the book and the weight of its legacy.

The commissioning and publication of the Wolfenden Report, which speak to both the social and the intellectual context of Devlin's work, are emblematic of the most obvious feature of contemporary Britain as it emerged from the period of austerity immediately following the Second World War. This was a period in which profound social changes – notably in class relations, in youth culture, and in prevailing sexual mores – were brewing. But like most such changes, they were felt unevenly and over a lengthy period; and, particularly in its early years, the decade we now remember as 'the Swinging Sixties' continued to exhibit remarkably conservative and judgmental social attitudes. A few examples will make this clear. While George Allen Lane and Penguin prevailed in the 1960

¹⁰ As recounted by Ludovic Kennedy in a foreword to Devlin's memoir (Devlin 1996: 6-10).

¹¹ Leaving aside the facts revealed in the author's note, one might cite the Manningham-Buller saga below as well as many incidents cited in Justice John Sackar's biography, not least Devlin's comments on John Profumo (Sackar 2020: 188).

¹² Devlin's biographer described his explanation for aspects of his pre-trial handling of the case 'pathetic' (Sackar 2020: 835), and more generally regards the Bodkin Adams case and its literary aftermath – Devlin's posthumous revenge on Manningham-Buller, *Easing the Passing* – as his Achilles Heel. Lord Phillips tartly remarks in his Foreword to the biography, '[Manningham-Buller] was not as stupid as Patrick thought he was and not as vain as Patrick certainly was' (Sackar 2020 viii).

Lady Chatterley obscenity Trial¹³ – the jury’s verdict would, one assumes, have been regarded by Devlin as vindicating his admiration for jurors’ common sense grasp of shifts in popular morality – the rhetoric of the prosecution, with the infamous questions about whether the jury would be content for their wives or servants to read Lawrence’s book, is testament to the fact that class, gender and sexual attitudes we might today associate with Edwardian or even Victorian era were by no means entirely a thing of the past (Kynaston 2015: 475-483). This was particularly marked in relation to homosexuality. When Princess Margaret married Anthony Armstrong Jones in May 1960, the friend originally chosen as Armstrong Jones’ best man had to be quietly stood down when it became known that he had been fined for importuning eight years earlier (Kynaston 2015: 412).

The cultural journey that had to be made towards the reforming Sexual Offences Act in 1965 needs to be understood in the light of an intensification of moralistic homophobic criminal justice policy in the 1950s. In the wake of Burgess and Maclean’s defections in 1951, the early 1950s had seen a particularly vicious campaign of entrapping and prosecuting men for importuning, from the conviction of Alan Turing of gross indecency in 1952 onwards. The consequence was a four-to-five-fold increase in prosecutions (Ibid. 2015: 28-34). This policy had been implemented under the auspices of the Home Secretary, David Maxwell-Fyfe – a man who regarded homosexuals as ‘in general ... exhibitionists and proselytisers and a danger to others, especially the young’ (HC Debate 3 Dec 1953, vol 521, col 1298, quoted in Duxbury 2015: 30), yet who paved the way for ultimate reform through his establishment of the Wolfenden Committee in 1954 (Duxbury 31, 34). The establishment of the Committee came in the wake of the widely perceived injustice of convictions in the 1954 Wildeblood Trial: an example of the volatility of public attitudes and elite reactions where defendants were men with whom they could identify (Kynaston 2009: 373-4), with the usually unsympathetic *Sunday Times* noting on this occasion the strength of the case for some reform.

The beginnings of a shift in the mid-1950s from the vilification of homosexuality as evil or sinful towards a less retributive, though equally problematic, view of homosexuality as a form of illness or pathology underpinned both the establishment of the Wolfenden Committee and much of the evidence presented to it. On publication of the Report in 1957, all 5000 copies sold out within hours, betokening a new public willingness to reconsider the issue. Both prosecution and sentencing policies modified. But more moralistic attitudes lingered: the *Sunday Times* commented that the Report risked ‘undermining of basic national moral standards’, while the *Sunday Express* referred to ‘degraded men ... [and] bestial habits’ (Kynaston 2015: 71). References to homosexuality remained banned from the stage by the Lord Chamberlain for much of the decade, and the award in 1959 of £8000 damages to Liberace on his winning a defamation case reflects how damaging the label of homosexuality was still seen to be. In 1959, Angus Wilson’s partner Tony Garrett was dismissed from his position in the Probation Service because he refused to leave his shared household with Wilson (Kynaston 2015: 382). Home Secretary

¹³ The trial transcript was published by Penguin the following year (*The Trial of Lady Chatterley: Regina v Penguin Books Limited: The transcript of the trial* (Penguin Books 1961) and the papers are now in the Penguin Archive at the University of Bristol: <https://archives.bristol.ac.uk/Record.aspx?src=CalmView.Catalog&id=DM1679>. For a vivid literary reconstruction of the trial, see Alison McLeod, *Tenderness* (London: Bloomsbury 2021).

R.A.B. Butler, following a 1958 debate on the Wolfenden Report in the House of Commons, judged that while homosexuality was increasingly regarded as a medical issue, public attitudes – particularly in the north of England and in Scotland – remained largely against legalization. As late as 1962, in the case of *Shaw v DPP*,¹⁴ a majority of the Judicial Committee of the House of Lords resoundingly defended the role of the courts as ‘guardians of public morals’. Lord Reid’s powerful dissent was, of course, the shape of things to come, and another symptom of the changes afoot. But the fact that almost a decade elapsed between the Wolfenden Report and the legislation which it had recommended evidenced the government’s sense that resistance to liberalization remained widespread.

A brief survey of contemporary popular culture reinforces this sense of a world on the cusp of change, yet in which many of the key prejudices and assumptions which have since been challenged remained strong. Playwrights like John Osborne and Shelagh Delaney and novelists like Alan Sillitoe, Keith Waterhouse and Stan Barstow were breaking the class mould of English culture, bringing the voices and attitudes of working-class people to stage and page. But – of importance given what we have identified as the patriarchal quality of Devlin’s conception of popular morality – their characters also expressed the unalloyed sexism and casual racism of the era. Lynne Reid Banks’ *The L Shaped Room* in 1960 broke a taboo in dealing realistically with pregnancy outside marriage and presented an extremely rare black character, while also representing many of the class and racial assumptions of the time. Pervasive cultural hypocrisy was reflected in the reaction to the few works that acknowledged the existence of a homosexual world that existed in parallel to and intertwined with the heterosexual world – charted as early as 1956 in Angus Wilson’s *Hemlock and After*. In 1958, the gay character camouflaged as an art student in Shelagh Delaney’s *A Taste of Honey* allowed the Lord Chamberlain to turn, in true British style, a ‘blind eye’ (Kynaston 2015: 272). In 1961, Peter Cook and Nicholas Luard opened a club, *The Establishment*, specifically to create a venue for political satire which would be outside the Lord Chamberlain’s control. In an interview with Clive James,¹⁵ Cook recalled that the Lord Chamberlain had objected to a sketch in *Beyond the Fringe* which referred to ‘queens’ – but was quite satisfied with the suggested alternative: three ‘aesthetic young men’, the same trope which had kept Delaney’s text intact a few years earlier and which remained the standard of comedy *double entendre* for years to come. Apparently, the many prosecutions of public figures during the 1950s had done little to produce a more honest public acknowledgment of the reality of sexual pluralism. Gender difference remained strongly normative: Enid Blyton declined to testify in the Lady Chatterley trial because her husband objected (Kynaston 2015: 566); while Doris Lessing’s pathbreaking Anna of *The Golden Notebook* (1962) was received as ‘hysterical, ‘too feminist’ and ‘against the feminine grain’ (Kynaston 2015: 599-600) – though, again, in a sign of things to come, the *New Statesman* welcomed the book as offering a radical vision of the struggle for women’s self-fulfillment. Even Equal Pay legislation was, after all, still eight years off, while the more general civil proscription of sex and race discrimination would

¹⁴ (1962) AC 220.

¹⁵ *Postcard from London* (1991) BBC archives <https://www.bbc.co.uk/programmes/p00rzvzj>.

not come until the mid 1970s. A Sixties Swinger who happened to be female still needed a male signature to engage in basic transactions such as taking out a mortgage. And those who were black or brown had to put up with racial abuse, social exclusion and discrimination, as well as, leaving aside certain musical genres, cultural invisibility.

Equally interesting from the point of view of our assessment of Devlin's text is the intellectual context in which it was formed. The book sparked reactions from some of the most influential jurists, philosophers, theologians and criminologists of the day, notably Richard Wollheim (1959), Basil Mitchell (1967), Barbara Wootton (1963), Morris Ginsberg (1964) and Eugene Rostow (1960) (Dean of Yale Law School), as well as Ronald Dworkin (1965-6). But the most famous response was undoubtedly that of Hart (1959; 1963; 1965). As we have seen, the ensuing 'Hart/Devlin debate' has been a staple for law students ever since. It also presents a fascinating example of the role which intellectuals played in shaping public discourse in the more deferential world of the 1960s.

Several features of the intellectual context at the time of the book's publication are also of interest. First, judges of the time rarely expressed themselves on policy issues of the day, nor did they tend to indulge in jurisprudential debate. Indeed, Devlin himself, speaking *'de haut en bas'* (Duxbury 2001: 81) to the Society of Public Teachers of Law in 1958, described the division of intellectual labour between judges and academics as the latter acting as 'critics of finer points of play', their work essentially parasitic on that of judges (Duxbury 2001: 74). The rarity of a judicial utterance anything like Devlin's Maccabean lecture probably explains some of the 'breakthrough' quality noted by Graham Hughes in 1962. Conversely, while many legal academics were extraordinarily deferential to the judiciary – at an Oxford dinner in the 1950s, Tony Honoré was amazed to hear his law faculty colleague C.K. Allen opine that a colleague's recent criticism of a Court of Appeal judgment in a *Law Quarterly Review* case note was 'a disgrace' (Lacey 2004: 157) – the more independent-minded and philosophically inclined scholars epitomized (and, in many cases, inspired) by H.L.A. Hart returned the compliment by tending to regard judges as anti-intellectual conservatives. And beyond giving us a relatively rare in-depth glimpse of the thinking of a very senior judge, the book is arguably of particular interest because of Devlin's Catholic background, which (despite his having lost his faith as a young man) seems to have underpinned his strong moralist views. Perhaps one might have expected the lengthy history of anti-Catholic discrimination in this country to encourage greater empathy with those who have been the objects of prejudice. There is an interesting psychological question here about the sort of repression which often goes with being a key public figure from a minority notwithstanding, as in Devlin's case, that minority status being ostensibly eclipsed by a glittering career.

The emerging liberal, secular and rationalist paradigm provides a second feature of importance in understanding the intellectual context for Devlin's book and its reception. In relation to the general role of criminal law, and the relationship between law and morality, Hart's work had been the focus for an increasingly rich literature from the mid 1950s onwards. Philosophical in method and liberal in outlook, Hart's emerging vision of criminal justice – brought together in 1968 in *Punishment and Responsibility*, but taking shape in essays from 1957 on, as well as in his 'debate' with Devlin – was firmly grounded in the traditions of Bentham and Mill, and (while resisting some of the extremes of the so-called

rehabilitative ideal) resonated with the welfarist, forward-looking temper of contemporary British criminal justice policy (Garland 2001: 2-52). This implied not merely a positive vision of the general justifying aim of criminal justice in terms of consequentialist concerns with deterrence and reform, alongside a constraining principle of responsibility motivated by a concern with fairness in the distribution of punishment, but also, negatively, a dismissal of retributivism as, in effect, atavistic, outdated, uncivilized. In a telling sign of the times, Hart's postscript to *Punishment and Responsibility* describes the idea that returning suffering for evil is intrinsically good as 'a mysterious piece of moral alchemy' or 'a primitive confusion' between punishment and compensation (Hart 1968 234-5; Lacey and Pickard 2015). One imagines that this sort of liberal insouciance may well have underpinned Devlin's distaste for what he saw as anti-democratic elitism. So confident is Hart's dismissal of retributivism that he barely gives it the dignity of a reasoned critique. This is the attitude that underpins a tone of incredulity in his reaction to Devlin's lecture, and to its treason analogy in particular (Hart 1959).

While Hart's modified, Mill-ian utilitarianism was particularly philosophical in outlook, a broadly similar liberal, rationalist view underpinned not only other jurisprudential work but many criminal law texts of the time (Williams 1957). In addition, Hart's liberal scepticism about the criminalization of immorality, particularly in the context of social disagreement, resonated with emerging socio-legal insights into the impact of such legislation, notably in terms of its extension of unaccountable police and prosecutorial discretion, leading to wasted resources, discriminatory enforcement and ultimately an erosion of the perceived legitimacy of criminal law (Kadish 1967). In this context, it is no surprise that, among contemporary commentators on the 'debate' – notably Richard Wollheim (1959), Robert Summers (1959), Graham Hughes (1962) and Barbara Wootton (1963) – Hart was generally regarded as the 'slam dunk' winner. Not all commentators were as derisive as Rose, who concluded that the reader would be 'unlikely to come across many books in which so many objectionable ideas are presented with so much confusion as in Lord Devlin's lectures' (Rose 1966: 153). But even those who, like Ronald Dworkin, had sympathy with Devlin's proposition that 'morality should count', rejected Devlin's emotive conception of what 'counted as morality' (Dworkin 1965-6), arguing that propositions had to pass certain tests of rationality and consistency in order to qualify as candidates for moral standing.¹⁶ Hughes' view is representative of the prevailing contemporary sense: '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. It is here that Lord Devlin's views become dangerous and here that they must be resolutely opposed' (Hughes 1962: 666).

Eugene Rostow, significantly, noted that, to Americans, it seemed that law enforced little other than morality, commenting drily that Dworkin's and Hart's criticism of Devlin's insistence that morality was partly a question of feeling was a 'strange criticism to hear made in this post-Freudian age' (1960: 196-7). But the sense that Hart, overall, had the better of the argument has persisted among many, particularly liberal, commentators. As

¹⁶ And while there would be more sympathy for Devlin, naturally enough, among natural law theorists, advocates of the muscular forms of natural law theory which were to emerge in the coming decades, notably Michael S. Moore (1997; 2014) and Robert George (1990; 1993), shared this criticism of Devlin's conception of morality.

Steven Smith put it, ‘The standard wisdom holds that Hart decisively won and Devlin lost the debate. And because the debate plausibly could be viewed as a debate about the harm principle, Devlin’s supposed drubbing could be, and often was, taken to signify the triumph of that principle’ – albeit a ‘verdict’ regarded by Smith as ‘contestable’ (Smith 2006: 13). Even natural lawyer Robert George conceded that ‘many... perhaps even most, think that Hart carried the day’ (1993: 65). This sense of Hart’s triumph was reaffirmed by the publication of Joel Feinberg’s monumental four-volume treatise on *The Moral Limits of the Criminal Law* between 1987 and 1990; a work that was generally regarded as having consolidated the dominance in the field of a sympathetic and sophisticated modulation of Mill’s and Hart’s liberal views. Looking back in 1990, Feinberg himself regarded Devlin’s view as ‘discredited’ (1990: 136). As philosopher Jeffrie G. Murphy summed it up: ‘like most good liberals I sided with Hart and Mill against Devlin.... I believed, along with most of the people with whom I talked about legal philosophy, that legal moralism had been properly killed off’ (Murphy 1995: 74-5).

However, particularly from the 1980s, the tide was beginning to turn, and a number of scholars originally persuaded of Hart’s views shifted their position in the subsequent decades – Murphy among them. Shifts of view such as that of Murphy have come during a period in which retributivism, forms of natural law theory and legal moralism more generally have enjoyed a decisive revival: a revival of which, ironically, with hindsight, one can see Feinberg’s contribution as a bellwether. And, as we shall see in the next section, these shifts in academic and socio-political culture have made a key difference to the long-term significance of Devlin’s book.

SIGNIFICANCE AND LEGACY

How, then, should we assess the significance of Devlin’s text? Intriguingly, the book is no longer in print at OUP – not even appearing on the OUP website. It is, however, still readily available from online booksellers in a 2009 edition produced, intriguingly, by the Liberty Fund.¹⁷ And the book remains a byword among generations of criminal law students and scholars for its trenchant statement of a legal moralist position which, in subtler varieties, holds enormous sway over criminal law theory, scholarship and public policy today. Over more than half a century it has inspired, and continues to generate, secondary literature about criminalization, both generally (Cranor 1983) and in relation to specific areas such as boxing (Camacho 2014); aspects of medical ethics (Moss and Hughes 2011); and the question of the integration of Islam in liberal societies (Joppke 2014). Above all – and here *significance* shades into *legacy* – the book is of key importance in unravelling the genealogy of the moralist paradigm which arguably characterizes much English language criminal law theory and scholarship today, and which has recently called

¹⁷ The Liberty Fund is a US-based private educational organisation dedicated to the promotion of ‘liberty, personal responsibility and a free society’, and – ironically, given Devlin’s views – generally associated with libertarian philosophy: <https://www.libertyfund.org/>.

forth a counter-reaction in the shape of the so-called 'political turn'. Quite generally, the book speaks to both substantive and methodological fault lines characterizing applied work in legal theory and the 'philosophical foundations' of the common law today.

Reviewing the secondary literature on Devlin's book allows us to track two important shifts in the field of criminal law scholarship, broadly understood. The first is a renewed interest in criminal law among moral philosophers, stimulated in part by Feinberg's important work. This has seen the increasing philosophical sophistication of the debate – but also a growing preoccupation with second order, meta-ethical questions (Swan 2017) rather than the substantive ethical and policy questions which animated the original debate. This is a reflection of the increasing specialization of philosophy, a development which has unwittingly erected barriers to the cross-disciplinary dialogue which was such a striking feature of the early literature on the Hart-Devlin debate. But it has also contributed to a revival of cognitivism and realism in ethics, and this has given impetus to the revival of legal moralism. The second, to which I will devote more attention, is the accumulating impact of neo-retributivism in not only penal but also criminal law theory, arguably bringing with it a renewed focus on the expressive and emotive aspects of punishment and an erosion of the liberal consensus the emergence of which marked the era of the 'debate' between Devlin and Hart. From the 1970s on, both pessimism about the efficacy of rehabilitative, consequentialist penal policies and a civil libertarian revulsion against the scale of discretionary power that they entailed prompted a critical reappraisal of the welfarist criminal justice policy that had prevailed in many countries over much of the 20th Century. Combined with popular and political concern about rising crime rates, this changing climate of opinion was hospitable to the revival of a more affective, backward-looking approach to crime: one based on a quasi-moral judgment of the offender's blameworthiness and moral desert rather than rational utilitarian goals such as reform or deterrence (von Hirsch 1976; 1996). It is in this context that we can best understand a subtle but decisive change in the respective fortunes of Hart's and Devlin's points of view.

Of course, Hart has retained many supporters (Bassham 2012). But Devlin's fortunes have taken a turn for the better. Nor did this support for Devlin always come from the quarters from which one might have expected it. Certainly, Robert George (1990, 1993), as an exponent of a strong form of natural law theory, has argued that Devlin's disintegration thesis, understood in terms of the defence of a certain 'interpersonal integration in community' (George 1990: 32), captured something of intrinsic, axiological rather than empirical, moral importance, and that the liberal position fails to capture key features of criminal law, notably public decency laws. Yet he also argued that Devlin's emotional, non-cognitivist conception of morality risked reducing his position to a licensing of prejudice (ibid 43). In not basing his argument on moral truth, Devlin was in part, in George's view, on the same side as Hart (ibid 24: see also Hittinger 1990). Another robust natural lawyer, Michael Moore, later went even further along this line of criticism, referring to 'the conventionalist and relativist ethics that made Devlin's brand of legal moralism so distasteful' (Moore 2014).

Of more significance from our point of view is an emerging view among even those who had originally lined up with Hart, or whose liberal views might have led one to expect

them to do so, that Devlin had the better of the debate in significant respects. Two key interventions came in the 1990s, from Jeffrie G. Murphy (1995), and from Gerald Dworkin (1999), the title of whose paper sums up an emerging change in the climate of opinion: ‘Devlin was Right’. Murphy had by this time come to take a more sceptical view of Hart’s riposte to Stephen and Devlin. He emphasized the moral considerations inherent in assessing desert in sentencing, as well as the moralized judicial rhetoric in which sentencing judgments are often framed. He agreed with Devlin that Hart’s liberal position that more ‘vicious offenders’ should be punished more harshly than those of ‘greater virtue’, yet that it is wrong to criminalise homosexuality on grounds of its immorality, was ‘simply an inconsistency’. Indeed he went so far as to accuse Hart, Mill, and (Ronald) Dworkin as ‘simply being unprincipled... Is not their so-called principle simply a slogan that they trot out only when it serves their own sexually permissive ideology?’ (Murphy 1995: 81).

In Gerald Dworkin’s view, Devlin had been correct about there not being a principled line between which immoralities should be regarded as criminal wrongs and which should not. Better, Dworkin argued, for the liberal to argue straightforwardly against the proposition that homosexuality is immoral (Dworkin 1998-9).¹⁸ Three years later, J. Paul McCutcheon took up similar themes, arguing moreover that it was a mistake for liberals to cede the moral terrain rather than to engage in substantive debate with the moralists (McCutcheon 2002). Perhaps most telling, in a 2013 special issue of *Criminal Law and Philosophy* marking the 50th anniversary of the publication of Hart’s *Law, Liberty and Morality*, no fewer than five of the seven contributions weighed in on key aspects of Devlin’s side of the debate. Danny Scoccia, agreeing that liberal political morality could not achieve the levels of principled clarity and simplicity envisaged by Hart or Feinberg, suggested that liberals themselves need to be able to appeal to ‘pure legal moralism’ to account for some of the criminal laws which they themselves support (Scoccia 2013). Further developing his 1995 argument, Jeffrie G. Murphy argued that Hart had missed an opportunity to further develop his brief remarks on the distinctive importance of sexual liberties, so as to engage in a substantive analysis which could have opened up an approach differentiating among liberties on the basis – *à la* Ronald Dworkin – of reasoned argument (hence aligning himself with those sympathetic to Devlin’s view that morality should count, while rejecting his view of what counted as morality) (Murphy 2013). Richard J. Arneson argued that Hart had not given a convincing account of how we should regard the criminalisation of activities such as suicide or assisted suicide, recreational drug use, prostitution, and cases involving remote and/or complex causation, such as environmental harms. His conclusion was that on the ‘enforcement of morals as such, we should acknowledge that the jury is still out’ (Arneson 2013: 435). (In an aside which reminds us of just how much attitudes had changed since the time of the debate, Arneson also commented that Hart’s examples seem inapt since they clearly do not involve

¹⁸ Cf. Swan (2017), who agreed that Dworkin’s meta-ethical principle was appealing, but that Dworkin draws the wrong conclusions from it: the reasons for that appeal in fact militate against the enforcement of morality. In a contribution which epitomises professional philosophers’ continued engagement with the debate, Swan proposes a revised statement of a principled distinction between the immoral-and-criminal and the immoral-but-not-criminal.

immorality... (Arneson 2013)). Steven Wall offered reasons for a presumption in favour of the view that it is a proper function of criminal law to enforce critical (as opposed to Devlin's view of popular) morality even where no harm is involved – 'a presumption that places me firmly on the Devlin side of the debate' (Wall 2013: 470). And Leslie Green concluded that, where relevant factual and moral obstacles can be overcome, the law can and sometimes should be invoked in an attempt to improve morality, including our social morality in relation to sexual conduct with particular reference to our understandings of consent (Green 2013: 489-94). Even the contributions more sympathetic to Hart's side of the debate were concerned to rescue his position from the weaknesses of the harm principle by, for example, resituating his argument in the larger context of his broader work on the fair distribution of freedom (Ricciardi 2013).

In addition to the rise in the fortunes of moralist versions of retributivism and of legal moralism, in assessing the relative fortunes of Devlin's and Hart's texts, we have to put into the balance the accumulating critical literature on the harm principle. This literature comes in a number of forms, not all of them espousing a moralist position. Some have questioned whether the harm principle can be given a clear enough definition to act as the limit on state power envisaged by Mill, with Bernard Harcourt (1999) influentially diagnosing 'the collapse of the harm principle', and Peter Cane arguing that 'the concept of harm is an unnecessary and analytically superfluous hindrance to clear thinking about the limits of criminal law' (Cane 2006: 36). Some years earlier, Ted Honderich had suggested that, in the final analysis, the harm principle simply reduced to another iteration the principle of utility, which it therefore could not, by definition, constrain (Honderich 1982). Others have accepted that the harm principle can be given a sufficiently determinate content to shape norms of criminalization, but have suggested instead that it is either that it is over-inclusive, and hence illiberal (Smith 2006), or under-inclusive, failing for example to account for the criminalisation of harmless personal grievances (Ripstein 2006), public decency laws (Alexander 2008) or 'free floating evils' such as corpse desecration. These criticisms have sometimes been taken to suggest that liberals themselves need a version of the strong moralist position or 'pure legal moralism' (Scoccia 2013).

I floated earlier the idea that, ironically, Feinberg's monumental intervention in the debate about the criminal enforcement of morality may, for all its impeccable liberal credentials, have paved the way for the gradual rehabilitation of legal moralism. As the contributions to the 50th anniversary debate about Hart's 1963 book attest, in philosophically inclined criminal law theory today, legal moralism is seen not only as a respectable and even a liberal (Duff 2018; 2019; 2020) position, but also something approaching orthodoxy. Certainly, in the hands of its most subtle and sophisticated exponents, we have a form of 'political legal moralism' which reconnects the debate about criminalization with an overall vision of liberal democracy – something very different from Devlin's view. But today's legal moralism once again puts the notions of moral wrong and of blame at the heart of its theory of criminal law; and one cannot help but think that Feinberg's addition of the criterion of wrongness in an effort to supplement the constraining and liberty-enhancing credentials of the harm principle opened the door to – or perhaps prefigured – a more general embrace of moralism.

But the revival of retributivism and forms of legal moralism in the last three decades of the 20th Century do not, of course, mark the end of intellectual history. And the new ‘liberal moralism’ has already elicited a further reaction in the field. This has taken the form of a ‘political turn’ in criminal law, producing accounts of criminal law which reject the analogy between interpersonal moral blame and criminal justice: the view that what criminal law is ‘for’ is quasi-moral blame and censure (Chiao 2016). For example, Hanna Pickard and I have argued for a view of criminal responsibility without blame that sits most naturally with a *regulatory* view of the function of criminal law and one oriented towards an institutional counterpart of forgiveness, in the sense of ‘wiping the slate clean’, rather than censure (Lacey and Pickard 2012; 2015a; Lacey, 2016: 1-24; 2016b; 2004). Ours is far from being the only such model of criminal justice. Erin Kelly, too, has argued persuasively for the differences between criminal law and morality, and for a rejection of the model of criminalization in terms of stigmatizing quasi-moral blame (Kelly 2018). Lindsay Farmer has elaborated a sophisticated argument about the role of modern criminal law in underpinning varying conceptions of civil order (Farmer 2016); while Vincent Chiao has argued that criminal law in the modern administrative welfare state exists fundamentally to sustain cooperation within public institutions, and should be supported to the extent (and only to the extent) that we have good reason to value the social order established by those institutions (Chiao 2019). Cognate accounts of the distinctive political or practical quality of state criminal justice as a system for social regulation or the facilitation of social cooperation have been offered by Stephanie Classmann (2020) and Peter Ramsay (2020). These conceptions of criminal law share a recognition that criminal law is ‘for’ ends quite distinct from those of moral blame and censure, and must be understood and assessed — morally and otherwise — in light of this fact.¹⁹ All of these accounts reject, decisively, the legal moralism which has enjoyed a revival in the decades subsequent to the publication of Devlin’s book.

In light of the revival of these de-moralised, regulatory, forward-looking accounts of criminal law, it is interesting to ponder the existence of another strand in the secondary literature on Devlin’s book, dating back to Rolf Sartorius’s intervention in 1972. This is the suggestion that Hart might have done better in sticking more closely to Mill’s text, and looking into it for resources with which to build up the substance of his case for a liberty-respecting criminal law. In Sartorius’ view, Hart could and should have done more to defend the substantive values represented by liberal utilitarianism (Sartorius 1972). This view is echoed in Hittinger’s suggestion that Hart could have made more of Mill’s positive case for liberty as not just self-preservation but also self-development, developing a theory of human well-being which gives more substance for the case for strict limits on state power (Hittinger 1990). Like Heta Hayry (1991), these writers put their finger on the need for Hart to elaborate the conception of liberal democracy underlying both his and Mill’s visions – a key issue seized upon by Devlin himself in the fifth chapter of *The Enforcement of Morals*, leading even commentators sympathetic to Hart’s anti-moralism to judge that

¹⁹ Note that none of these conceptions of what it is to have an institution of criminal law is inconsistent with the idea that criminal law and its enforcement are appropriately subject to searching critical scrutiny. Indeed Chiao, to take just one example, emphasises the fact that his account of the function of criminal law offers a justification which is contingent on the value of the socio-political order which it exists to coordinate.

Devlin addressed this second order question of democracy more squarely than his antagonist (Allan 2017).²⁰ As Wollheim (1957) observed at the outset, however, Devlin's mistake was to see the unity of society in moral as opposed to political terms (Allan 2017: 594). In this sense, the genealogy of the political turn in criminal law theory can be seen as – perhaps counter-intuitively – closely linked to the debate, implying that this latest development in criminal law scholarship is in a real sense part of its legacy.

IN CONCLUSION

‘Devlin was one of the most powerful minds to sit on the appellate bench in the post-1945 period... [and] ... a masterful operator. On occasion, an intellectual advocate of a populist tradition that would make judges eunuchs, Devlin in fact ‘developed’ the common law with grace and elegance. Yet he was a mystical figure. He seemed unable to produce a satisfactory philosophy of the judicial process until long after he retired.... [H]e managed to convey a feeling of being bored both as a High Court judge and as a law lord’ (Stevens, 467).

As Robert Stevens indicates, Patrick Devlin remains an elusive character. His unfinished memoir (Devlin 1996) abounds in details of debates, university politics, and his struggle for career advancement, but gives little sense of him as a person other than that of an ambitious man with a strong sense of entitlement. *The Enforcement of Morals* is, perhaps, the multivalent text that it is because of the tensions between the strongly hedonistic impulses and the patriarchal moralism which underpinned his personality. It is equally a textual monument to a world on the cusp of radical social change. Its significance for late 20th and early 21st Century criminal law thought both in and beyond the UK is deep, and its legacy accordingly wide-reaching. It will be for future readers to determine the further influence of this trenchant, though uneven, text in its still-evolving context.

²⁰ Cf. Cane's view (2006) that as a result of its focus on sexual morality and framing around the harm principle, the debate also failed to grasp the relevance of law's dynamic role and institutional form. While Cane's argument is not put in terms of democracy, his case for ‘taking law seriously’ as something which can articulate and institutionalise arguably presupposes a background political process producing legislation.

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