THE HART-DEVLIN CONTROVERSY IN 1965[1]

I

In 1958 Mr. Justice Devlin (as he then was) was invited to deliver the Maccabaean Lecture for 1959. He took as his text the broad "statement of juristic philosophy"[2] in the Wolfenden Report:[3] that (without wishing to "condone or encourage private immorality") we should recognize that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business". In the intervening years Lord Devlin has been so outstanding a spokesman of the very opposite view, that many readers will be surprised to learn from the preface of his new book that at that point of time, in 1958, he "completely approved" of this statement. The Maccabaean Lecture was originally conceived simply as a catalogue of examples of how various areas of the criminal law other than homosexuality might be reformed so as to bring them also into line with the Wolfenden assumption.

But "study destroyed instead of confirming the simple faith in which I had begun". In the event, the Maccabaean Lecture[4] was an *attack* on the Wolfenden view: "a statement of the reasons which persuaded me that I was wrong".

Two years later, in the famous case of *Shaw* v. *Director of Public Prosecutions*[5] (the "Ladies' Directory" case), the House of Lords also departed from the Wolfenden approach. They went back to Lord Mansfield[6] to reinvoke the view that the courts are "custodians of the public morals", with "a residual power . . . to conserve not only the safety and order but also the moral welfare of the State".[7] They used this power to assert that there "is" (or, at least in Viscount Simonds' view, that they would overtly create) a common law offence of "conspiracy to corrupt the public morals".

These two resounding judicial assertions of the power and duty of the law to enforce public morality have stimulated one of the most famous (and

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[1] A review article of *The Enforcement of Morals*, by Patrick Devlin (London, Oxford University Press, 1965; xiv and 139 pp.; $4.12 in Australia); and of *The Morality of the Criminal Law*, by H. L. A. Hart (Jerusalem, Magnes Press, 1965; 54 pp.; $2.08 in Australia). The former book will here be cited simply as "Devlin". The latter, and Hart's earlier *Law, Liberty and Morality* (1963), will be cited respectively as "Hart (1965)" and "Hart (1963)".

[2] See Lord Pakenham in 206 *H.L.D.* col. 738 (4th December, 1957).

[3] Report of the Committee on Homosexual Offences and Prostitution (*Cmnd.* 247, 1957) para. 61.

[4] "The Enforcement of Morals" (1959) 45 *Proceedings of the British Academy* 129-151, now reprinted in Devlin 1-25.

[5] (1962) A.C. 220, decided 4th May, 1961. Other issues raised by that decision are only *apparently* collateral to the "enforcement of morals" debate. The decision was (1) a professed "enforcement of morals", effected (2) by overt judicial creativeness, which operated (3) retroactively, and (4) (in the words of John Austin, 1 *Lectures on Jurisprudence* (3 ed., 1869) 224) "under cover of vague and indeterminate phrases". Each of these four features of the case is an independent focus of controversy. Yet if, as this decision seems to prove, (2), (3) and (4) are unavoidable concomitants of *judicial* enforcement of morals, then even if as to (1) taken singly we are disposed to agree with Lord Devlin, objections to any one of (2), (3) or (4) may lead us to conclude that enforcement of morals is at any rate not an appropriate *judicial* activity.

[6] In *R.* v. *Delaval* (1763) 3 Burr. 1434 at 1438-39.

[7] See generally Viscount Simonds, (1962) A.C. at 267-68.

most bewilderingly multipartite) debates in modern jurisprudence.[8] The two books here to be discussed are, at this time of writing, the latest shots to be fired by the two major protagonists. Lord Devlin once again denies the existence of the Wolfenden "realm of private morality"; and Professor Hart again explores the "modification" of John Stuart Mill's essay *On Liberty* which enables him to support the Wolfenden view. Both books are clearly destined to give the whole discussion a renewed vigour, and whole new dimensions.

II

Strictly speaking, Lord Devlin's book adds nothing that is new: it simply reprints his Maccabaean Lecture, together with six other lectures delivered from 1961 to 1964 by way of extension or re-exploration of the original theme. The Maccabaean Lecture itself has long been famous, and two of the others have been printed in American law reviews.[9] But of the remaining four, one has been previously published only as a Holdsworth Club pamphlet,[10] and the other three not at all; so that for most readers, most of the book will in fact be new. For readers previously familiar only with the Maccabaean Lecture, it will be strikingly so.

The six new lectures are arranged in two groups. Three reflect Lord Devlin's awareness that a jurisprudential problem such as the relation of law and morals cannot be adequately discussed with reference solely to criminal law. So much jurisprudential theorizing, from Austin onwards, has taken criminal law as its sole paradigm case, that this is an especially welcome extension of the debate. While still insisting that "only the criminal law can be used to enforce moral standards",[11] he sets out to make this thesis more meaningful by showing how other parts of the law relate to morality in other ways. The Holdsworth Club lecture deals with the law of tort, and also with "quasi-criminal" (statutory) offences; and two previously unpublished lectures discuss the law of contracts, and of marriage and divorec. The result is a survey of most of the moral problems that have worried Lord Devlin as a judge, including some which he himself has judicially tried to resolve.

He sees the law of torts, for example, as a series of islands of morally neutral "compensation for damage done", with the gaps between them partly filled in by the concept of negligence—which, insofar as it imports a reference to actual states of mind, may allow some moral element to enter. This leads him to assert that "the great blemish on the law of tort" ("due simply to under-development") is its failure to provide for malicious or careless, but non-physical, harm.[12] This "blemish", of course, has now been rectified by

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[8] For a partial bibliography (including also some older relevant literature) see Devlin xiii-iv; for another list see J. Stone, *Social Dimensions of Law and Justice* (1966) 376, n. 462. Generally pp. 279 and 368-381 of this last work should now be added to the list.

[9] "Law, Democracy and Morality" (1962) 110 *University of Pennsylvania L.R.* 635; "Mill on Liberty in Morals" (1965) 32 *University of Chicago L.R.* 215: for which see now respectively Devlin 86-101, 102-123.

[10] *Morals and the Quasi-Criminal Law and the Law of Tort* (1961), for which see now Devlin 26-42.

[11] Devlin 52. He at once qualifies this by conceding that contract law may be so used, e.g., through refusal of specific performance, or voidness for illegality. (For a fuller conspectus of such devices see Stone, *op. cit. supra* n. 8, at 369.) But he argues (Devlin 52-60) that these techniques should be much more sparingly used, confined to activities that really are "a breach of the moral law" (*id.* 59), and even then to "the direct consequences of the wicked act" (*id.* 53). He makes some attempt (esp. at 60) to base the needed distinction on the "fundamental difference between the law that expresses a moral principle and the law that is only a social regulation", as to which see *infra*, text accompanying nn. 20-25. But his real drive is to show by numerous examples that allowance of the defence of "illegality" must be decided piecemeal, by a weighing of the interests involved in each particular situation. See esp. *id.* 58-59.

[12] Devlin 41, and *cf. id.* 37.

Hedley Byrne & Co. Ltd. v. *Heller & Partners Ltd.*,[13] not least by Lord Devlin's own speech in that case. On the other hand, he inclines to think that "a branch of the law whose object is to provide compensation for damage" *morally ought not* to be "used directly to serve a moral purpose".[14] The limited role of "malice" as a relevant state of mind should then be more limited still, and his brief discussion of this viewpoint in relation to punitive damages[15] clearly gives us the motivation for his later more elaborate (and still controversial) statement on this matter in *Rookes* v. *Barnard*.[16]

Again, as to the law of contract, it has long been recognized[17] that the various strategies developed over the past two decades for dealing with exemption clauses, "fundamental terms", and the like, reflect the dislike of their judicial authors (among whom Lord Devlin has been notable) for the "fine print" of standard form contracts of adhesion, which the consumer or client has no option but to accept. His discussion of this matter as part of the morality of contracts[18] is therefore to be welcomed, though it is oddly more formal (and much more cautious) than some of his *judicial* statements.[19] Here, indeed, he seems to conclude that there is no moral issue after all, and that the "form-mongers" are quite entitled to avoid litigation if they can.

His discussion of "quasi-criminal law" is less satisfactory, mainly because he never succeeds in formulating an adequate criterion which would enable us to determine what is comprised in this field. Clearly its statutory provenance is not an adequate test;[20] and for the most part he seems inclined to work by reviving the rather old-fashioned distinction between *mala prohibita* and *mala in se*.[21] Yet this is blurred by his anxiety to show that even the merely "quasi-criminal" *mala prohibita* must have *some* link with morality. "Real" crimes, he says, *must always* have a direct relation to some central moral content; "quasi-criminal" provisions are morally neutral in themselves, but are aimed at forestalling situations in which immoral conduct is possible. "Real" crimes are morality's "citadel"; quasi-criminal ones merely its "fortified outworks".[22]

These wide claims simply do not fit the diversity of either "criminal" or "quasi-criminal" laws; and the suggestion that they do—that directly or indirectly morality *must always* be involved—adds difficulties which were not present in the Maccabaean Lecture itself.[23] Nor do his other suggested distinctions do anything to help. These are that crimes are "gross and deliberate breaches of the moral law . . . deeply injurious to society", while quasi-criminal offences are more venial; that "the sense of obligation which leads a citizen to obey" is "different in quality" for a law good in itself and for

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[13] (1964) A.C. 465.

[14] Devlin 34n, 41-42; and *cf. supra* n. 11.

[15] Devlin 37-38.

[16] (1964) A.C. 1129 at 1220ff.

[17] See, e.g., *Anson on Contracts* (22 ed. by A. G. Guest, 1964) 141-169.

[18] Devlin 49-51.

[19] *Cf.* esp. his witty irreverence in *McCutcheon* v. *David MacBrayne Ltd.* (1964) 1 W.L.R. 125, at 132-37 — perhaps a response to the fact that his speech in that case was to be his judicial swansong.

[20] See Devlin 28.

[21] *Id.* 26, 30-33. His vagueness here echoes that of his own much earlier statement in *R.* v. *Martin* (1956) 2 Q.B. 272, where he drew surprising consequences of statutory interpretation from a distinction between "offences against the moral law", these being wrong wherever committed, and mere "breaches of regulations . . . made for the better order or government of a particular place such as a public house, or a particular area such as the County of Middlesex, or a particular country such as England". This distinction met with criticism from A. L. Goodhart, Note (1956) 77 *L.Q.R.* 318 at 319; with a groundless (but tempting) dismissal as *obiter* from Bin Cheng, "Crimes on Board Aircraft" (1959) 12 *Current Legal Problems* 177 at 178-79; and with puzzled evasion from Lord Parker, C.J., in *R.* v. *Naylor* (1962) 2 Q.B. 527. The House of Lords in *Cox* v. *Army Council* (1963) A.C. 48 abstained from deciding the point; but see Viscount Simonds at 69.

[22] Devlin 27-28.

[23] As well as intensifying some that were there present. Compare his language *ibid.* with my discussion *infra* n. 67.

a mere "regulation designed to secure a good end"; and that morality's relation to the quasi-criminal law is unlike its relation to "real" crimes and more like its relation to torts[24]—this last although in general he seems disposed to conclude that the law of torts has hardly any relation to morality at all.[25]

The other three lectures are mostly closer to the original ground of debate, being direct responses to the criticisms which Hart and others have levelled at the Maccabaean Lecture. But here, too, the original debate is extended on many fronts.

The Pennsylvania lecture[26] seeks to justify the original Maccabaean reliance[27] on "the man in the jury-box" as the arbiter of public morality. The justification is not wholly satisfying. In part, it involves a return to the earlier eulogies of the jury in Lord Devlin's Hamlyn Lectures of 1956.[28] But those lectures balanced eulogy with cautious awareness of many defects of the jury system, of which we now hear less: they stressed, for instance, that "the jury is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class."[29] Are these the minds that Lord Devlin is now asking us to accept as our arbiters of a legally-enforced morality?

He tells us we must accept them, since the only alternative is a kind of Platonic elitism.[30] But his argument ignores the fact that his own "insuperable . . . practical objection" to elitism would also make his jury proposal unacceptable: namely, "that 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".[31] Nor does he really face the fact that the whole dilemma—*Whose* morality?—only arises if we assume that the law must enforce *someone's*. Here he resorts to his familiar argument[32] that even his opponents want *some* enforcement of morals, notably for protection of youth; so that even they *must sometimes* face the above dilemma. But this supplies the missing assumption only *pro tanto*.

His attempt to supply it by reliance on *Shaw's Case*[33]—where the goal of "enforcement of morals" is authoritatively laid down—does not help him, either. Apart from the very dubious value of *any* reliance on *Shaw's Case*, this particular use of it steers close to the dangerous argument that what the law *is* can somehow be taken as a guide to what it *should* be.[34] So, for that matter, does his related but more central use of that case, transforming their Lordships' brief remarks on the jury's role in such cases[35] from a mere judicial evasion of the decision's implications, into major support for Lord Devlin's position. Moreover, *this* use of *Shaw's Case* has the surprising consequence that the jury are now to be sole arbiters, not only of *what is* the "public morality" to be enforced, but also of *whether* in any given instance it will be enforced or not.[36] This, of course, makes nonsense of the entire search for criteria to which lawyers and legislators should be advertent in deciding how to chart the line between enforced and unenforced precepts. Both Hart and Devlin are to be ignored, and the whole matter left to the jury!

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[24] See respectively *id.* 33, 31, 26.
[25] See *supra*, text accompanying nn. 12-14; but see *infra* at nn. 90-91.
[26] *Supra* n. 9.
[27] Devlin 15.
[28] Sir Patrick Devlin, *Trial by Jury* (1956), esp. 158-165. See now Devlin 90-91.
[29] *Op. cit. supra* n. 28, at 20.
[30] See esp. Devlin 89, 92ff.
[31] *Id.* 93.
[32] *Id.* 92. *Cf. id.* 6-7, 11-12, 28-29, 132-33.
[33] *Supra* n. 5.
[34] For an earlier flirtation with this argument see Devlin 5-6, and the careful comments in Hart (1963) 27-29.
[35] (1962) A.C. at 269 (Viscount Simonds), 290 (Lord Tucker), 292 (Lord Morris), 294 (Lord Hodson). See Devlin 91, 97ff.
[36] See esp. *id.* 99.

The whole of this Pennsylvania lecture does very usefully show that the choice between juries and Platonic elites raises basic problems of democratic theory. But the attempt to range democratic ideology on the side of the jury is no answer to Hart's earlier criticisms also based on that ideology.[37] Nor is Devlin's overall position at all assisted by the assertion in this context that what, in democracy, makes all men "equal" is not equal intelligence, but an equal "faculty" of telling right from wrong (and that otherwise it would be "pernicious" to give them equal rights in government).[38] The two great contributions of this Pennsylvania lecture are, first, its recognition of the problem that moral judgments differ, and, second, its removal of any possible doubt that what Lord Devlin seeks to enforce is the public morality actually held, and not some "true" morality. But the insistence on "equal" moral faculties available to all men would suggest both that public morality *is* "true" morality, and that moral judgments do *not* differ: and, of course, if Devlin cannot somehow reintroduce this last suggestion, his whole thesis would collapse. "Without a collective judgment there can be no case at all for intervention."[39]

The purpose of the Chicago lecture is somewhat more abstract. Here, Lord Devlin is seeking to refute the argument of Mill, that moral deviators should be suffered because some of them may be the harbingers of a newer and higher morality. He urges us to admit that Mill paints an "idealistic picture", in which those who perform immoral acts are seen as "doing them earnestly and openly and after thought and discussion in an endeavour to find the way of life best suited to them as individuals". The fact is, he says, that "pimps leading the weak astray far outnumber spiritual explorers at the head of the strong".[40]

The critique of the critics here is quite brilliant, but is capped in the final lecture (previously unpublished) by a dazzling refutation of Hart's "attempts to bring Mill's doctrine into contact with 'contemporary social reality' ".[41] Hart's "modification" of Mill (it is said) yields so much to "legal moralism", and even "paternalism", as to make nonsense of what is left.[42] In these last two lectures Lord Devlin's critical arguments are so powerful and ingenious that one almost forgets that they really do very little to further his own case.

III

Compared with all this Professor Hart's book, which is in fact new, may seem less novel. His major contribution has of course already been made, in

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[37] See Hart (1963) 77-81. [38] Devlin 100.

[39] *Id.* 8; and *cf.* the perceptive comments on judicial assumptions of moral "homogeneity" by Hart (1965) 39-41.

[40] Devlin 107-08. This "moral pioneers" issue is a main focus of the discussion in Stone, *op. cit. supra* n. 8, at 378-79, esp. n. 463a.

[41] Devlin 125. The phrase "contemporary social reality" comes from Hart (1963) 63. In fact all that Hart was there claiming was that the Devlin position was *not* in contact with such reality. The ironical adoption of an opponent's rhetorical phrases is a standard controversialist's trick, at which both Hart and Devlin are expert. As in all good debates, it adds greatly to the fun, but also to the distortions and cross-purposes. For another example see *infra* n. 66.

[42] See Devlin 128-138. We begin with Mill's "famous sentence" (so dubbed by Hart (1963) 4; and see now Hart (1965) 36) "that the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled . . . because it will be better for him . . . , because, in the opinion of others, to do so would be wise or even right." (Mill, *On Liberty* (1859) ch. 1). Hart's "modification", says Devlin, reduces finally to saying "that the only *purposes* for which power can rightfully be exercised over any member, etc., *are* to prevent harm to others *or for his own physical or moral good.* His own good, either physical or moral, *is therefore* a sufficient warrant. He *can* rightfully be compelled . . . because it will be better for him . . . , *but not* because, in the opinion of others, to do so would be wise or even right." (Devlin 134).

his *Law, Liberty and Morality*;[43] and anything he might now add could be only in the nature of a postscript to that remarkable little book. Moreover, while Devlin obviously thrives on controversy, Hart seems in danger of getting bogged down in it. The Hart-Devlin debate has long been rivalled in interest and importance by the Hart-Fuller debate,[44] and his long-term concern with theories of punishment[45] seems lately to be issuing in a Hart-Wootton debate.[46] The first of his two new lectures[47] is wholly concerned with this last; and while this tandem presentation usefully draws attention to the fact that the two controversies are philosophically interrelated[48] (as the Hart-Devlin and Hart-Fuller debates may also be),[49] it does not allow either one of them to be much further advanced.

The point at issue in the burgeoning Hart-Wootton debate does not really go to Lady Wootton's own major theme. That theme is simply that "punishment" for crimes should now be abandoned in favour of crime prevention through "social hygiene". Each offender is to receive "the treatment which experience suggests is likely to evoke the right responses".[50] Sometimes this might mean hospitalization, sometimes imprisonment; eventually (she thinks) the distinction between these would disappear.

Hart, like most liberals, is prepared to assent to much of this. His objection is to the corollary claim that notions of criminal "responsibility" should also be abandoned, and "treatment" predicated on a "strict" or "objective" form of liability. In holding back from full commitment to Lady Wootton's "extreme view", he is not of course refusing to heed the lessons

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[43] *Supra* n. 1.

[44] See H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard L.R.* 593; L. L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart", *id.* 630; H. L. A. Hart, *The Concept of Law* (1961), esp. 181-207; L. L. Fuller, *The Morality of Law* (1964), esp. 133-151, 184-85; H. L. A. Hart, Book Review (1965) 78 *Harvard L.R.* 1281; L. L. Fuller, "A Reply to Professors Cohen and Dworkin", in Symposium (1965) 10 *Villanova L.R.* 624 at 655.

[45] See, e.g., his "Murder and the Principles of Punishment in England and the United States" (1957) 52 *Northwestern University L.R.* 433; "Prolegomenon to the Principles of Punishment" (1959-60) 60 *Proceedings of the Aristotelian Society* 1; and indirectly his probing of "degrees" of negligence in "Negligence, Mens Rea and Criminal Responsibility", in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961) 29, on which see my Book Review (1963) 4 *Sydney L.R.* 323 at 325.

[46] See B. F. Wootton, *Social Science and Social Pathology* (1959) 227-267; *id.*, "Diminished Responsibility: A Layman's View" (1960) 76 *L.Q.R.* 224; H. L. A. Hart, *Punishment and the Elimination of Responsibility* (1962); B. F. Wootton, *Crime and the Criminal Law* (1963).

[47] Hart (1965) 5-29, esp. at 12ff. The two lectures were originally delivered at the Hebrew University of Jerusalem in 1964.

[48] See *infra* at n. 73, where I suggest that the same two moral assumptions fundamentally motivate Hart's arguments in both debates. More generally, each debate opens up the entire theoretical question of the justification of punishment. See, e.g., Hart (1965) 20, 27-28 (*contra* Wootton); and *cf. id.* 38-39 (*contra* Devlin). *Contra* Wootton he is concerned to defend himself by insisting that he does not rely on a notion of punishment as mere "retribution for wickedness"; *contra* Devlin he is concerned to attack by insisting that his opponent *does* rely on such a notion, or at least on its variant contemplating "emphatic denunciation" of wickedness. The question how far law can and should weigh subjective "states of mind" similarly permeates both debates: see Hart (1965) 5-29 *passim*, esp. 7; *id.* 49-53; and Devlin 19-20, 34-42.

[49] J. D. Morton, Book Review (1966) 82 *L.Q.R.* 115, is not quite correct to merge the Hart-Fuller issue (a "morality of law") with the Hart-Devlin issue (a "law of morality"), as if all three thinkers were engaged in one three-cornered dispute. Yet all three might fruitfully explore the linkages underlying such a view. The two major ones are specified *infra* nn. 87-88. In addition Fuller's notion of a "spectrum" between "morality of duty" and "morality of aspiration" (1964 work cited *supra* n. 44, esp. at 9-10) might assist Lord Devlin at least in the perplexities discussed *supra* at nn. 20-25; and discussion of *Shaw's Case*, *supra* n. 5, might usefully be linked both with Fuller's views on retroactivity (*op. cit.* 51-62), and with his view that allocations of different legal tasks should respect the "integrity" of different legal institutions (see, e.g., *id.* 168-181, on which see my Book Review (1965) 20 *University of Virginia Reading Guide* 11 at 15-16). Finally, the deepest confusions of the whole Hart-Devlin debate might be linked with Fuller's constant insistence on the necessary confusion of "means" and "ends" in all human activity.

[50] See Wootton, 1963 work cited *supra* n. 46, esp. at 79.

of modern psychology. He recognizes that the actual subjective states of mind which underlie criminal conduct are much more variable, and open to involuntary determinants, than can be acknowledged by traditional notions of responsibility based on "fault" and "knowledge of wrong". He sees the innovative plea of "diminished responsibility"[51] as a step in the right direction, but a "meagre and half-hearted" step. His thesis is simply that before that step, most liberal critics of the law sought reform through *extension* of the principle of *mens rea;* that is, through extending responsiveness to subjective "states of mind" by replacing the outworn straitjackets of the M'Naghten Rules with new rules able to accommodate subjective diversities. But lately, the drive has rather been (as with Lady Wootton) to eliminate the principle of *mens rea* altogether. In face of this new fashion, Hart finds *his* liberalism transformed into a kind of conservatism; and his purpose is to argue that amidst new enthusiasms, this "older" liberalism should not altogether be lost.

He now proposes a compromise by which *mens rea* "except so far as it relates to mental abnormality" should be retained as a "necessary condition of liability"; questions of mental abnormality should, as Lady Wootton proposes, be raised only after conviction, going only to sentence (or "treatment").[52] But this compromise will not really work: as he himself admits in a footnote,[53] questions of *mens rea* and of mental disorder cannot be thus distinguished. He is left saying simply that whatever we do, we should not abandon *mens rea*; and his real reasons for saying it are moral reasons.[54]

In his second lecture, Hart returns to the debate with Lord Devlin. He begins by taking up explicitly his own earlier half-suggestion that the striking parallel between Devlin's arguments and those of James Fitzjames Stephen[55] a century earlier represents "the persistence among our judges of a certain characteristic philosophy as to the proper scope and use of the criminal law";[56] and he is able to explore this idea somewhat further, though still not far enough:

> Is this persistence explicable in terms of social origin, education, or the conditions or status of an English judge's office? These are sociological questions of great importance but as they are not the subject of this lecture I will spare you my amateur speculations on these topics.[57]

This is a surprising disclaimer of jurisprudential competence; and although Hart's clarification of what he *does* propose to do is partly reassuring, if anything it increases our puzzlement over his earlier disclaimer. His main purpose, he says, is to "descend from abstract theories to concrete facts" and "consider how the reformers inspired by Bentham and Mill have in fact fared".[58]

This enables him to enrich the debate with some useful empirical data (historical, statistical, and sometimes almost sociological) drawn from the 1961 reform of the English law of suicide, and from the still unsuccessful attempts at reform in the areas of homosexuality and abortion. This kind of argument, if there were more of it, might dispose of "legal moralism" once

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[51] U.K. Homicide Act, 1957, s. 2, discussed in Hart (1965) 11-12.
[52] *Id.* 15, 24-25.
[53] *Id.* 25.
[54] See *infra*, text accompanying nn. 73-76.
[55] *Liberty, Equality, Fraternity* (2 ed., 1874). For Hart's first reaction to this seeming judicial solidarity see Hart (1963) 6, 16-17, 61-66.
[56] Hart (1965) 35; and see generally *id.* 35-41.
[57] *Id.* 36. Compare the remarks by G. Sawer, *Law in Society* (1965) ch. 6, which may be "amateur speculations" but do at least recognise that some such discussion is a jurisprudential necessity. On the regrettable general tendency of Hart's penetrating intellect to stop short whenever it reaches the sociological domain, see G. Hughes, "Professor Hart's Concept of Law" (1962) 25 *Modern L.R.* 319, esp. 327ff.; B. E. King, "The Basic Concept of Professor Hart's Jurisprudence" (1963) *Cambridge L.J.* 270. His willingness later in the 1965 book (see esp. *infra* n. 59) to draw on social science surveys is therefore doubly welcome.
[58] Hart (1965) 41.

and for all;[59] but a single lecture gives room for only a few inconclusive assertions. Hart's "concrete facts" not only leave the theoretical argument largely where it was; they do not even (as one might have expected) manage to meet Lord Devlin's complaint[60] that (except as to homosexuality, bigamy and cruelty to animals, and partly as to abortion) Hart still has not told us which moral precepts he would agree to enforce, and which not. Even in his descent to concrete facts, Hart is still selecting "those examples which he finds it most convenient to deal with".[61]

In short, whereas Devlin's successive lectures are a series of careful refinements and restatements of his originally rather confused position, Hart (at least at the theoretical "doctrinaire" level to which Devlin[62] assigns the whole debate) is content to stand pat. No doubt a man who is right in his views is entitled to do this, and perhaps can do no other. But if (as this reviewer believes) Hart is in fact right, it becomes rather paradoxical that most readers will find Devlin's latest arguments much more persuasive than Hart's.

IV

But this is only one of the paradoxes in this great debate as the two latest books have left it. Another—though perhaps this is only to be expected when great minds disagree—is that the area of agreement between them is much larger than either of them seems to realise. Even in 1959, Lord Devlin was not saying that "private immorality" *must always* be subjected to criminal sanctions; he was merely seeking to deny the equally dogmatic view that "private immorality" *must always* be immune from such sanctions.[63] In each case "it is the old and familiar question of striking a balance between the rights and interests of society and those of the individual".[64] In Roscoe Pound's language (which Devlin sometimes almost uses),[65] the question whether any given activity should be forbidden or penalized by law must be answered by a weighing of all the interests involved. And this involves the corollary that the answer may have to change along with changes in the interests asserted for the time being.

In the Maccabaean Lecture itself the references to law's concern with "immorality as such",[66] the reliance on the moral views of "the man in the jury box", and the unsuccessful struggles to distinguish the thesis concerning law and morals from a similar thesis that might be advanced about law and

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[59] See esp. the discussion of suicide at 43-44, giving first results of a survey after the U.K. Suicide Act, 1961. These results show (1) a very widespread ignorance (75%) of the fact that attempted suicide was no longer a crime (suggesting that legal provisions scarcely reach the social level at all); and (2) no difference in moral attitudes as between those aware of the change, and those ignorant of it (suggesting that legal provisions, even when known, can do little to change moral attitudes). Fuller results of this survey have now been published by N. Walker, "Morality and the Criminal Law" (1964) 11 *Howard Journal* 209; *id.* (with M. Argyle), "Does the Law Affect Moral Judgments?" (1964) 4 *British Journal of Criminology* 570. Such results must of course be used with caution, suicide being in any case a rather special crime.

[60] Devlin 128, and esp. 138-39.

[61] *Id.* 128.

[62] *Id.* 125-27 — no doubt written with "the judicial tongue well tucked into the judicial cheek", as, says Devlin 49, are most orthodox judgments on the construction of standard form contracts. See *supra* at n. 17.

[63] See the full analysis in Stone, *op. cit. supra* n. 8, at 377.

[64] Devlin 15.

[65] See, e.g., *id.* 104.

[66] The phrase originates in the Wolfenden Report, *supra* n. 3, para. 257 ("It is not the duty of the law to concern itself with immorality as such"). Devlin quotes this statement at 3, and his own uses of similar language (e.g., at 2, 5, 8, 11, 14) are probably to be understood as allusions to this formulation of the view he rejects. If the phrase is misleading, it is the Wolfenden Committee and not Lord Devlin that is to blame. Yet in Hart (1965) 32, 34, 36, 38, the phrase is still treated as an accurate summation of Lord Devlin's own theme.

religion,[67] all operated to obscure the actual modest demand for a flexible weighing of interests. But the Chicago lecture makes it finally clear that only this more modest demand is in fact involved.[68]

Hart, of course, would be less likely to put his demand in Poundian terms. Yet he, too, appears to believe (at any rate as to abortion) that "the issue should be calmly viewed as one to be decided by consideration of the balance of harm done by the practice, and the harm done by the existing law".[69] His present careful consideration of abortion laws, the earlier similar consideration of bigamy, the concessions to "paternalism" which allow Lord Devlin such sport, and his general awareness of the need to "modify" Mill's "famous sentence", all show that he, too, asks for no more than a weighing of interests in each case.[70]

Once this flexible, piecemeal approach is seen as common ground, the real difference between Devlin and Hart will be found to centre on the place to be accorded to two particular interests. One is what Pound would have called "the social interest in the general morals"; the other is his "social interest in individual self-assertion".[71] Devlin's arguments are clearly prompted by some sort of special solicitude for the former interest; Hart's arguments by a similar solicitude for the latter. Each of them, when speaking inattentively (as both of them sometimes do), tends to fall back into the assumption that his own favoured interest should be somehow a "paramount" interest, of such importance to society as to override virtually all other interests that may be involved—and *a fortiori* to override the opponent's favoured interest, if indeed the latter deserves any place in the weighing at all. But each of them seems really concerned only to insist that his own favoured interest should always carry some weight, as against his opponent's *apparent* inclination to accord it no weight whatsoever.

All this leads to a further paradox. On the above understanding, Lord Devlin is saying merely that it may sometimes be necessary to enforce the prevailing morality even at the cost of individual self-assertion; and Hart is saying that it may sometimes be necessary for the law to tolerate individual departures from popular morality, "even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' ".[72] But whether the opposed views are stated in this

[67] His recurring treatment of the problem as one of how far to distinguish "crime" and "sin" has theological overtones not wholly neutralised by his emphasis at 3-4 that "sin" is meant in its "wider" (non-theological) meaning — especially when he tells us at 20 that the clergy are "the natural guardians of public morals". Nor is he helped by his absorption (e.g., at 4-5, and esp. in the passage at 9-10 on which his whole argument rests) in the historical linkage of morals and religion; nor by his tendency to see himself as doing battle with "the agnostic or free-thinker", e.g., at 3-4 and throughout the lecture on marriage and divorce. In this lecture, indeed, the relevant *moral* issues are almost submerged in attempts to sort out the relationship of the *theology* of "Christian marriage", to the *legal* regulation of marriage as a social institution. The consequent radical challenge to the very possibility of a *secular* divorce *a vinculi* yields some fascinating arguments, with true secularism seen as attainable only by sharp procedural disjunction of the issues of (secular) marital separation, and (secular) licence to remarry. But amidst the law-and-religion discussion the law-and-morals issue (i.e., how can the law best implement the changing *moral* attitudes relating to "Christian marriage"?), though in fact discernible as a separate issue, is only dimly so.

[68] See esp. Devlin 102, 111ff. The point is further reinforced by his seemingly parallel treatment of contractual "illegality": see *supra* n. 11.

[69] Hart (1965) 47.

[70] See *id.* 46-48 (abortion); Hart (1963) 38-43 (bigamy); *id.* 30-34 ("paternalism"); *id.* 33 (the "famous sentence"). As to these last two points see *supra* n. 42.

[71] See R. Pound, 3 *Jurisprudence* (1959) 303-04, 316-19. No doubt the latter "social" interest might also be expressed as an individual interest of personality: see *id.* 42-45, 63-67. But in stating the clash with "general morals", it seems best to express both conflicting claims as "social" interests, so as to avoid the ideology-charged dichotomy between "society" and "individual". *Cf.* Stone, *op. cit. supra* n. 8, at 181-82. From this viewpoint, Lord Devlin's formulation quoted *supra* at n. 64 is potentially misleading. And see *infra* n. 77.

[72] Hart (1963) 81. The words "intolerance, indignation and disgust" (Devlin 17) have been widely criticised. He defends them in the preface to his new book, at viii-ix.

modest form, or in the more absolutist form which both writers sometimes favour, it is clear that Devlin's is essentially a moralistic view, and Hart's a non-moralistic, utilitarian one. It is therefore striking that Devlin bases his arguments on non-moralistic utilitarian grounds, and Hart on moralistic grounds. Hart does not finally rest his case (as Mill attempted to do) on the argument that "enforcement of morals" may hamper social progress by suppressing "moral pioneers"; he relies ultimately on two deep interdependent convictions which are beyond utilitarian or even rational justification. One is that individual liberty is an absolute ethical value; the other is the principle of justice that any punitive or other legal enterprise which cuts down this absolute value requires to be *justified*.

In the 1965 version of his argument against Lady Wootton, these two moral convictions are frankly asserted as the basis of his stand.[73] Their place in his argument against Lord Devlin is somewhat less explicit; but the older enunciation of both of them by Bentham and Mill is taken as the opening theme of his second 1965 lecture.[74] As to his basis for these convictions, he also seems uncertain. Clearly his appeal to the authority of the older utilitarians is not an adequate basis. Nor does he essay the difficult task of showing that such assertions are derivable from (or even consistent with) the utilitarian principle itself. At first he seems disposed to ascribe them at most to "considerations of fairness or justice", and at least to "an intelligible ideal of justice to the individuals whom we punish". Later he speaks in terms of the individual's "right not to be used" for schemes of "social hygiene" except on some justification peculiar to him. Finally, he comes to rest on simple assertion of "a judgment of the value of individual liberty".[75] In other words, Hart cannot *prove* that the justification which Devlin offers for "the enforcement of morals" is illusory or outmoded; he can only appeal to our own moral sense that it is not worth the price.[76]

Devlin, for his part, is not concerned[77] either to deny Hart's two moral principles, or to counter them with any rival morality of his own. In terms of Hart's distinction between "positive" and "critical" (or "rational") morality,[78] he is not contending that the law should enforce true "rational" morality so as to build a *better* society; he is saying merely that the law must have power to enforce "positive" morality (even when this is wrong-headed) so as to preserve a *stronger* society. Morality, if not "a single seamless web", is at any rate "a web of beliefs rather than a number of unconnected ones";[79] and if for want of legal protection any part of it is weakened, or seen to be flouted with immunity, the popular conviction sustaining the whole web may be undermined. If this happens, society itself may be threatened. For society is "a community of ideas", including moral ideas; morality "is built into the house in which we live and could not be removed without bringing it down".[80]

In short, Lord Devlin is asserting three *sociological* propositions—first,

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[73] Hart (1965) 20, 27-29.

[74] *Id.* 31-32.

[75] For these various claims see respectively *id.* 20, 27, 29.

[76] See the peroration in Hart (1963) 83.

[77] Or at least not now concerned. In 1959 he said: "The Wolfenden Report . . . requires special circumstances to be shown to justify the intervention of the law. I think that this is wrong in principle." (See now Devlin 11.) But he now asserts (*id.* 102): "We . . . say that we belong to a free society. By this I think we mean no more than that we strike a balance in favour of individual freedom. . . . The question to be asked in each case is: 'How much authority is necessary?' and not: 'How much liberty is to be conceded?' . . . That authority should be a grant and liberty not a privilege, is, I think, the true mark of a free society."

[78] Hart (1963) 17ff.

[79] For this reformulation see Devlin 115, responding to the criticism in Hart (1963) 50-52.

[80] Devlin 9. *Cf. id.* 89, where he draws support from a majority of the U.S. Supreme Court in *Minersville School District* v. *Gobitis*, 310 U.S. 586 at 596 (1940): "The ultimate foundation of a free society is the binding tie of cohesive sentiment."

that a popular moral precept not legally recognized may thereby tend to lose the support of popular convictions; second, that if any particular precept is thus weakened (whether through legal default or otherwise), the whole body of popular morality may be infected by the weakness; and third, that the popular morality of any given society is one of the indispensable bases of its social cohesion.

Each of these three hypotheses is open to further testing. Some of them seem shaky even on Lord Devlin's own acount. The second, for instance, with its implication that morality is an interconnected (if not a "seamless") web, remains even in his latest reformulation open to many objections. He is emphatic in his insistence that the "web" metaphor applies "for most people"; that "most men take their morality as a whole".[81] Yet presumably morality can only be a "whole" if the warp and woof of the web are supplied by general rational principles, concretized through the "separate rational judgments" which Devlin denies that most men make. These general rational principles come with "critical" morality, not with the "popular" morality with which Devlin is concerned. Without them, "most men" *must* take their morality piecemeal; and so in fact does Lord Devlin himself.

If, indeed (as here suggested), his whole concern is to show that the "enforcement of morals" issue must be settled by *ad hoc* weighing of interests for each moral precept, rather than by "some single principle",[82] then this presumably would *entail* a discrete, "piecemeal" approach. But however it be in theory, the "morality" which he in fact presents as he ranges from topic to topic is not even a seamy web, but hovers between two models of discreteness.

A first model is that each human enterprise or relationship has its own distinct "morality". Lord Devlin's remarks on the morality of "Christian marriage" often seem close to this view; and so perhaps is his attempt to formulate moral precepts for law itself.[83] For the most part, however, his lectures seem rather to presuppose the alternative model, which would make "morality" a random catalogue or congeries of all precepts to which men commonly attach a special kind of obligation, some of them (mainly as to physical violence and sexual aberration) being specific rules, and others (such as "honesty" and "fairness") being vaguer standards of propriety in the conduct of human relations. The former would be suitable for enforcement by criminal law; for the latter we would need to envisage some vaguer kind of relevance—for instance in terms of quasi-criminal "outworks",[84] or of the purposely vague *leitmotif* of Lord Devlin's discussion of contracts: "The moralist cannot say much more about contract than that the good man should keep faith and deal fairly."[85] Whatever the detailed analysis may be, the mere fact that he finds it possible to think of different kinds of relationship between "law" and "morality" implies the presence not merely of different branches of law, but of different branches of morality.

All this goes only to suggest that Lord Devlin's three hypotheses are *merely* hypotheses and therefore defeasible. But sociological hypotheses need sociological refutation: mere counter-hypotheses, however brilliant the speculations suggesting them may be, will not do the job.[86] *A fortiori*, we cannot

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[81] Devlin 115.

[82] *Id.* 22.

[83] See respectively *supra* n. 67 and *infra*, text accompanying nn. 90-93. This model, of course, is one which Hart (*contra* Fuller) has lately sought to reject: see his Book Review cited *supra* n. 44, at 1286.

[84] See *supra* at n. 21.

[85] Devlin 43-52.

[86] Most of the arguments in Hart (1963) did not directly attempt to refute the above three points at all, but to give independent reasons for thinking their *conclusion* undesirable. These reasons often indirectly amounted to refutation (see, e.g., *id.* 63 as to the second point, and *id.* 70-77 as to all three), but only occasionally did so directly,

expect to refute him on moral grounds. We might seek to do this, for instance, by saying that even if his three propositions be admitted, "rational" morality must still insist on individual moral liberty; that even if non-enforcement of morals is a threat to social survival, morality (or democracy) demands that we take the risk. To all such moral arguments Lord Devlin might properly answer that they simply are not relevant to what he set out to say; that his is a morally neutral argument about what is socially expedient for a legal system part of whose purpose is to ensure social survival.[87]

But perhaps the moralistic tone of the Maccabaean Lecture has estopped him from making this defence. We cannot really say for Devlin, any more than for Hart, that this is merely a pragmatic debate about the effective adjustment of law to factual social problems. The opposed views are *also* rival assertions about the moral responsibilities of those concerned in the creation and administration of law. To that extent, both views seek acceptance as part of what Lon Fuller would call "the morality of law itself".[88] If, indeed, we locate the debate in Pound's "interests" framework (or even in Bentham's "utilitarian" one), the distinction between pragmatic fact and moral value disappears. We are then left saying simply that this is a debate about justice.

This ultimate justice-orientation gives both books a significance which goes far beyond their illumination of recent English legal controversies. The moral principles finally at issue "are not merely the moral convictions or mores of a particular society but are matters of justice which may be said to enter very deeply into the heart of morality at all times and places";[89] and their legal importance correspondingly extends to every legal system. But it also leads to a final paradox, which in these two books is quite striking. This is that when from time to time they find themselves directly confronted with "principles of justice", both Hart and Devlin seem to falter.

Devlin, for instance, despite his view that the law of tort as "compensation for damage done" cannot *implement* morality,[90] wants to insist that this does not render it "immune from test by moral standards". But he has some difficulty in explaining what these moral standards are. He can only say that the enterprise of adjustment of losses calls into relevance "the ordinary man's sense of justice", "sound sentiments" relating to liability and redress for injury. "This is not saying much more than that justice is a

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and then always by mere counter-assertion. See *id.* 58, and esp. 67-68, as to the first point, and *id.* 50-52 as to the second and third. (The third point is there partially admitted, but only to introduce the "moral pioneers" issue mentioned *supra* at n. 41.) What Hart (1965) adds to all this goes only to the first point. At 46 there is a powerful (but still only speculative) argument that too much reliance on *legal* sanctions may lead to a withering, rather than strengthening, of "the moral sense"; and there are also the suggestive (but inconclusive) statistics summarized *supra* n. 59. At this stage, therefore, the first point may be regarded as presumptively (though not conclusively) rebutted; the second and third as still quite open.

[87] *Cf.* the compromise by which Hart, 1961 work cited *supra* n. 44, at 188-195, seeks unsuccessfully to appease the teleological yearnings of Fuller's writings also there cited. This is, at its most modest level, a morally neutral view that the goal of "social survival" inheres in every legal system, simply because any society making use of law at all envisages "social arrangments for continued existence", not "those of a suicide club"; and that legal arrangements suggested by coupling this goal with "simple truisms" about social living can properly be treated as "natural necessities". In the Hart-Devlin context it is clear that Lord Devlin (though possibly not Hart himself) would accept this morally neutral framework as sufficient to contain his whole argument.

[88] See Fuller, 1964 work cited *supra* n. 44, at 41-44, 96-98. At 132-33 Fuller *almost* perceives this linkage. The point is clearer if with W. L. Morison, Book Review (1965) 5 *Sydney L.R.* 181 at 184, we reduce Fuller's "morality of law" simply to his "specifications of desirable attitudes to the task of legislation and legal administration".

[89] *Cf.* Hart (1965) 53. These Jerusalem lectures were obviously planned as a conspectus of recent English problems of criminal law (as distinct from jurisprudence). This leads him to wonder at 54 whether the issues raised have relevance for most of his audience. Clearly, at least at the level of the principles involved, they do.

[90] *Supra* at nn. 12-16; and see esp. Devlin 39.

moral idea." This "moral idea" cannot be made to yield specific precepts governing the actual problems of the law of torts, and even if it could the law's non-moral origins would keep it rather remote from these precepts. The most we can ask is that no part of the law of torts "be positively repugnant to the ordinary man's sense of moral justice".[91]

His dislike of the non-enforcement of contracts on grounds of "illegality" seems to rest upon some similar vague morality of law: "even sinners are entitled to justice".[92] But here again his nearest approach to clarity is his attempt to construct a moral principle that when the law borrows moral principles, it should not distort or over-inflate their moral significance.[93]

Hart, for his part, encounters almost exactly converse problems, leading him into similar (and quite uncharacteristic) vagueness, when he tries to deal with the practice of imposing heavier sentences when criminal negligence has resulted in death or serious injury; or with the "objective intent" approach of *Director of Public Prosecutions* v. *Smith*.[94] He introduces both matters by by way of qualification of his rejection of "the Devlin view": as instances in which he himself would be disposed to contend that the law pays too little attention to morality. Perhaps they link rather with his uneasiness over Lady Wootton's proposals: for here, too, "punishment" is being predicated on objective results rather than on subjective "states of mind"—thereby both offending Hart's overriding moral principle,[95] and refusing to allow more particular moral considerations to enter. And here, too, Hart finds himself working with "principles of justice" which (for all that appears) can only be asserted, rather than themselves justified.

All this returns him to the question whether acceptance of such principles requires him to admit that law *is* concerned with "enforcement of morals". In 1965, as in 1963, he insists that this argument confuses two distinct kinds of morality; but all that he can now say by way of clarification is that "justice is a method of doing other things, not a substantive end."[96] We can admit his distinction, and still find this formulation of it inadequate.

In short, on this point, as in relation to the twin moral convictions which underlie his whole approach, Hart is left (like Devlin) finally able to tell us only *what* he believes.[97] He cannot tell us *why*. And this is only another way of saying that when it comes to "justice", neither judges nor philosophers quite know what to do.

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[91] *Id.* 40-41.
[92] *Id.* 53, 59; see *supra* n. 11.
[93] Devlin 59-60. This, he thinks, has happened with the *ex turpi causa* precept.
[94] (1961) A.C. 290. On both these matters see Hart (1965) 7, 49-53.
[95] See *supra* at n. 73.
[96] Hart (1965) 53-54; *cf.* Hart (1963) 34-38.
[97] See *supra* at nn. 73-76; and *cf.* Hart (1963) 20, where he avoids the problem of justifying his demand for justification by the admirable device of observing that it is presupposed by the whole discussion.

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