

Morality and the Criminal Law: Reflections on Hart-Devlin

*J. Paul McCutcheon**

I

The relationship between law and morality represents a major theme in jurisprudence and is the subject-matter of this article. I shall focus on the use of the criminal law to enforce morality and, in particular, I shall consider whether an identifiable line can be drawn between moral standards that may properly be the subject of legal enforcement and those that may not. This issue was, of course, central to the Hart-Devlin debate. The immediate catalyst to that debate was the publication in Britain of the *Report of the Wolfenden Committee*¹ which, among other things, recommended that male homosexual conduct be decriminalized. The debate broadly echoed that conducted in the 19th century between the great political philosopher John Stuart Mill and Sir James Fitzjames Stephen, who was arguably the pre-eminent criminal law judge in late-Victorian England.² In broad outline Mill, Hart and the Wolfenden Committee advocated the liberal cause while Stephen and Devlin are generally seen as legal moralists. In the heady days of the 1960s, and perhaps for many years afterwards, Hart was largely thought to have had the better of the

* School of Law, University of Limerick, Ireland. This is a revised version of the Lansdowne Lecture delivered at the University of Victoria, British Columbia, February 5, 2002.

1. *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, 1957) Cmnd 257.
2. See R.A. Samek, "The Enforcement of Morals: a Basic Re-examination in its Historical Setting" (1971), 49 Can. Bar Rev. 188.

debate, to have trumped Devlin's supposedly outmoded, superstitious (and let it be said religiously inspired) conservatism with a convincing statement of liberal and secular principles that best reflected the values of personal autonomy. However, with the passage of time things do not seem so clear-cut and I shall suggest that for all its flaws there is something of merit in Devlin's argument and that it offers insights we should not ignore.

The question that arises is whether the law should be used to enforce a particular view of morality, a matter that has been the focus of debate between liberal and conservative commentators. Mill trenchantly set out the liberal case in his celebrated essay *On Liberty*. He wrote that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection".³ Accordingly, he argued that the right to limit individual freedom is restricted:⁴

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 to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.

Thus Mill would confine the power of the state to regulate to cases where harm to others is threatened, the so-called "harm principle". It is clear that he would deny the state the right to act paternalistically, on a view of what is in the best interests of its citizens. Equally, the state is not entitled to enforce a code of morality (unless the relevant regulation can be independently justified on the grounds of harm prevention). However, Mill qualified these views. The principle of liberty applies to those who are in "the full maturity of their faculties"⁵ and it followed that the liberty of children could properly be restricted in their own best interests. By analogy, the same

3. *On Liberty* (Penguin Classics, 1974), p. 68.

4. *Ibid.*

5. *Ibid.*, at p. 69.

consideration would apply to other categories, such as the mentally incompetent, who lack “the full maturity of their faculties”. This protection is sometimes thought of as “soft paternalism” but it must be distinguished from the paternalism that Mill condemned.⁶ Despite these qualifications Mill’s “simple principle” has been widely endorsed and has become a slogan for the liberal cause.

Writing as a political philosopher Mill did not draw a distinction between legal and moral sanctions: his work discussed the legal *and* moral restraints that may be imposed on individual liberty. On the other hand, the principal interest of his adversary Stephen was with the contents of the criminal law.⁷ Stephen contended that part of the law’s purpose was to gratify “the feeling of hatred” that the prospect of criminal conduct stimulates in the minds of right thinking people. He recognized that the criminal law was concerned with the “grosser forms of vice” and lesser forms, “mere vice”, fell beyond its remit. In this his views were not substantially different from those of Mill, and in the modern idiom would be accommodated within the principle of minimalism that is said to circumscribe the criminal law.⁸ However, Stephen took the view that the criminal law as it existed at the time “could hardly be regarded as imposing any restraint on decent people which is ever felt as such”.⁹ In other words, the range of prohibitions that the criminal law imposed at that time could not properly be considered to amount to an inappropriate restriction of personal freedom. In his view, a number of factors could properly shape the criminal law, including the moral climate in which it operates, a concern for the “incurable weakness of human nature” and societal revulsion at the “grosser forms of vice”. These factors

6. It might be noted that application of Mill’s harm principle was confined to “advanced” nations; the situation of “those backward states of society” was equated with an individual’s lack of capacity. He wrote that “[d]espotism is a legitimate mode of government in dealing with barbarians provided the end be their improvement”.

7. *Liberty, Equality, Fraternity* (Chicago: University of Chicago Press, 1991).

8. See Ashworth, *Principles of Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 1999), pp. 33-37.

9. *Liberty, Equality, Fraternity*, *supra*, footnote 7, at p 144.

do not provide as apparently clear-cut a criterion as Mill's harm principle, but instead they operate as broad guidelines to the proper limits of the criminal law. Stephen's confidence in the state of the criminal law as it existed in late-Victorian England might now strike us as being astonishingly complacent and his robust Christianity and arguably elitist views¹⁰ are hardly in tune with the secular and democratic spirit of this age.

II

The Hart-Devlin debate was stimulated by the publication, in 1957, of the *Report of the Wolfenden Committee*, which recommended the decriminalization of male homosexual conduct and the regulation of prostitution-related activities. The background to the debate was completed by the decision several years later in *Shaw v. Director of Public Prosecutions*¹¹ in which the House of Lords held conspiracy to corrupt public morals was an offence known to the law. To support its case for the liberalization of the law the Wolfenden Committee invoked the harm principle and suggested that there is a realm of private conduct that is "in brief and crude terms not the law's business". In *Shaw* the House of Lords took a different tack and argued that one of the functions of the criminal law was to protect the public moral welfare: to this end, Viscount Simonds opined that the courts enjoyed a residual power to recognize or create new offences where this course of action was demanded by the interests of public morality.

Devlin took issue with the central proposition in the Wolfenden Report.¹² He acknowledged that the harm principle could explain the core prohibitions of the criminal law (such as murder, rape, assault, theft) but, in his view, that principle is

10. See *Liberty, Equality, Fraternity, ibid.*, at p. 32: "We agree that the minority are wise and the majority foolish, but Mr Mill denies that the wise minority are ever justified in coercing the foolish majority, whereas I affirm that under circumstances they may be justified in doing so . . . in my opinion the wise minority are the rightful masters of the foolish majority".

11. [1962] A.C. 220.

12. *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

not the sole criterion. He contended that that principle does not explain the criminalization of consensual conduct which by its nature does not cause harm to others and to this end he referred, *inter alia*, to the prohibition of voluntary euthanasia, suicide pacts, duelling, abortion and sibling incest. Those are acts which can “be done in private and without offence to others and need not involve the corruption or exploitation of others . . . [t]hey can be brought within [the criminal law] only as a matter of moral principle”.¹³ To Devlin a sense of public morality is vital to the integrity of society. On this view a shared moral perspective is the cement that holds society together and a dislodging of public morality threatens the structure of society itself:¹⁴

society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought . . . A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society must pay its price.

Devlin went further and stated that “[m]orals and religion are inextricably linked” and that “the moral standards of Western civilization are those belonging to Christianity”.¹⁵ However, it should be emphasized that he did not contend that Christian morals should be enforced in their own right through the mechanism of the criminal law; in this respect he was no theocrat. He made a more subtle point: for the purposes of the criminal law there was no discernible difference between “Christian morals and those which every right minded member of society is expected to hold”.¹⁶ He was also careful to ensure that this notion of public morality would not become a vehicle

13. *Ibid.*, at p. 7.

14. *Ibid.*, at p. 10.

15. *Ibid.*, at p. 4.

16. *Ibid.*, at p. 23. Devlin also expressed the view that the “free-thinker and non-Christian” could accept that Christian morality formed the basis of the criminal law.

for needless intolerance. The individual has rights which should be taken into account and “[n]othing should be punished by the law that does not lie beyond the limits of tolerance”.¹⁷ In this respect he drew a distinction between conduct that is disliked by the majority and a “real feeling of reprobation”. Prohibition should be based on the latter not the former and the task of the lawmaker is to identify the boundary between the two. He recognized that the limits of tolerance shift, thus acknowledging that conceptions of public morality evolve and develop. However, “[n]ot everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law . . .”.¹⁸

The liberal viewpoint was articulated by Hart who took Mill’s dictum as his starting point.¹⁹ However, he qualified this by accepting that it is permissible to legislate in order to protect the vulnerable from exploitation. In his view the rules that exclude the victim’s consent in murder and assault can be explained as exercises in legal paternalism “designed to protect individuals against themselves”.²⁰ This marks a significant departure from the position suggested by the harm principle, as Hart indeed recognized, but he contended that paternalist regulation is an accepted fact of social life. The core of Hart’s thesis is that society cannot be identified with a particular set of views on morality, a point that is at odds with Devlin’s central theme. Moreover, he drew a distinction between questions of morality and of public decency, accepting that the law might appropriately prohibit conduct on the basis that it offends public decency. He noted, for instance, that sexual conduct that is generally permissible becomes an affront to public decency if it takes place in public.²¹ However, true to his liberal beliefs he

17. *Ibid.*, at pp. 16-17.

18. *Ibid.*, at p. 17.

19. *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963).

20. *Ibid.*, at p. 31.

21. *Ibid.*, at p. 45: “Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse between consenting adults in private is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public.”

rejected the notion that conduct might be prohibited on the ground that mere knowledge of its occurring might cause shock or offence to others.²²

If distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Such liberty is plainly nugatory. *Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is he does — unless, of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.*

III

The enforcement of sexual morality was its immediate context but the general terms in which the Hart-Devlin debate was conducted show that its scope is much broader and it is relevant to other forms of private behaviour: drug-taking, private use of pornographic material, gambling and animal cruelty are examples. A number of justifications might be invoked in support of prohibiting these activities, including a paternalistic determination of what is in an individual's best interests, public decency, public sentiment, feelings of revulsion or disgust as well as public morality. However, it is difficult to bring prohibition in these cases within the harm principle, at least as it was classically articulated by Mill: the conduct in question occurs in private and does not "harm" others. Similar considerations arise in relation to laws that require the wearing of seat belts and crash helmets. Nevertheless, such is the enduring ideological appeal of the harm principle that it is frequently invoked to justify prohibitions. Thus it is said that drug-taking harms society in that drug users are liable to become a charge on the public purse: as a result of their conduct it is likely that

22. *Ibid.*, at p. 47 (emphasis added).

they will rely on publicly funded health and social welfare programmes and that this is a type of indirect harm that is properly a matter of societal concern. However, even if this is the case it does not necessarily follow that the use of the criminal law is appropriate. Other measures that have a less restrictive impact on individual liberty might be employed such as taxation, the withdrawing of entitlements to public assistance or the placing of the costs of such conduct on the individuals who engage in them. I express no particular opinion on this point but it seems to me that those who derive their views from Mill have a case to answer. By the same token, the harm principle has been invoked in support of the imposition of stricter prohibitions of pornographic and violent literature, films and videos: a link is said to exist between exposure to such materials and violence against women and children. These efforts to justify the various prohibitions in terms of harm stretch the principle to such an extent that the reworked concept of harm becomes nebulous.²³ Hart implicitly acknowledged this difficulty in his qualified adoption of Mill's proposition and his recognition that grounds other than harm, including paternalism and public decency, might justify legal prohibition. However, it should be noted that other liberal theorists would eschew paternalism as a permissible rationale. A further difficulty that Hart and others tend to overlook is that the concept of harm itself, as MacCormick has observed, is "morally loaded".²⁴ The decision to classify a consequence as "harm" with a view to its prohibition involves a societal judgment that is essentially moral in nature. It runs into claims of individual liberty and the reasons that are accepted as being sufficient to limit that freedom will depend on the decision-maker's evaluation of the competing normative propositions that are advanced.

23. See Harcourt, 'The Collapse of the Harm Principle' (1999), 90 *J. Crim. L. & Criminology* 109; Ashworth, *Principles of Criminal Law*, *supra*, footnote 8, at pp. 44-45.

24. N. McCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 1982), p. 29.

Hart's thesis became the prevailing orthodoxy of the 1960s²⁵ and it still enjoys the ringing endorsement of commentators and theorists. Joel Feinberg took up the liberal cause in his four-volume work *The Moral Limits of the Criminal Law*.²⁶ He adopted the harm principle as it was articulated by Mill but would add the causing of offence to others, what he termed the "offence principle", as a justification for criminalization.²⁷ However, he contended that paternalism and moralism could not properly be invoked in support of penalizing conduct.

IV

As matters transpired the years following the Hart-Devlin debate witnessed a general liberalization of the criminal law, especially in regard to matters that might be considered to lie within the domain of private morality. This was achieved both by the enactment of reforming legislation and by judicial means, the latter in the form of recognizing constitutional rights of privacy. In Britain, suicide and male homosexual conduct had been decriminalized and abortion legalized by the end of the 1960s. In the United States, the Supreme Court held in a series of decisions that the right of privacy protected, *inter alia*, the use of pornographic materials in the home,²⁸ the use of contraceptives by married couples,²⁹ and in *Roe v. Wade*, a famous and still controversial decision, it held that the right included the right to terminate a pregnancy.³⁰ These developments might be taken to amount to an endorsement of liberal

25. Lee, *Law and Morals* (Oxford: Oxford University Press, 1986), p. 28.

26. *Harm to Others* (Oxford: Oxford University Press, 1984); *Offense to Others* (Oxford: Oxford University Press, 1985); *Harm to Self* (Oxford: Oxford University Press, 1986); *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990).

27. Alexander, "Harm, Offense, and Morality" (1994), 7 *Can. J. Law & Juris.* 199 has argued that there is little difference between the offence principle, as articulated by Feinberg, and legal moralism: "the Offense Principle covers most of the territory that Legal Moralism might otherwise occupy" (*ibid.*, at p. 213).

28. *Stanley v. Georgia*, 394 US 557 (1969).

29. *Griswold v. Connecticut*, 381 US 479 (1965).

30. *Roe v. Wade*, 410 US 113 (1973).

thesis and a corresponding rejection of that associated with Devlin.

However, the foregoing catalogue does not paint the full picture and examples abound of liberty limiting laws that seem to rest on considerations of morality. The American and Irish Supreme Courts have held that constitutional rights of privacy do not invalidate laws that penalize male homosexual conduct. In *Bowers v. Hardwick*³¹ the majority of the U.S. court held that it was constitutionally permissible to base laws on what are essentially moral choices. In the Irish case, *Norris v. Attorney General*,³² the majority reinforced broadly similar reasoning by alluding to the condemnation of homosexual conduct by Christian teaching as being "gravely sinful". My point is not whether those decisions were convincing; in fact I believe that they were flawed and find the reasoning un-persuasive. What is significant for present purposes is that moral considerations, or perhaps more accurately what the courts in those cases thought were moral considerations,³³ prevailed over arguments from autonomy.

Individual liberty is also compromised by an array of laws that do not seem to be based on considerations of harm (or, for that matter, paternalism) but are better explained as resting on moral rationales. Examples include laws that prohibit consensual adult incest, bestiality, animal cruelty and (in various American states) fornication, adultery and necrophilia, as well as consensual killing and injuring. These counter-examples do not amount to a negation of the liberal case but at the least they call for comment. One plausible answer from the liberal per-

31. 478 US 186 (1986).

32. [1984] IR 36. The European Court of Human Rights later ruled that the measure violated the plaintiff's right under the European Convention of Human Rights: *Norris v. Ireland* (1988), 13 EHRR 186. Homosexuality was eventually decriminalized: *Criminal Law (Sexual Offences) Act 1993*.

33. See Murphy, "Moral Reasons and the Limitation of Liberty" (1999), 40 *Wm. and Mary L. Rev.* 947 at p. 952, suggesting that the U.S. court failed to consider three vital questions that arise in relation to a claim that moral conviction may justify a criminal law: (i) did a majority of the citizens in fact disapprove of the practice in question; (ii) if so, was that disapproval moral in nature; and (iii) if the disapproval is moral in nature, is it rational or reasonable.

spective is that all or some of these laws involve an indefensible curtailment of individual liberty and cannot stand. In the alternative, a liberal might seek to show that in fact the various proscriptions fall within the harm principle or cause offence or, in case of theorists like Hart, amount to legitimate paternalism. In this event the proponent will face a considerable burden of proof in regard to most of the examples cited;³⁴ perhaps it might be most easily discharged in the case of incest.

I wish to examine several cases in slightly more detail. It has long been established that an individual may not consent to the infliction of serious personal violence. This general proposition was endorsed in *R. v. Brown*³⁵ where the House of Lords held that the consensual infliction of injury by sado-masochistic homosexuals was criminal and the accused were convicted on a variety of serious assault charges. In reaching this conclusion the Law Lords adopted a line of earlier decisions to the effect that legally operative consent is limited to trivial degrees of force, defined as force that is not likely to result in actual bodily harm. The majority approved the statement of law by the English Court of Appeal in *Attorney-General's Reference (No 6 of 1980)*: "it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason".

The dividing line between the lawful and unlawful is haphazardly drawn. It is accepted that "ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities".³⁶ On the other hand, case law has established that sexual gratification is not a good reason for raising the threshold of permissible force,³⁷ nor is consensual fighting,³⁸ nor an agreement by a wife that her husband may beat her if

34. It is perhaps significant that Goldberg J. in his concurring opinion in *Griswold v. Connecticut*, 381 US 497 (1965), considered the constitutionality of adultery and fornication laws to be "beyond doubt".

35. *R. v. Brown*, [1994] 1 A.C. 212 (H.L.).

36. *Ibid.*, at p. 231 *per* Lord Templeman.

37. *R. v. Donovan*, [1934] 2 K.B. 498 (C.C.A.); *R. v. Brown*, *supra*, footnote 35; *People v. Samuels*, 250 Cal App 2d 501 (1967).

38. *Attorney-General's Reference (No 6 of 1980)*, [1981] Q.B. 715 (C.A.); *R. v. Jobidon* (1991), 66 C.C.C. (3d) 454, 7 C.R. (4th) 233, [1991] 2 S.C.R. 714.

she consumes alcohol.³⁹ It is difficult to see how the activities in question could be considered harmful once the "victim" has consented (assuming of course that he or she had the capacity to consent). Moreover, the Court of Appeal decision has sidelined the possibility of invoking a justification based on the interests of preserving the public peace. It is significant that the court abandoned the rationale (for which there had been support in earlier decisions, most notably *R. v. Coney*⁴⁰) that fighting poses a threat to public order.⁴¹ The position now is that consensual fighting is unlawful irrespective of its effects on public order: a private consensual fight is unlawful because, in the words of the Court of Appeal, there is no "good reason" to recognize it as lawful. In effect, the burden of justification falls on those who urge the lawfulness of that activity rather than on those who seek to curtail liberty by declaring it unlawful. These prohibitions cast doubt on the liberal position. Hart might invoke a paternalistic rationale, at least in some of these cases, but that position was eschewed by Mill and is rejected by many modern advocates of the liberal cause, most notably Feinberg.

I might also mention two other issues that have been the subject of recent legal intervention. Laws have been passed in a number of common law countries outlawing female circumcision, what is now also referred to as female genital mutilation.⁴² In other jurisdictions it is likely that female circumcision would be found to come within the law of assault. The sale of human organs for transplant has also been prohibited by statute in a number of countries.⁴³ It is significant that these acts are

39. *State v. Brown*, 364 A 2d 27 (1976).

40. (1882), 8 Q.B.D. 534.

41. [1981] Q.B. 715: "we have not followed the dicta which would make an act (even if consensual) an assault if it occurred in public, on the ground that it constituted a breach of the peace, and was therefore unlawful. These dicta reflect the conditions of the times when they were uttered, when there was little by the way of an established police force and prize-fights were a source of civil disturbance. Today, with regular policing, conditions are different."

42. *E.g.*, *Prohibition of Female Circumcision Act 1985* (U.K.); *Crimes (Female Genital Mutilation) Amendment Act 1994* (New South Wales).

43. *E.g.*, *Human Tissues Gift Act 1972* (Ontario); *Human Tissue Act 1982* (Victoria);

unlawful irrespective of the consent of the complainant. A person of full age and capacity is denied the opportunity to do with his or her body as he or she pleases. However, I suspect that few reasonable people would consider these laws to involve an inappropriate intrusion into individual liberty or, to borrow Stephen's words, that these prohibitions represent a "restraint on decent people which is ever felt as such". Furthermore, I think that most "decent people" would consider legislative intervention in these matters to be warranted. In other words, the general public belief is that it is proper for law-makers to criminalize these activities. The reasons for those sentiments hardly need to be stated. Yet from a liberal perspective this is the type of curtailment of liberty that is problematic. The fact that the legislature or the majority of the public might view the acts in question with distaste or revulsion or consider them to violate the best interests of the "victim" is neither here nor there. If the liberal position is to have any meaning it surely must be to afford legal protection to preferences that deviate from those of the majority.

One response that might be offered by liberals is to query the nature of the consent in cases of the type under discussion. On this basis it might be suggested that it is doubtful whether a "true consent" would or could ever be given to acts such as female circumcision or commercial organ donation. It would not be difficult to identify circumstantial constraints, be they cultural or economic, that could be said to deprive a supposed consent of a voluntary character. But this comes close to saying: "I do not believe you truly consented because your choice is so irresponsible and so irrational that no sensible person could have made it." I believe that Mill's disciples are estopped from adopting that argument unless they are prepared to modify their thesis and to allow at least a limited role for paternalism and/or legal moralism. Another version of the argument is to acknowledge that true consent might be given in such cases but to focus on the danger of consent being viti-

National Organs Transplants Act 1984 (U.S.); Human Organ Transplants Act 1990 (U.K.).

ated by coercion or other factors. On this pragmatic view, if the risk of the latter is unacceptably high it might be thought prudent to withdraw legal approval from all cases; the cost of restricting the liberty of those who truly consent is outweighed by the benefit of protecting those who might be coerced or exploited. However, a position of this type accepts that a person's freedom of action may be limited in the interests of others who are not affected by anything done by that person and again it forces liberals to reconsider their position.

The purpose of this brief survey is to show that considerations other than harm might be advanced in support of laws that curtail individual liberty. The range of "good reason[s]" that might be relied on is open-ended and different rationales for criminalizing are invoked in different contexts. Harm is one, and as I noted at the beginning of this talk, it can be seen to underpin the major offences in the criminal calendar: murder, rape, assault, theft and the like. But, as I have suggested, there are many other offences that cannot be brought within the harm principle and other justifications must be sought. Different versions of liberal theory acknowledge that paternalism, offence to others and pragmatic concerns might legitimately be invoked but seem to deny a role for moral considerations. However, in many such cases a sense that the proscribed conduct is wrongful is as plausible an explanation as others that are offered and that sense often is the real motivating force behind the enactment of the prohibition. By the same token, decriminalization is liable to occur when it is no longer felt that the conduct in question violates a social norm (or is required as a protective measure). Ultimately it is probably futile to seek a single unifying criterion that distinguishes the lawful from the unlawful. The only safe conclusion, which was alluded to in *R. v. Brown* and is obvious in *Attorney-General's Reference (No 6 of 1980)*, is that certain forms of conduct are socially tolerated and others are not. Thus male circumcision, contact sports, professional boxing and rough horseplay are tolerated while female circumcision, commercial organ donation, consensual fighting, bestiality and animal cruelty are not. I suggest that it is fair to conclude that the latter activities are considered wrongful, while the former are not,

and that the judgment of wrongfulness is legitimately taken into account in the decision to criminalize. And this takes us back to Devlin.

V

There are flaws in Devlin's essay. Some might consider that he moves rather too easily from the descriptive to the normative, confusing the "is" with the "ought": on this view the fact that conduct is currently criminal does not justify the conclusion that it ought to be so. Devlin is also criticized for his suggestion that a sense of public morality is central to the structure of society and that society would disintegrate were public morality undermined.⁴⁴ Certainly, history has shown that societies are adaptable, that they are capable of surviving significant change and it is obvious that the legal reforms that have been enacted in the years since Devlin wrote have not threatened the social fabric. Nonetheless, there is a certain (perhaps intuitive) appeal to Devlin's views on this point and it cannot be denied that a society is characterized by a set of common values and agreed norms. Liberal theorists generally accept this and indeed the notion of a set of accepted values underpins their theories. Their disagreement with Devlin is principally on the source and nature of the particular values chosen. Devlin might also be taken to task for equating public morality with that of Christianity. It is plainly at odds with the secularism that underpins liberal theory to root a societal vision in a religious belief and it was only to be expected that proponents of liberalism would react with hostility. This objection is particularly strong in societies such as the United States where the separation of church and state assumes constitutional significance. The point might also be made that Western society, or Western Europe at least, has entered a post-Christian phase.

44. E.g., Hart, *Law, Liberty and Morality*, *supra*, footnote 19, at pp. 50-52; R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. 242-55; Murphy, "Legal Moralism and Liberalism" (1995), 37 *Ariz. L. Rev.* 73 at pp. 76-77 suggests that Devlin's argument is essentially utilitarian in nature and that he differs from Mill only on "issues of empirical evidence of social harm".

This is especially evident in declining church attendance and the decreasing relevance of religious beliefs and practice in people's lives. However, it would be an exaggeration to conclude from this that the Western societies are no longer Christian. Christianity, or perhaps more accurately the Judaeo-Christian ethical tradition, has shaped the development of the Western world for many centuries and the practices of the current generation cannot shake off that legacy. It is possible to overstate this criticism of Devlin. As I explained earlier Devlin did not argue for the enforcement of Christian morals as such; his more subtle point was that *as far as the criminal law was concerned* there was no difference between the standards of Christian morality and that which the "right minded member of society is expected to uphold". This facilitates a secular evaluation of morality or at least one that is not expressly religious in nature.

Despite these flaws, if in fact one so considers them, Devlin provides valuable insights and a renewed recognition of the cogency of Devlin's arguments is discernible among some commentators.⁴⁵ In the first place, he highlighted a troublesome inconsistency in the liberal argument: he contended that its rejection of legal moralism is inconsistent with its preference for retributive punishment, that is, the idea that the sanction imposed on an offender ought to reflect his or her degree of blameworthiness. Thus there is general recognition that the accused's personal culpability is a relevant criterion in determining the appropriate sanction. It is accepted that a poor person who steals merits a lesser sentence than the affluent thief; and one who steals to feed his or her dependants will be treated less harshly than the habitual offender for whom theft is a chosen way of life. The punishment must fit the crime. This stance involves moral considerations and does not confine the determination of the quantum of punishment to the social goals of deterrence and harm prevention.⁴⁶ By the same token character

45. See, e.g., G. Dworkin, "Devlin was Right: Law and the Enforcement of Morality" (1999), 40 Wm. and Mary L. Rev. 927; Murphy, "Legal Moralism and Liberalism" (1995), 37 Ariz. L. Rev. 73.

46. See Murphy, "Legal Moralism and Liberalism", *ibid.*, at p. 79.

failings that are displayed by an accused are apt to aggravate sentence. Where relevant, a court will describe the offender's conduct as wicked, heinous, callous or depraved, language that is pregnant with moral overtones. Liberal theorists are happy to accept this position but would deny the state the right to prohibit "harmless" conduct on the grounds that it breaches the norms of what they call "conventional" morality. Murphy has tersely (and perhaps a little cruelly) summarized the contradiction in the liberal position:⁴⁷

Liberals such as Mill and Hart do not think that it is legitimate to criminalize homosexuality simply because it is perceived as a vice, and yet they see no problem in punishing particularly vicious criminals more severely than those of greater virtue. Is this not simply an inconsistency? Are not Mill and Hart and [Ronald] Dworkin simply being unprincipled when they claim that the criminal law should be concerned only with harm and not with personal vice and virtue? Is not their so-called principle simply a slogan that they trot out only when it serves their own sexually permissive ideology?

Hart sought to answer the charge of inconsistency by arguing that the question of what forms of conduct should be made criminal is "distinct and independent"⁴⁸ from the question of how severely different offences should be punished. Punishment may be graded for utilitarian reasons (such as fear of bringing the law into disrepute) or for reasons of fairness (such as treating like offences alike). However, Hart argued that this does not necessarily lead to the conclusion that it is justifiable to criminalize immoral conduct on that account alone. To this end he contended that:⁴⁹

[liberal theorists] can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant in the severity of punishment.

47. *Ibid.*, at p. 81.

48. *Law, Liberty and Morality*, *supra*, footnote 19, at p. 36.

49. *Ibid.*, at p. 37 (emphasis in original).

This observation, and in particular the distinction between system and quantum, hints at Hart's notion of the general justifying aim of punishment that he developed elsewhere.⁵⁰ Feinberg employed the latter idea and contended that it was consistent to argue that the purpose of deterring harm (the general justifying aim) should be modified by the operation of fair procedural rules.⁵¹ Thus, if one's sense of fairness demands punishment according to the offender's moral desert that should be reflected in the quantum of punishment. However, it is doubtful whether the question of punishment is merely one of fair procedures that can be divorced from a general justifying aim of punishment. If the latter is meaningful it must accommodate the graduation of punishment that is accepted by liberals and legal moralists alike. In other words, Feinberg's fair procedures must fit within his general theory of punishment. The attempt to transfer the moral issue from being a matter of general theory to one of procedures is unconvincing. In this regard, Hart was more candid in admitting that the inclusion of moral factors into the assessment of punishment represented a compromise with his general theory.⁵²

The second point of importance in Devlin's essay is his conclusion that "it is not possible to set theoretical limits to the power of the State to legislate against immorality".⁵³ In this, of course, he differs from liberal theorists, in that the latter seek to identify a "simple principle" that marks the legitimate boundaries of the criminal law. However, Devlin did not contend that all immoral conduct should be criminalized for that reason alone, much less that the law should enforce Christian morals as such. His point was that it is permissible for the State to proscribe conduct on the grounds that it is immoral or, to put

50. *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

51. *Harmless Wrongdoing*, *supra*, footnote 26, at pp. 147-51.

52. *Law, Liberty and Morality*, *supra*, footnote 19, at p. 38: "in the theory of punishment, what is in the end morally tolerable is apt to be more complex than our theories initially suggest. We cannot usually in social life pursue a single value or a single moral aim, untroubled by the need to compromise with others."

53. *The Enforcement of Morals*, *supra*, footnote 12, at p. 12.

it another way, that morality is a legally relevant criterion when it comes to determining the contents of the criminal law. It is not the only or governing factor and he identified three “elastic principles” that should be taken into account. These are, first, that allowance should be made for the maximum degree of individual freedom that is consistent with the integrity of society; second, that on new moral issues the law should be slow to act; and third, that as far as possible privacy should be protected. He also accepted that the principle of minimalism is an appropriate consideration.⁵⁴ The question for Devlin is one of balancing public interest with individual rights and to this end he acknowledged that not all wrongdoing can or should be criminalized: “[n]othing should be punished by the law that does not lie beyond the limits of social tolerance”.⁵⁵ He associated intolerance with a “real feeling of reprobation”,⁵⁶ with a sense of indignation and disgust. These sentiments were important both as an indication that the limits of tolerance had been breached and in shaping moral judgment.⁵⁷ Intolerance, in the sense that Devlin employed the term, was to be distinguished from mere prejudice: in his words “before a society can put a practice beyond the limits of tolerance there must be a deliberate judgement that the practice is injurious to society”. The law-maker must exercise that judgment in identifying the limits of social tolerance and thus in determining what may properly be criminalized. Devlin also recognized that society’s evaluation of what is tolerable is liable to alter and that this must also be taken into account by the legislator.

54. *Ibid.*, at p. 19: “The last and biggest thing to be remembered is that the law is concerned with the minimum and not with the maximum.”

55. *Ibid.*, at pp. 16-17.

56. *Ibid.*, at p. 17.

57. *Ibid.*, at p. 17: “Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting that he was doing wrong. It is the power of common sense and not the power of reason that is behind the judgements of society.”

VI

I suggest that the notion of intolerance, as Devlin explains it, is important. It serves to segregate serious wrongdoing from the trivial and confines the criminal sanction to the former. In this context Devlin's observation that conduct that is tolerated is not necessarily approved of is germane.⁵⁸ Conservatives often oppose the legalization of a particular activity on the grounds that the proposal would amount to societal approval: thus it is sometimes said that to permit gambling, drinking, homosexual acts or whatever is to approve these activities. Devlin clearly disagrees and in this he is not too far from the liberal position. The lawfulness of many of the acts that I mentioned earlier — male circumcision, professional boxing and rough horseplay spring to mind — is perhaps best explained on the basis that they are, and traditionally have been, tolerated. By the same token the criminalization of female circumcision, commercial organ transplants and consensual fighting can also be understood as lying beyond the limits of social tolerance.

The notion of tolerance may also be linked to that of social demand: perhaps they are different sides of the same coin. By social demand I have in mind the circumstances where an activity is desired to a sufficient extent to allow or invite a societal judgment that it is to be tolerated. Conduct that is socially demanded, in this sense, is liable to be tolerated and considered lawful. Smoking tobacco, drinking alcohol and gambling are to one extent or another demanded by the public and for that reason they are lawful. Where an activity is not socially demanded, or where it is not demanded with sufficient force, it is easier to consider it intolerable and to criminalize it. This might explain why certain sexual pursuits are lawful and others are not. Liberal societies have come to accept homosexual conduct as tolerable and this no doubt is a consequence of political action and the raising of social consciousness by

58. *Ibid.*, at p. 18. The language of law reform reflects this point: the repeal of a controversial measure is often described as "decriminalization" (which implies nothing more than a willingness to tolerate) rather than "legalization" (which might be taken to indicate approval).

groups that sought its decriminalization. In contrast, there is no discernible social demand for the legalization of bestiality, incest and necrophilia, nor am I aware of any pressure groups advocating those activities, and as a result they are currently taken to lie beyond the limits of tolerance. The picture, of course, is not as black and white as the foregoing might suggest. In some circumstances an activity might be practiced by a considerable section of the community yet claims for its decriminalization are resisted. Drug use is a good example: the growing acceptance of the use of recreational drugs has not yet resulted in the adoption of any significant measures towards their legalization. Perhaps in time that will happen but, as with many other reforms, calls for legalization will be met with counter-arguments based on considerations of harm, public welfare, paternalism, morality and the like.

Some years ago the Irish High Court upheld the validity of a law that forbids the importation, manufacture and sale of chewing tobacco.⁵⁹ The case involved a point of European law, namely whether the Irish legislation breached the free movement of goods provisions in the Treaty of Rome. The court concluded that the State had established that the measure in question was justified on public health grounds. The public health argument that prevailed was essentially paternalist in nature, but I can assure you that the decision did not evoke public consternation or disquiet. There was no sense that this was regarded as an inappropriate infringement of individual liberty or as an intrusion into an inviolable realm of personal freedom. However, had the law been directed at all tobacco products I have no doubt that public reaction would have been quite different. A measure of the latter type would most likely have been equated with Prohibition in 1920s America and the expected arguments would have been advanced. The explanation for the different reactions is simple. In Ireland there is no discernible social demand for chewing tobacco as opposed to other forms of tobacco.

59. *United States Tobacco (Ireland) Ltd v. Ireland*, [1993] 1 IR 241.

VII

Devlin provides a convincing account of the scope of the criminal law. The notion of intolerance together with his "elastic principles" and the concept of minimalism are the factors that properly shape the criminal law. These factors are best thought of as approximate guidelines that indicate the boundaries of the law rather than as hard and fast criteria. On this view of things the boundaries of the law are shaped, and always have been shaped, by an amalgam of forces that includes the concept of harm and a regard for personal freedom but also embraces paternalistic and moral concerns. The result is a much more vague set of guidelines than the liberal position would allow but the cardinal point is that "there is no principled line following the contours of the distinction between immoral and harmful conduct such that only grounds referring to the latter may be invoked to justify criminalization".⁶⁰

Devlin's conservatism should not be confused with anti-liberalism. There is much in *The Enforcement of Morality* that liberals can endorse. He acknowledged the relevance of individual rights and personal freedom and accepted the principle of minimalism. There are hints in his essay of a belief that the criminal law should not, or could not, be used to promote good but is to be confined to prohibiting wrongdoing.⁶¹ The principal disagreement between Devlin and his critics relates to sexual conduct, particularly homosexual conduct. It is somewhat surprising that liberal theorists seem to concede that homosexual conduct is immoral⁶² and instead argue that it falls into the realm of private immorality that they contend is no concern of the law. Perhaps at the time Hart estimated that public opinion in Britain was hostile to homosexuality and his interest was to counter what he would have perceived to be majoritarian prej-

60. G. Dworkin, "Devlin was Right: Law and the Enforcement of Morality", *supra*, footnote 45, at p. 928.

61. *The Enforcement of Morals*, *supra*, footnote 12, at p. 19: "there is much in the Sermon in the Mount that would be out of place in the Ten Commandments".

62. See, e.g., R. Dworkin, *Taking Rights Seriously*, *supra*, footnote 44, at p. 240.

udice: that, however, is a matter of speculation. I suspect that in fact liberal theorists do not consider homosexuality to be immoral and that sentiment informs their views. Furthermore, I find it difficult to comprehend a stance that considers an activity to be immoral yet would conclude that the claims of individual liberty demand its legalization. I suspect that a belief that an activity under scrutiny is not immoral is an unarticulated premise behind liberal claims that the activity should not be criminalized. In this event the more enriching debate would centre on the morality of the impugned conduct.⁶³ In this debate the cogency of the competing moral claims would be scrutinized along with the equally important question whether those arguments count as moral in the first place. A claim does not qualify as being moral simply on account of the language in which it is expressed or the strength of feeling that lies behind it. A supposed moral objection might be dismissed as being prejudicial in nature or as entailing inadmissible considerations.⁶⁴ Many of the pronouncements of those who call themselves the “moral majority” might on closer examination be found to lack moral quality. To this extent by seeking to deny the relevance of moral claims liberal theorists have ceded ground to their conservative opponents rather than engaging with them in moral debate.

I shall conclude my remarks by restating my main point, namely that the limits of the criminal law cannot be set by reference to a “simple principle”, be it harm, individual liberty or whatever. Instead the boundaries of the law are shaped by a

63. See G. Dworkin “Devlin was Right: Law and the Enforcement of Morality”, *supra*, footnote 45, at p. 946: “I encourage liberals who wish to argue against, for example, the criminalization of homosexual sex, to engage in the honest toil of arguing that the reason such conduct ought not be criminalized is that there is nothing immoral in it.”

64. R. Dworkin, *Taking Rights Seriously*, *supra*, footnote 44, at p. 249 lists four types of argument that are excluded from moral debate: prejudice, emotional reactions, rationalization and parroting. Murphy, “Moral Reasons and the Limitation of Liberty” (1999), 40 *Wm. and Mary L. Rev.* 947 at p. 954 holds the view that a moral judgment is characterized by the reasons advanced in its support; the object of the disapproval should involve “harm, injustice or certain failures of human flourishing”.

variety of forces that operate as broad guidelines rather than as clear-cut criteria. Once this is acknowledged it must be accepted that it is legitimate and appropriate to take moral considerations into account in determining the contents of the criminal law. In short, the law-maker may properly justify a prohibition on an appeal to moral reasons.