Social Integrity and Private ‘Immorality’ The Hart-Devlin Debate Reconsidered

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Abstract

In a debate between tolerance and intolerance one is disinclined to side with intolerance. Nevertheless that, in a sense, is what I want to do in this paper. The particular debate I have in mind is the old one between H.L.A. Hart and Patrick Devlin about the legal enforcement of moral values. It should be noted, though, that the issue has by no means been settled in the minds of many people. The proposed repeal of the British law prohibiting the promotion of homosexuality (a law known as Section 28) “could destroy Scottish society,” according to Mazhar Malik of Glasgow’s Ethnic Community Resource Centre, echoing Devlin’s concern from the 1960s. In what follows I will first sketch and defend, partially, what I take to be Devlin’s communitarian argument and then attempt to explain what is wrong with it and how this should affect our estimation of the proper relation between law and morals. I will argue that at least some private ‘immorality’ can be defended without recourse to the liberal belief in a morally private sphere. In part I I look at the kind of communitarianism that can be found in Devlin’s work, in part II I support this reading of Devlin and expand on it by looking at some important passages from his work, and in part III I consider the reasons why his argument does not support legislation against gay sex, and, in fact, could be used to defend gay rights.

I

In Great Britain in 1957 the Wolfenden Committee issued its Report of the Committee on Homosexual Offenses and Prostitution, which recommended that “there must remain a realm of private morality and immorality” that is “not the law’s business.” Devlin, a British High Court judge, criticized this view, as I will explain. The communitarian reading of Devlin’s position on the legal enforcement of morals comes from Robert P. George. According to this interpretation of his argument, Devlin is saying that,

the price of toleration [of serious deviance from a society’s constitutive morality] is the loss of a distinctive form of interpersonal integration in community understood as something worthwhile for its own sake.

This interpretation of Devlin, which I will unpack below, is preferable to Hart’s, George claims, because without distorting or ignoring anything Devlin says it makes his case more compelling.

Hart’s Devlin defends a “disintegration thesis,” according to which a society will be destroyed if its morality changes. As Hart argues, though, this view is either trivial, if the disintegration thesis is a
mere tautology (with “society” defined by a particular morality), or else, it would appear, demonstrably wrong. Individualism and ‘permissiveness’ have increased markedly in many North Atlantic democratic societies since the 1960s, as George says, without any significant breakdown in social order accompanying them. Hart’s reading, George suggests, is consistent with the relevant texts, but is not the most charitable such interpretation available to us.

What, though, are we to make of George’s preferred alternative reading? Devlin, George argues, regards society as something like a friendship or a marriage. Social cohesion is not merely instrumentally valuable, for the sake of peace, trade, and so on. It is also intrinsically valuable. That is to say, there is value in “a state of affairs in which individuals identify their interests with those of others to whom they understand and experience themselves as integrally related by virtue of common characteristics and beliefs.”⁵ Indeed Devlin assumes that “the preservation of society [defined as just such a state of affairs] outweighs every other good.”⁶

Preservation of society here means not only the absence of chaos or the continued physical proximity of people. George uses the analogy of a marriage. A couple can continue to live together and function cooperatively even after having drifted apart emotionally, no longer thinking of themselves as a unit for the sake of which at least some of their individual actions are done, and for which purely individual interests might be sacrificed. Similarly, a society has disintegrated if its members "merely live in interactive proximity to one another but do not understand themselves to be members of that society in any more distinctive sense."⁷

There are a couple of problems with Devlin’s position thus understood. The first is the difficulty involved in explaining exactly why such community-mindedness is valuable. Anybody who is community-, nationally-, or racially-minded (society need not be nice) will probably feel no need for an explanation of what is valuable about social cohesion as defined here. Others, and perhaps philosophy itself, will require an explanation, however. Perhaps the best approach is to imagine a complete lack of such cohesion. Imagine living among people with whom you have nothing in common. Existential novels and science fiction horror movies such as the 1970s version of Invasion of the Body Snatchers come to mind. Such a life would be nightmarishly lonely to an extent that is almost inconceivable (existential novels such as Sartre’s Nausea are not noted for their realism).

If we awake from this nightmare to a world where we are not alone then we are halfway toward Devlin’s desired social cohesion. Only halfway because thus far all we have are individuals who understand themselves to be related by virtue of common characteristics and beliefs. They do not yet identify their interests with those of others, nor do they necessarily understand and experience themselves to be integrally related to them.

However, what is so fundamentally necessary to one’s sanity and happiness that without it one would be living an almost inconceivable nightmare might reasonably be called integrally related to oneself. In this case, the necessity is a society of others like oneself. If I identify you as necessary to my sanity (we are the only humans left among weird aliens, say) then I clearly have an interest in your survival and, moreover, your survival as a recognizably human being. You have a similar interest in my survival. Each of us can identify (some of) our interests with those of the other. Now we have a minimal sort of Devlinian society. Is there value in it? If there is value in human life and happiness, and if this society is necessary for such happiness, then certainly there is value in the
society described, however minimal and desperate it might be.

Devlin goes further than this though. The “society” I have described does fit the description given, but it is clear that Devlin has in mind a society of people that have more in common than mere humanity. They share not just basic intuitions about good and evil but actual moral principles on quite specific issues. A communitarian might argue, though, that Devlin is simply raising the standard. The two last humans alive are not likely to flourish if all they share is humanity. Ideally they would share a deep friendship or love. Where there is significant disagreement about those issues that they take to be most important, whether these be sex, religion, or something else, nothing like the desired community of minds will happen. So people will not flourish without agreement on morals (assuming that people naturally care deeply about morality). I take it that something like this must be what Devlin has in mind.

The second problem with George’s reading of Devlin is that, as George notes, Devlin implicitly accepts, without argument, that the preservation of society is a good so valuable that any and all other goods may be sacrificed for its sake. This, I suspect, would be impossible to prove. It sounds just plain false. George plausibly asserts that “The integration of human beings around shared principles of injustice or other forms of wickedness is an undesirable integration.” The integration of a Nazi or ultra-nationalist Bosnian Serb society comes to mind. I will return to this problem below.

II

It is time now to look at what Devlin himself says. I will argue that George’s reading is indeed more plausible than Hart’s, and that it can be illuminated by reference to the work of Charles Taylor and Alasdair MacIntyre, each of whom has been associated with the communitarian school of thought.

I will now play Devlin’s advocate and try to explain why Devlin’s position is in fact partly right. Here are some key quotations from Devlin, which I will explain and try to make into an argument for a communitarian position on the legal enforcement of morals:

1. “What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter are its morals.”

2. “[T]he moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.”

3. “I do not assert that any deviation from a society’s shared morality threatens its existence any more than I assert that any subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.”

4. “If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by
the invisible bonds of common thought. If the bonds were too far relaxed the members would drift
apart. A common morality is part of the bondage. The bondage is part of the price of society; and
mankind, which needs society, must pay its price.”

5. “[I]f society has the right to make a judgement and has it on the basis that a recognized morality
is as necessary to society as, say, a recognized government, then society may use the law to
preserve morality in the same way as it uses it to safeguard anything else that is essential to its
existence.”

What is the significance of proposition 1? Devlin does not say that a general morality is a necessary
precondition for a desirable society. What he says is that a general morality is partly constitutive of
society and holds society together. Well, one might ask, which is it? Does the common morality
(partly) constitute society, or does it hold together a society made up (entirely) of something else?
Devlin’s reply is that one might answer either way. It does not matter. What matters is
understanding that a general morality is as essential to society as rules are to a game like
Monopoly. Rules are not necessary if the game is to be worth playing: they are necessary if there
is to be a game at all.

Let us turn now to statement 2. Morality is not being identified with mere prejudice of any kind
here. Devlin explicitly says that making homosexuality illegal solely because of disgust “would be
wrong,” but adds that one cannot “ignore disgust if it is deeply felt and not manufactured.” This
is tricky. It is rather unclear what Devlin means by “manufactured,” but he could mean whipped up
by propaganda or not sincerely felt as moral disgust and hence phony or artificial. The
manufactured contrasts with the natural. This is an issue to which I will return. At any rate it is
plain that not just any disgust will do for Devlin. It must be deeply felt and nigh on universal. It
should be a disgust that we can confidently expect the members of a jury to share, and not only to
share but to share after “argument, instruction, and deliberation,” and to take seriously enough to
punish those who provoke it. Moreover, this disgust must be combined with feelings of
intolerance and indignation.

How seriously should we take these feelings? It seems to me that we cannot ignore them. This
would certainly be true if the vast majority of people were literally made sick by some activity, or
by the knowledge that such activity were not illegal. (In this case there would be physical harm, of
course, not just feelings of moral disapproval, but Devlin only sanctions legal punishment of
immoral acts that do public harm, as I will explain in part III). It is at least arguably arbitrary to
legislate against offensive acts performed in public (flashing, flag-burning, and so on) on the basis
of their offensiveness if the same acts are just as offensive when performed in private (which, of
course, they might not be). If the offensiveness, or its consequences for public health, is serious
enough then legislation might be an option one would have to consider.

But this is not what Devlin means. He is concerned with morality, not mere offensiveness
(although the two are not completely distinct, according to his view). Nonrational moral intuitions
are fundamentally important and cannot simply be ignored. As Charles Taylor says, “My
perspective is defined by the moral intuitions I have, by what I am morally moved by. If I abstract
from this, I become incapable of understanding any moral argument at all.” Rational argument

finds its footing only on the rough ground of nonrational feeling or intuition. Where there is no such feeling there can be no rationality, at least not in the sense of sanity. A psychopath might be extremely logical, but this is not enough to constitute rationality in the ordinary sense of the word.

Taylor argues that it is pathological to have no sense of what is incomparably important, however trivial or conventional or ill-thought out these commitments may be in those who are non-pathological but shallow.\textsuperscript{18} It might be God, say, that one takes to be incomparably important or, conceivably, several things might be equally important, forming a set of core values which are of comparable importance to each other, but incomparably more important than anything else in life. Devlin would agree, I think, that one must (if one is psychologically healthy) care deeply about some things; far more deeply than about others. And if what one cares about in such a way is, say, children, then one will be disgusted by, intolerant of, and indignant at their abuse. Where this disgust, etc. is at one’s very core then one cannot ignore it. For Taylor, the relevant one here is the self, which is essentially moral (oriented to some sense of the good). For Devlin it is the community, which is likewise essentially moral.

The trivial, the merely conventional and the ill-thought out are intuitions that Taylor and Devlin want to reject. But core values are not trivial. Devlin explicitly has in mind values that are taken “so seriously that ... a breach of [them is regarded] as fit for punishment.”\textsuperscript{19} Nor are they merely conventional: they are constitutive of society. Nor are they ill-thought out. They need not be thought out at all, but a judgement of a core principle (i.e. the judgement of x that it is a core principle) should be made only “after argument, instruction, and deliberation.”\textsuperscript{20} So not just any old prejudice is being defended here. Devlin has in mind the following kind of argument, used by Judith Jarvis Thomson in her famous paper on abortion, in which she likens the situation of a pregnant woman to that of you with a famous violinist attached to your body:

If anything in the world is true, it is that you do not commit murder, you do not do what is impermissible, if you reach around to your back and unplug yourself from that violinist to save your life.\textsuperscript{21}

If twelve men and women on a bus chosen at random, after argument, instruction, and deliberation, could reasonably and confidently be expected to say that if anything in the world is true it is that gay sex is so seriously wrong that it must be punished, then we must take this feeling seriously. That, roughly speaking, is Devlin’s claim.

What now about 3? I have suggested that Devlin might believe in both core and non-core moral values, but he does not explicitly commit himself to anything so black and white. There are degrees of seriousness of violations of society’s morality. This could be taken as meaning that each of society’s moral rules is equally serious, but can be violated to various degrees (a white lie being not so serious as perjury, for instance). However, homosexual acts, Devlin argues, should all be illegal, whereas adultery (also against society’s morality) should not be.\textsuperscript{22} I infer that he regards some parts of the general morality as being more important than others. Those that are so serious that their violators deserve criminal punishment are what I call core values.

With this in mind, let us turn to 4. According to Hart, famously, Devlin assumes
that all morality—sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty—forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole.\textsuperscript{23}

Hart also attributes to Devlin the view that society will fall apart unless this web is maintained intact.

Devlin explicitly denies this charge. Comparing the rules of morality to the rules of a game, he asserts that the rules can be changed without destroying the game, but adds “that it would depend on the extent of the change.”\textsuperscript{24} This is true. Minor alterations are made frequently in the rules of professional sports, for instance, without these sports being destroyed. But when association football spawned rugby football, which in turn was changed into American football, the world gained new games, not just variants of soccer. How does this help Devlin?

The analogy could be applied in two ways. In the first, one would consider the effects of a change in the morals of society. In the second, one would consider the effects of a breach of these rules. With regard to the first possible application, Hart’s Devlin seems to believe that any change means utter change: touch the web and it disappears. This would be an unfortunate position to try to maintain in the face of human history. The real Devlin allows for minor change. But what of major change? Can a society be destroyed by a significant change in its morals? Perhaps the society of the ancient Romans was, too many orgies making them vulnerable to barbarian attacks, but of course it depends on one’s definition of a society.

Devlin defines a society, at least in part, in terms of its shared ideas (see 1). Society “is not something that is kept together physically.” It is not just a bunch of people in the same place. It is a community of, among other things, ideas. Change those ideas significantly (and of course there will be a gray area here) and you no longer have the same society. This is at least, or especially, true if the change happens rapidly.

Even if this much is accepted, one might still wonder whether sexual morality could ever be sufficiently important to play this role in society. Surely, it might be said, crimes such as murder and theft will always be regarded as worse than any sexual indiscretion or violation of some puritanical taboo. It is quite possible, though, to regard sexual values as core values, a major change in which would destroy a society defined in large part by its sexual morality. Clearly Devlin regards opposition to homosexuality and prostitution as fundamentals of English society in the 1950s and 1960s. He might be wrong, but his view is not patently absurd.

Applying Devlin’s game analogy differently, one would consider the effects of a breach of, rather than a change in, the rules of society. The rules of a society may be broken without that society collapsing. But if they are broken seriously enough, society is in peril. Here the second application of the analogy shades into the first. For one Manson does not destroy America, however vile his crimes. What threatens a society is a widespread, persistent breach of its morality. And this is hard to conceive without a change either in that morality or else in its status as the agreed morality of the society. If we accept Devlin’s conception of what a society is, and George’s conception of what social disintegration is, then 4 seems true. This still leaves the question of whether humanity really does need society so conceived, but we have seen at least some reason to think that it might.
Let me present a final sketch of Devlin’s argument. People need society. Society essentially involves, and is possibly defined by, a set of deeply held and almost universal beliefs. These beliefs include moral beliefs. Not any act contrary to this common morality threatens the society in question, but serious breaches do. Such breaches might include violations of sexual morality. Therefore, society has the right to use the criminal law, in self-defense, to punish such violations.

According to Devlin, then, if there is a realm of morality and immorality that is not the law’s business it is defined not by privacy but by triviality. Serious breaches of society’s morality, however private, may legitimately be subject to legal punishment. In what follows I will try to show what is wrong with Devlin’s argument, particularly with his position on homosexuality and the criminal law.

III

One obvious line of attack is on Devlin’s own terms. If, it might be argued, one in ten people in any given society is gay, as has been claimed, then twelve men and women picked at random cannot confidently be expected to feel the unmanufactured disgust that Devlin requires for homosexuality to be legitimately outlawed. Whether this is right depends on human psychology: can one feel Devlin’s brand of intolerance, indignation and disgust at acts that one is profoundly tempted to engage in? Hart says that where there is disgust, indignation and intolerance for a kind of act, “the conviction that such practices are morally wrong is surely inseparable in the mind of the majority from instinctive repulsion and the deep feeling that they are “unnatural”.” This seems reasonable. Could a gay or lesbian person regard himself or herself as unnatural? If so, could these feelings be anything other than ‘manufactured’? I hope not, but I do not know. Nor do I know what percentage of any society is likely to be gay, nor whether homosexuality itself occurs genetically or psychologically or sociologically. Nor do I know where, if anywhere, to draw the lines between biology, psychology and sociology. So I will not press this line of criticism.

What about Devlin’s starting point? Does humanity need society, does it need communities of ideas? I take it that Devlin’s claim is not that individuals cannot survive in isolation, but that they cannot flourish in such conditions, that human beings are political animals. A community of some kind does seem necessary. Without it life is likely to be lonely, impoverished, unpleasant, uncivilized and brief. But one need not be a latter-day Hobbes to take this view. Rousseau’s vision of the solitary person “wandering up and down the forests, without industry, without speech, and without home,” is scarcely more appealing. Without some society, without some community of ideas, one might as well live in a nineteenth century asylum. This, I take it, would not constitute flourishing.

But what would? We have some rough idea. It is not all that difficult to answer the questions “How are you doing?” and “How are your parents?”. But flourishing is hardly a precise concept, and it is a precise account or definition that we need, at least, if we are to know specifically what is required for human beings to flourish. Alasdair MacIntyre says that:

When someone complains--as do some of those who attempt or commit suicide--that his
or her life is meaningless, he or she is often and perhaps characteristically complaining that the narrative of their life has become unintelligible to them, that it lacks any point, any movement towards a climax or a telos. 28

He describes people like this as “unscripted, anxious stutterers in their actions as in their words.” 29 This is an interesting view, but if legislation is being considered we need something more concrete and specific to go on. This is not a criticism of MacIntyre since he does not say these things in connection with legislation, but it is a problem for such teleological ethical theories as Devlin’s and MacIntyre’s that even so thorough and articulate an exponent as MacIntyre does not provide grounds for much specific legislation. At least this is a problem for Devlin since he quite explicitly does want to justify specific, major legislation on the basis of some such theory.

This is a significant weakness in Devlin’s argument. For it will not do to argue that gay sex should perhaps be illegal on the grounds that human beings have certain needs without an account of what those needs are, how we know, and whether or not the same needs might be the basis of an argument that gay sex should not be illegal. Could a gay person flourish without a legal sex life? I strongly suspect not, but without being able to say what flourishing is, how can we say? To butcher MacIntyre’s remark about suicide and the meaning of life, might not we expect attempted or actual suicide in those whose “movements towards a climax” are liable to criminal prosecution? I am not arguing for some special private sphere. Devlin’s arguments against such a thing, I think, are quite good. If people were committing suicide left, right and center because certain sex acts were not illegal we should not rule out legislation against those acts a priori on the grounds that they are private and therefore untouchable. We should be more empirical and more democratic than that. But is the anti-homosexuality of the anti-homosexual as inescapable and strong as the homosexuality of the homosexual, and which group is in the majority? I believe that sexuality is deeper than anti-gay prejudice but have no idea how anyone would prove this, or the reverse. Where there is doubt, the law should hold off, as Hart and Devlin agree. To paraphrase Ronald Dworkin, making someone live in a way that others approve, but he or she believes a horrifying contradiction of his or her life, is a devastating, odious form of tyranny. 30

What I am arguing for then is a kind of liberal Devlinism. This might sound self-contradictory, or else like liberalism pretending to be something else. Let me address such concerns now. A classic liberal might say that the law should allow any act that does not harm others. Mere immorality is not justification for legal proscription. There is, therefore, a private sphere of (allegedly) immoral but harmless acts that ought to be left alone.

Devlin, as I read him, accepts all of this except the conclusion. He bases his argument for legal moralism on the premise that mankind needs society, which is to say that without society people will suffer some harm (of an unspecified and frankly vague sort, admittedly). Not all immorality is to be made criminal, he says (see 3 above). There is not, though, a private sphere, because even acts committed in private might be harmful to a society, precisely because they violate its core morality. Those liberals who accept that offensiveness that does no physical harm can be a legitimate basis for legal restraint might sympathize with Devlin on this. Pornographic displays in private are widely accepted, whereas the same displays in public would be considered too offensive to be permitted. Devlin, I think, would deny that there is any principled reason for taking this attitude to what is
offensive when seen but not towards anything that might be offensive when merely known to occur, or known to occur legally. Simply knowing that pornography is being indulged in tends not to bother us (although it might some), but what about cannibalism, necrophilia, bestiality, and the like? To avoid any gray area concerning the rights of dead people or living animals, let us take the particularly offensive example of necrophilia in bestiality. This harms no one, but few people would consider it an acceptable practice on condition that it be done in private. We might say the same about child pornography, if it were somehow produced without harm to the children. Closing the door does not remove the offensiveness in such cases.

One could say that what Devlin is arguing for is simply an extension of the offense principle or, if bestiality and such acts do harm, of the harm principle. This is no objection though. Devlin's objection to certain immoral acts just is that they do harm because they violate the core values that hold society together and thus make a good life possible. Our feelings of offense or outrage are an indication that we are aware, however dimly, of this harm being done, or at least threatened. It does not matter whether we call this legal moralism, or an extension of the offense principle, or an application of the harm principle. What matters is that there is no private sphere.

This is perhaps not the fiercest defense of gay rights, or liberal principles in general, that one might want. But it is at least a sketch of a line of defense, and a line that avoids the errors that appear to me to bedevil Hart’s critique of Devlin. Extreme conservative views will never be well defeated until they are properly understood. If nothing else, I hope that I have furthered such understanding here. Moreover, the defense of gay rights offered here is based on the idea that there is something to Devlin’s neo-Aristotelian communitarianism. I believe this to be the case, but have not proved it to be so. If communitarianism is in fact philosophically bankrupt, then the anti-gay conservative has even less of a leg to stand on. Evaluating communitarianism and its rival political theories, though, is a job for another day.  

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Notes

1. No doubt many consider this debate not only old but long settled, with Hart's liberalism clearly winning. It can be argued, however, that Hart misunderstands Devlin's position and as a result fails to identify what is wrong with it. One problem with this argument is that Hart explores numerous possible readings of Devlin, but it is the interpretation that he seems to favor, including the "disintegration thesis," that I will treat as representing his considered opinion on what Devlin most probably means.


5. Ibid., p.70.

6. Ibid., footnote p.58.

7. Ibid. p.70.

8. Ibid., p.79.


10. Ibid., p.15.

11. Ibid., p.13, footnote.

12. Ibid., p.10.

13. Ibid., p.11.

14. See ibid., p.13, footnote.

15. Ibid., p.17.

16. Ibid., p.90.


18. See ibid., p.31.


20. Ibid.


22. Or rather, so Devlin argued. Devlin’s book was published in 1965 and his argument quite explicitly rests on the perceived morals of a particular society (England) at a particular time.


27. See G.E.M. Anscombe, ‘Modern Moral Philosophy’, in her Ethics. Religion and Politics: The collected philosophical papers of G.E.M. Anscombe: v.3 (Minneapolis: University of Minnesota Press, 1981), p.41: “[P]hilosophically there is a huge gap, at present unfillable as far as we are concerned, which needs to be filled by an account of human nature, human action, the type of characteristic a virtue is, and above all of human ‘flourishing’. And it is the last concept that seems the most doubtful.”


29. Ibid., p.216.


31. I am grateful to a number of people who have helped me with this paper, especially Stephanie Wilkinson and an anonymous reviewer for their comments on an earlier draft and to Nancy Schaub and John Simmons, on whom I first tried out the communitarian reading of Devlin.