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Revisiting the Hart-Devlin Debate: At the Periphery and By the Numbers

JAMES ALLAN*

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We are not yet at the stage when trying to say something new about the well-known Hart-Devlin debate is like attempting to give a novel take on the Old Testament, or on William Shakespeare’s plays—or life for that matter—or even on the music of The Beatles. But then again those analogies are not wholly misplaced, at least not within legal philosophical circles in the common law world. So I was tempted to try my hand at some other topic falling under the aegis of “legal moralism” and leave Professor Hart and Lord Justice Devlin well enough alone. However, for good or for ill, I have resisted that temptation, at least in a peripheral way.

* © 2017 James Allan. Garrick Professor of Law, University of Queensland. Special thanks go to Peter Skegg for his insights when we twice or thrice discussed this issue over a tea and coffee over a dozen years ago back when we were both colleagues at the University of Otago Faculty of Law in New Zealand, and also for recently sending me some further thoughts together with some interesting materials when I mentioned to him earlier this year that I would be writing this Article. Thanks go as well to all of the participants at the Legal Moralism Symposium held at the University of San Diego School of Law in May 2016 for their comments on an earlier draft of this article, and to David Campbell.
Accordingly, I will be approaching the theme of this conference through the prism of a half-dozen year long debate that was held in Britain between a judge, Patrick Devlin, and a law professor, Herbert Hart.1 The former was the second youngest person, at age forty-two, to be made a first instance superior court or High Court judge in Britain during the entire course of the twentieth century.2 That happened in 1948.3 Devlin was promoted to be a Lord Justice of Appeal on the Court of Appeal in 1960—remember that date—and then put on the country’s highest court, the Judicial Committee of the House of Lords—or when talking about law or with lawyers just the “House of Lords”—a year later in 1961, at the age of fifty-five.4 He retired three years later, at age fifty-eight.5 For now, though, simply note that Devlin’s initial contribution to this debate—his 1959 British Academy Maccabean Lecture “The Enforcement of Morals”—was made when he was still a first instance superior court trial judge.6

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2. Id.
5. Id. Lord Devlin was thought to have retired in part because he was bored as an appellate judge. As he said in an interview: “I was extremely happy as a judge of first instance. I was never happy as an appellate judge . . . for the most part, the work was dreary beyond belief.” Id. Of course American and Canadian readers should bear in mind that at the time the United Kingdom was a full-blooded parliamentary sovereignty jurisdiction (like New Zealand today) that was not part of any European Community or European Union and that had no bill of rights (that is, of individual rights of citizens as opposed to the 1689 Bill of Rights of Parliament). See, e.g., MARTIN J. DEDMAN, THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION 1945–95, at 121 (2006); A GUIDE TO THE HUMAN RIGHTS ACT 1998, at 5 (3d ed. 2006), https://www.justice.gov.uk/downloads/human-rights/act-studyguide.pdf [https://perma.cc/T7JA-C9QD]. So the sort of invigorating excitement for judges that comes with being able to decide for an entire country such issues as who can marry or who can have an abortion or which prisoners can vote or whether to mandate the availability of euthanasia or the unavailability of capital punishment and indeed a whole lot more besides was simply not part of the judge’s job when Devlin was a top British judge. He did not get to indulge in a sweeping form of legislating from the Bench (via adopting a ‘living tree’ or ‘living constitution’ approach to interpreting a bill of rights) in the way that is pretty common today across many countries, my native Canada most definitely included, and which for many probably helps to alleviate boredom. Of course this claim is a comparative one. Judicial legislation in negligence law and elsewhere was certainly something that the top judges of Devlin’s day indulged in, Devlin included.
6. See PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). This pattern, of the judge who does something that will be long remembered while still two promotions below a country’s highest court, but who later goes on to make it onto that highest court, also played out in America with O.W. Holmes, Jr. who, in 1897, wrote his timeless article The Path of the Law, 10 HARV. L. REV. 457 (1897), while a regular Justice of the Supreme Judicial Court of Massachusetts, but then became Chief Justice of that court in 1899 after which Holmes made it onto the US Supreme Court in 1902 at the age of 61. DAVID H.
The other participant in the debate was the law professor, H.L.A. Hart, who is best known today for his magisterial *The Concept of Law* published in 1961—again, remember that date. I have argued elsewhere that writing something that is still regularly read in fifty, or better yet, 100 years is a form of legal academics’ immortality. Hart would achieve, indeed he has achieved, such immortality with this book, though interestingly, as A.W.B. Simpson noted in his book length treatment of it, this was really the only monograph book Hart ever wrote. As a digression, I might here mention that I managed to complete a whole Canadian law degree in 1985 at a very good law school without ever having to read *The Concept of Law*. Indeed, the next year in London, when I found myself in a small Master of Laws jurisprudence seminar run by Professor William Twining, with some eight or nine others from Greece, from France, from the United States, from England, from Australia and elsewhere, it was more than a little embarrassing on the very first day of class to have Professor Twining walk in and ask who had read Hart’s classic. I was the only one who had not. Indeed, I was then only vaguely half aware of its existence. Twining said he would take the book as read. And I still recall the sense of the “scales falling from my eyes,” to quote Jeremy Bentham’s reaction to reading David Hume, as I hurriedly made my way through Hart’s masterpiece to catch up with the others in that seminar course.

At any rate, those were the two protagonists in the original debate. The basic timeline of their jurisprudential skirmish was this:

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10. See Simpson, supra note 9, at 184 (“[Hart] . . . only ever wrote one book.”).

11. See Jeremy Bentham, A Fragment on Government 51 n.2 (J.H. Burns & H.L.A. Hart eds., 1988) (“For my own part, I well remember, no sooner had I read that part of the work which touches on this subject, than I felt as if scales had fallen from my eyes. . . .”). As it happens, I shared Bentham’s reaction to reading Hume too. See generally James Allan, *A Sceptical Theory of Morality and Law* (1998).
1. In 1957, the Wolfenden Report in the United Kingdom recommended that consensual sexual activity between men in private should be decriminalized, resting that recommendation in part on the wider claim that the function of the criminal law was “to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others . . . [it was] not to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes [already outlined].”

2. In 1959, Lord Devlin used the occasion of his above-mentioned Maccabaean Lecture “The Enforcement of Morals” to take issue with the Wolfenden Report’s underlying premise about the proper scope and functions of the criminal law. As Peter Cane has put it, “[a]lthough Devlin did not express it as straightforwardly as he might have, his basic point was that the criminal law is not (just) for the protection of individuals but also for the protection of society.”

3. In that same year of 1959, Professor Hart, not yet having published his _The Concept of Law_, responded to Devlin in a radio broadcast soon thereafter published as “Immorality and Treason” in _The Listener_ magazine.

4. In 1962, with _The Concept of Law_ behind him, Hart expanded on his critique of Devlin’s position in three lectures delivered at Stanford University and published the following year as _Law, Liberty and Morality_. In addition to dissecting Devlin’s position by relying on a number of distinctions, Hart endorsed a J.S. Mill-like “harm principle” rationale for the proper reach of

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12. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, CMD 241, ¶ 13 at 9, ¶ 14 at 10 (UK) (hereinafter WOLFENDEN REPORT).
the criminal law.17 Hart added some ancillary discussion to this in a 1964 lecture he gave in Israel.18

5. In 1965, not long after retreating from the bench, Devlin published a revised version of that original Maccabaean Lecture that, together with a half-dozen other lectures on broadly related topics—three previously in print in some form or other and three not—was turned into a book entitled, The Enforcement of Morals.19 Devlin maintained his non-Millian position.20

That was the timeline. As is well known, the subject matter of their debate—at a core level, or in its most general sense—addressed the question of “when the criminal law should be used to enforce and reinforce norms of conduct that exist independently of the criminal law”—to put the issue in the way Peter Cane does.21 Or, if you prefer Gerald Dworkin’s framing of how Hart saw the debate, then “Ought immorality as such [sic] be a crime?”22

I. SOME INITIAL PERIPHERAL OBSERVATIONS

Most, indeed possibly all, discussions of the Hart-Devlin debate skip lightly over the fact that one of the disputants was a professional philosopher23

18. Id. (“For it is perfectly consistent to urge that the law should only be used to repress activities which do harm to others and also to insist that in doing this it should observe certain principles of justice between different offenders: to insist that the principles should be observed in the course of punishing people for the harm which they do, does not concede that people may be punished even if they do no harm.”).
19. See generally Devlin, supra note 6.
20. Id. at 123.
22. Gerald Dworkin, Devlin Was Right: Law and Enforcement of Morality, 40 WM. & MARY L. REV. 927, 927 (1999). Dworkin provides a good list of thinkers who have sided with Hart (namely, most of them) and with Devlin (most obviously given his article’s title, albeit in an enervated fashion, Gerald Dworkin himself). See Ronald Dworkin, Taking Rights Seriously 240–58 (1977); Joel Feinberg, The Moral Limits of the Criminal Law 173–75 (1988); Thomas Nagel, Equality and Partiality 165 (1991). Cane, in passing, adds more names to the two ledgers, though Cane himself is another Devlinite in my view. See infra Part II.
23. Hart had been a successful barrister before the War, then he worked for MI5 during the War, and after the War he opted not to go back to the practice of law but instead to go to Oxford University as a philosophy don. See Neil MacCormick, H.L.A. Hart 5, 7 (2d ed. 2008). Hart only moved back over to law and legal philosophy on winning the Chair of Jurisprudence in 1953. See id. For some eight years he was a full-time philosopher at Oxford. Id.
and the other was a judge. Put differently, Devlin was not an academic when he was invited to deliver the 1959 Maccabaean Lecture. He was a busy trial judge. He could not devote anywhere near the sort of time to drawing out distinctions and reading up on others’ views that an academic could. In addition, no English judges back then had law clerks—meaning paid, recently graduated law students, who generally finished at the top of their classes at the best universities, and who for a year or two spend huge amounts of time helping the judge find cases, foreign as well as domestic law on point, learned articles, everything, and even at times write up first drafts of judgments and opinions or invited extra-judicial lectures. So although this is speculation on my part, it seems unlikely that Devlin would have spent more than a day or two on writing up a public lecture. The time he did spend would be focused on the big picture question, not on the finer gradations of the argument nor on elucidating three or four helpful, or supposedly helpful, distinctions, nor on tracing his argument back to, say, James Fitzjames Stephen.

This first observation is worth making if, like me, you think Devlin won the debate as regards the core issue under dispute, while still being outflanked and outscored by Hart on some of the finer philosophical points.

Here is a second observation: Sex mattered to this debate. Yes, the general point on which issue was joined between Hart and Devlin was the abstract one of when the criminal law should be used to enforce norms of conduct that exist independently of that criminal law. But the general issue was arrived at via the Wolfenden Report, and that had been established to look at the question of homosexuality and prostitution.

25. See Nina Holvast, The Power of the Judicial Assistant/Law Clerk: Looking Behind the Scenes at Courts in the United States, England and Wales, and the Netherlands, 7 INT’L J. FOR CT. ADMIN. 10, 19 (2016). Indeed, not until 1997 was the function of ‘Judicial Assistant’ (the UK analogue of law clerks) created at the Court of Appeal of England and Wales, the penultimate top court. Id. That model was later extended to the top court, the Judicial Committee of the House of Lords, in 2001 and was carried over when that top court was rebranded as the UK Supreme Court in 2009. See, e.g., id. For a powerful argument that judgments/opinions (and case law generally) would be considerably better if we went back to the old system under which all judges did their own researching and all of their own writing up of judgments/opinions and were not allowed to have law clerks see John Smillie, Who Wants Jurisprudence?, 11 OTAGO L. REV. 183, 191–92 (2006).
26. In the context of the later Hart-Fuller debate, Frederick Schauer makes a broadly similar point that Fuller was not a philosopher and Hart was and that that can and should affect how we score the debate. See Frederick Schauer, (Re)Taking Hart, 119 HARV. L. REV. 852, 867 (2006) (book review); see also Cane, supra note 14, at 29. And notice that this general point applies even more strongly here to Hart’s debate with Devlin as Fuller, though not a philosopher, was certainly a well-published legal academic. He was not a busy trial judge writing up an argument in his spare time. And all that conceded, in Devlin’s more considered 1965 book he more than holds his own with Hart in discussing some of these philosophical distinctions raised by Hart. See infra Part II.
closet, then, but still lurking over this Hart-Devlin debate, is the fact that they were talking about—and then abstracting from—the topic of regulating sex. Their starting point was not, say, the extent to which society ought to regulate economic activity. It was sex.

And that skewed this debate in at least two ways. The less obvious way is this: If you were to take American and British university academics as a group and compare them to another group such as, say, entrepreneurs, then my sense—or hunch if you like—is that you would get quite different comparative scores when asking the two groups to weigh the desirability of regulating most aspects of sexual behaviour versus economic behaviour. Even if the issue were transliterated into the language of “harm” and some “harm principle,” academics would value a “light touch”—sorry!—when it comes to regulating sex. Paedophilia excepted, they would see no harm whenever there was consent—though for some, or many of these same academics, a “consent test” would not be sufficient to foreclose the desirability of economic regulation.

By contrast, entrepreneurs as a group would score freedom—no regulation—of economic activity as comparatively more desirable than would academics as a group—and not just because far fewer entrepreneurs were in a position to marry graduate students or enjoy the benefits of a sparse regulation when it comes to sex. No, the point is more fundamental than that, namely that in a comparative sense, the entrepreneurs would simply value more highly their freedom in the economic sphere than in the sphere of sex. Or put differently, who you are matters when it comes to what you might want regulated, or not regulated. Yet almost all of the participants in this debate have been academics. So the fact that sex is lurking in the background to this particular manifestation of the broader legal moralism issue might well at times have had a bearing on the sort of arguments or answers most employed or gave. It may have influenced whether they ended up on Team Hart or Team Devlin—the latter of whose captain, the judge, would be one of the very few non-academics participating.28

Now, of course, it is true that I have no hard, or even social science type, evidence for the comparative claims made in the previous two paragraphs. In one sense this is perfectly in keeping with how Devlin and Hart ran aspects of their cases in this debate, given that “Devlin provided no hard

28. This point will resurface below when I discuss the second-order issue of democracy and how disagreement about the proper scope of the law’s reach ought to be resolved. See infra Part IV.
The more obvious way in which sex has skewed the Hart-Devlin debate has to do with homosexuality, and the evident fact that many of those participating in this legal moralism dispute, starting from one of the two original protagonists onwards, did not think that such activity was immoral—Hart included. As A.W.B. Simpson puts it:

To set the issue up you have to take some form of conduct which is agreed to be immoral, and ask if it should also be illegal. . . . In the Hart-Devlin debate this never happened, since Hart did not think that the conduct in question [homosexuality] was immoral, whilst Devlin did.32

That means that you can end up with claims such as Gerald Dworkin’s that he thinks Hart won the debate regarding the particular examples in play—namely that the state ought not to punish homosexual sex between consenting adults33—and yet that he also thinks that Devlin won the big

30. See HART, supra note 7, at v.
31. Id.
32. SIMPSON, supra note 9, at 191. It may be that in the realm of sex, setting up the issue is harder than in other realms. Is there today still consensus on whether polygamy is immoral? Bigamy? Adultery? Even if the issue is wholly translated into the language of harm, I wonder how many people honestly think that, say, consensual sex between a 24 year old female teacher and a 16 year old male student harms the boy.
33. Dworkin, supra note 22, at 928.
picture debate—namely that “the ‘mere immorality’ of an action brings it within the legitimate sphere of the criminal law,” though subject to that law not in fact being brought to bear on the immoral actor, on occasion, for other consequentialist reasons.

So you need to be clear precisely what it is you are asking when you inquire of someone whom he or she thinks won this Hart-Devlin debate.

II. A Few of My Favorite Things

My favorite analysis of the Hart-Devlin debate, one I find convincing in all its main contentions, is Peter Cane’s 2006 Journal of Ethics article. His three primary arguments are:

1. It is a mistake to base what the limits of the law ought to be on some Millian or Hartian or Feinbergian—or any other theorist’s—harm principle, with their attendant worked out elaborations of that harm principle, plus some needed ancillary distinctions. Just do a straight out consequentialist analysis. “[T]he limits of the law are better fixed by open-endedly assessing reasons for and against legal regulation than by [appeal to the more limited harm principle and its elaborations].”

2. This debate, and the question of legal moralism generally, should not be limited to the criminal law. Regulation by the civil law or private law, most obviously by tort law, but contract law too, covers much the same ground. Bankruptcy can be worse for some than imprisonment; besides, imprisonment is extremely rarely doled out by the criminal law; and anyway,

34. See id. (arguing that Devlin is right to believe that there is “no principled line” separating immoral and harmful conduct when it comes to justifying criminalization).
35. Id. at 945–46.
36. See id.
37. See generally Cane, supra note 14.
38. See id. at 35–36.
39. Id. at 26, 44.
40. Id. at 26.
41. Id. at 41.
42. Indeed, a moderately benevolent one-party democracy, say Singapore, can use the laws of bankruptcy—often following defamation proceedings—to accomplish much of the “keeping dissent in check” work that more malign and more brutal countries accomplish in far uglier ways. For present purposes, the point is that bankruptcy can be—no it is—a very powerful regulatory tool in the law’s armour.
“Why should we determine the limits of law by reference to the perspective of the minority of people who obey it only because of its coercive capacity, rather than the perspective of those who view law as a legitimate source of standards of behaviour?”  

3. The relationship between law and morality is not, or at least need not be, as competitive as it is conceived to be in the Hart-Devlin debate.

The gist of all of that, together with the preponderance of Cane’s supporting arguments, seems right to me and very powerfully argued. Here, I will simply indulge in one quibble regarding an ancillary aspect of the third of those theses by Cane. My quibble has to do with the last bit of Cane’s section 7 and the beginning part of section 8, near the end of his paper. Here, Cane is discussing in passing how morality is understood by the protagonists in the debate, and indeed by later participants. Consider these two passages:

Dynamically understood, morality is a product of a process of practical reasoning. This is what the [sic] Dworkin called “morality in the discriminatory sense,” by which he meant norms of conduct based on reason as opposed to emotion, prejudice, parroting and so on. . . . In the dynamic understanding, the idea that morality is a product of reason. . . .

Underpinning the Debate is a picture of the relationship between the legal answer and “moral” answers according to which conflict between them should be resolved in favour of morality. This is (partly, at least) because the “moral” answer is understood to be the product of reason whereas the legal answer is conceived as the product of political conflict and compromise rather than reason.

This is to assume a Kantian understanding of morality rather than a Humean, sentiment-driven—or feeling-based—understanding of morality under which reason is inert and cannot move action. Admittedly, whole forests have been felled to provide the paper needed for recording this Kantian-Humean dispute about the respective roles of reason and feelings.

43. Id. at 46.
44. See id. at 48–50.
45. Id. at 47–48.
46. See id.
47. Id. at 48 (footnote omitted).
48. Id. at 50.
49. And I confess to being in Hume’s camp myself. See Bentham, supra note 11, at 440 n.2; see also James Allan, Sympathy and Antipathy: Essays Legal and Philosophical 3–4 (2002); Allan, supra note 11 (extensively discussing David Hume’s philosophy of law); J. L. Mackie, Hume’s Moral Theory (1980) (outlining the similarities of Hume’s moral theories to his own).
Moreover, the substantive merits of that Kant-Hume dispute do not affect Cane’s claims that “we have no reason necessarily to prefer any particular non-legal answer to the legal answer . . . because no method of answering the question is universally, or even widely, accepted as infallible”50 and that “[t]aking law seriously does not mean accepting its norms as correct or preferable [to morality’s] but only treating them as eligible candidates for that status, and just as eligible as our normative ‘intuitions.’”51 Cane’s argument works on either conception of reason, Kant’s or Hume’s.

My quibble, though, is with his claim in the passage above that in this debate both protagonists think “the ‘moral’ answer is understood to be the product of ‘reason.’”52 No doubt Ronald Dworkin thinks that.53 As for Lord Devlin, I am not at all sure. Take the preface to his 1965 book and read page viii.54 This could pass for a layman’s précis of Hume’s understanding of the moral sentiments, with sentences from Devlin such as “[f]or the difficult choice between a number of rational conclusions the ordinary man has to rely upon a ‘feeling’ for the right answer.”55 “Reasoning will get him nowhere.”56 Or see the original Maccabean Lecture itself, even in its revised book form, where the reasonable man’s “judgement may be largely a matter of feeling.”57 At the very least, I think anyone wanting to put Devlin in Hume’s camp rather than Kant’s would have a considerable amount of material with which to work.

Another favorite thing of mine regarding this debate is the seven pages by Devlin at the very end of his 1965 book.58 Now I said above that I judge Devlin as the overall, big picture winner of this contest, but that on some of the finer philosophical points, he was outscored by Hart.59 However, that is not true on all of the finer points. Read these last few pages of

50. Cane, supra note 14, at 50.
51. Id.
52. Id.
53. I return to Hart in Part III, infra.
54. See DEVLIN, supra note 6, at viii.
55. Id. (noting that he puts “the word in quotation marks because [he is] not sure that [he] use[s] it in its correct philosophical sense”).
56. Id.
57. Id. at 15.
58. Id. at 132–38. When discussing the Hart-Devlin debate with Peter Skegg, and sometime after I had first read Devlin’s and Hart’s contributions to the debate, Peter mentioned to me that he thought the end of Devlin’s book was superb. When I was re-reading the debate I realized that I wholly agreed with Peter. These seven pages by Devlin are outstanding. Thank you, again, to Peter for pointing this out.
59. See supra text accompanying note 26.
chapter VII of Devlin’s book and you will read a judge taking apart the arguments of a professional philosopher and jurisprude—and remember, I say that as someone who finds the vast preponderance of The Concept of Law to be some of the best legal philosophy writing going and who sides with Hart—his postscript aside—or, if like me you dislike posthumously pasted together by others of incomplete and previously unpublished work, then Raz and Bulloch’s postscript aside—in virtually all of his tussles with Dworkin. So I am in no way an instinctive or regular anti-Hartian.

Yet Devlin sparkles in these pages at the end of his book. He sparkles when doubting the coherence of the claimed paternalism versus moral principle distinction; the claimed physical paternalism versus moral paternalism distinction; the claimed moral paternalism versus enforcement of the moral law distinction; when he queries what Hart means by “legal moralism”; and when he questions how Millian Hart is in fact being.61 And then there are the memorable quotes:

What, alas, I did not foresee was that some of the crew who sail under Mill’s flag of liberty would mutiny and run paternalism up the mast.62

I think, if I may say so without impertinence, that Professor Hart’s argument might have been clearer if he had left Mill out of it. He gains no advantage by citing Mill as an authority. If Mill was obviously wrong about paternalism, why should he be right about enforcement of morals?63

The most common case of a man willingly submitting to assault would, as I have suggested, be a case of masochism. To say that the law should intervene there not because of the vice but to protect the man in his own best interests from getting bodily hurt hardly seems sense. So in euthanasia. It cannot seriously be suggested that, if there were no moral principle involved, the law in a free country would tell a man when he was and when he was not to die, obtaining its mandate from its paternal interest in his body and not his soul.64

The terms in which Professor Hart justifies the sort of paternalism he advocates lead to the same conclusion. There is, he says, “a general decline in the belief that individuals know their own interests best.” There can be no reason to believe

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60. See Hart, supra note 7, at 238–76. On the topic of this dubious postscript, it also led to a fairly unscrupulous repagination of the second edition that forced people to buy something that was wholly unchanged save for that postscript.
61. See Devlin, supra note 6, at 133–38. It is also worth reading Ronald Dworkin’s introduction to the Oxford University Press readings in philosophy series book The Philosophy of Law, in which parts of the Hart-Devlin debate are reproduced, especially pages 9–11 of the introduction. R.M. Dworkin, The Philosophy of Law 1–16 (1977). Readers, if they be like me, will come away with the impression that Ronald Dworkin is not following the arguments of Devlin where they lead so much as trying to find reasons to justify positions he, Dworkin, already holds.
62. Devlin, supra note 6, at 132.
63. Id. at 133.
64. Id. at 135.
that if unable to perceive their own physical good unaided, they can judge of their own moral good.\(^{65}\)

Paternalism, unless it is limited in some way as yet unstated, must, as I have pointed out, make all morality the law’s business.\(^{66}\)

III. BACK TO THE PERIPHERY

I will be very brief in this penultimate section as I simply wish to ask how the Hart of the *Concept of Law*—call him Hart #1—might respond if someone asked him for more detail regarding what the Hart who was debating Devlin—call him Hart #2—meant by “critical morality.”\(^{67}\) Remember, Hart #2 wanted to adopt the distinction between a) “the morality actually accepted and shared by a given social group”\(^{68}\)—which Hart #2 labels as “positive morality,” that which happens to exist—and b) “the general moral principles used in the criticism of actual social institutions including positive morality”\(^{69}\)—which Hart #2 labels as “critical morality”. Of course, regarding b), we might well all wonder “used by whom?” as it is plain that it will not be everyone in society, nor will those that do use such a “critical morality” all employ the same one, or agree on what theirs requires.\(^{70}\) But leave such wonders until section D below. Here I limit myself to fleshing out Hart #2’s critical morality’ by appealing to Hart #1. What do we get when we let #1 speak for #2?

Firstly, we get utilitarianism. It is plain in reading chapter 9 of the *Concept of Law* where Hart is discussing why we ought to keep separate law and morality and where his answers are all Benthamite ones about how doing so—ensuring there is a separate moral platform from which to assess the law—delivers good consequences, in terms of our being more likely to resist wicked legal regimes, that he leans heavily towards

\(^{65}\) Id. at 136 (footnote omitted).

\(^{66}\) Id. at 137.

\(^{67}\) See Hart, supra note 16, at 20.

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) A not too dissimilar sense of wonder applies in my view to Gerald Dworkin’s announced distinction between positive and critical morality and his assertion that he is only concerned with the latter of those—“the set of moral principles that one believes are the correct (best justified, true) views concerning moral matters for the society in question.” See Dworkin, supra note 22, at 928 n.8. Again, the pronoun ‘one’ is here a weasel word; it hides more than it reveals. Can we judge between critical moralities or not? What happens when my critical morality delivers different assessments than yours? I return to these issues in the final section of this paper. See infra Part IV.
utilitarianism. This is an answer to the “what do you mean by critical morality” question, and it is one that seems to me to be implicit in Hart #2’s arguments against Devlin as well—and is further reinforced by Hart’s decision after resigning from Oxford to spend years editing Bentham’s unpublished papers.

But saying his critical morality is consequentialist does not say all that much. And interestingly the second thing we get when we let Hart #1 speak for Hart #2 is two negatives that do not make a positive. Recall that in discussing the internal aspect of law and the critical reflective attitude that Hart #1 considers just what this moral motivator of people is. But he never tells us what it is; he only tells us what he says it is not. First off, it is not some metaphysical entity, some bizarre thing in some non-causal realm. It is of the external, causal realm, not the metaphysical realm. Indeed, Hart is scathing about the plausibility of that metaphysical option, which is the Kantian one. Second off, Hart is equally adamant that it is not just some feeling some person has, that the critical reflective attitude has to be something more than feelings. So the Humean option is off the table too. Hence, what we get from Hart #1 is the suggestion or implication that there is some third option available, some Tony Blair-like third way. Yet he never tells us what it is. Or what it can be. In that meta-level sense,

71. See Hart, supra note 7, at 187–212 (especially pages 203 through 207). And notice, too, that for the whole book until near the end of chapter nine Hart writes from the vantage of the outside observer, the Visiting Martian, and tells us the importance of rules, how judges are like referees, and so on and so forth. And then he shifts to the vantage of the concerned citizen. No longer does he write about what is the case. He writes now about how we ought to keep these two separate (and certainly not that all or most or many people do keep separate law and morality). See generally Hart, supra note 7.

72. See MacCormick, supra note 23, at 12.

73. See Hart, supra note 7, at 56–57.

74. See, e.g., id. at 84 (“[Understanding obligation in terms of a prediction] has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing ‘above’ or ‘behind’ the world of ordinary, observable facts. But there are many reasons for rejecting this interpretation of statements of obligation as predictions, and it is not, in fact, the only alternative to obscure metaphysics.”).

75. See, e.g., id. at 85 (“[W]e must not allow them to trap us into a misleading conception of obligation as essentially consisting in some feeling . . . .”); id. at 56 (“The internal aspect of rules is often misrepresented as a mere matter of ‘feelings’ . . . .”).

76. See Allan, supra note 49, at 67 (addressing key distinctions between reason-based Kantian theories of motivation and emotion-based Humean theories of motivation).

77. And notice that this strategy of driving somewhere down the middle between two options is one Hart reaches for elsewhere in The Concept of Law. See Hart, supra note 7, at 149. For instance, Hart rejects the formalist view that judges never have discretion while also rejecting the realist view that judges always have discretion. See id. He drives between the two—when within a rule’s core of settled meaning the judge lacks discretion but in the infrequent cases that fall in a rule’s penumbra of doubt the judge does have discretion. See id. The former, that rules deliver answers, is the norm and massively
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Hart #1 is no help at all in trying to nail down what Hart #2’s critical morality is meant to be.

IV. DEMOCRACY AND THE SECOND ORDER ISSUE IN THE DEBATE

I will be brief here too in this final section. I want to consider the second-order issue of what to do when people disagree about whether and when the criminal law, or the civil, private law for that matter, ought to be used to enforce non-legal norms of conduct. It seems plain to me that this second-order issue, or debate, is at least as important as the first-order legal moralism dispute given that smart, nice, reasonable people will inevitably disagree in their answers to that first-order dispute. It also seems plain to me that some version of democratic decision-making—“letting-the-numbers-count,” if you prefer—is the least bad option on the table.78

Now Hart discusses democracy in this context near the end of his book.79 Cane characterizes Hart’s discussion as “defensive in tone.”80 That is being kind to Hart, as there is also an element of unfairness to what the Professor says:

The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted.81

Yet least-bad, Churchillian defenders of democracy like me,82 and plenty of others would never say that what the majority decide is beyond criticism. Free speech and vigorous criticism are far more often found in conjunction with majoritarian democracy than with any other political set-up that I know of and certainly massively more so than in one party dictatorships, theocracies, military juntas, or even—I speculate here—realms run by Plato-like philosopher Kings—be they sitting on a top court, or otherwise.83

Nor does any supporter of “democracy is the least-bad decision-making more likely. See id. However the latter, discretion, can happen. See id. Indeed when it comes to the scope judges have to exercise their discretion at the point of application, sometimes “[h]ere all that succeeds is success.” Id.

78. See JAMES ALLAN, DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION 166 (2014).
80. Cane, supra note 14, at 30 n.30.
82. See, e.g., ALLAN, supra note 78, at 166.
83. See, e.g., id. at 153.
system going, and by a lot” thinking have to commit himself to saying what democracy produces can never be resisted. If push comes to shove and in some extreme instance you think civil disobedience—or insurrection and revolution—is called for, that is wholly consistent with thinking democracy is the least-bad system thus far tried.  You had better, though, be prepared to take the consequences of your choices and actions!

So “defensive in tone” is quite a kind description of Hart’s short discussion of democracy in this debate. Devlin’s discussion, in chapter V of his book, is much to be preferred, including the emphasis Devlin puts on juries and the need for unanimous verdicts in criminal cases and his endorsement of jury nullification as a protection against the law. Devlin is also correct to point out in these pages that although in a democracy, “the word of the educated man goes for no more than that of any other sort of man”—he gets no extra vote—it is nevertheless equally true that they have certain advantages—that come with brains, and no doubt from the wealth that that often brings with it. These advantages include “powers of persuasion above the ordinary” and an “easier access to the ear of the law-maker.”

To my way of thinking, after we have had the first order debate about when to employ the criminal law, and we have enjoyed the top level conferences on legal moralism, and we have tried to convince the legislators as to what should and should not be enacted, we cannot improve on democratic decision-making—and the knowledge that in a democracy every law passed can in the future be repealed. Each law enacted will have some people’s moral support. Each law repealed will too. It is hard to see why any one person’s critical morality, or best understanding of the harm principle, or willingness or unwillingness to defer to paternalistic considerations, ought to trump any other’s in a society of tens or hundreds of millions.

84. At the end of chapter nine of The Concept of Law Hart makes plain that in evil and wicked legal systems morality can, and should sometimes, trump law. See HART, supra note 7, at 210–12. This can lead a citizen to flee, to opt for civil disobedience, or even to take up arms. There is nothing in what Hart says there that implicitly denies those options to a citizen in a democracy if the elected legislature goes crazily off the rails, though of course the likelihood of that happening is incredibly slight. It is because this risk is comparatively far smaller in a democracy than in any other “thus far tried” political set-up that democracy is the least-bad system going, but at the same time it leaves open the remote possibility of a justified taking up of arms.

85. DEVLIN, supra note 6, at 86–101.
86. Id. at 91.
87. Id. at 95.
88. Id.
89. Id. at 96.
90. See ALLAN, supra note 82 and accompanying text.
It is a commonplace that in our sort of society matters of great moment are settled in accordance with the opinion of the ordinary citizen who acts no more and no less rationally in matters of policy than in matters of morals. Such is the consequence of democracy and universal suffrage. Those who have had the benefit of a higher education and feel themselves better equipped to solve the nation’s problems than the average may find it distasteful to submit to herd opinion. History tells them that democracies are far from perfect and have in the past done many foolish even wicked things. But they do not dispute that in the end the will of the people must prevail nor do they seek to appeal from it to the throne of reason.91

Devlin’s lack of exposure to international public lawyers, self-styled human rights experts, today’s twenty-first century top judges, members of the supranational elite, and more may have led him to put that last sentence in terms of an is rather than an ought. But otherwise, I think Devlin was right.

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91. Devlin, supra note 6, at 91–92.