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## The Harm Principle, Legal Moralism, and the "Disintegration Thesis": On Lord Devlin Being Unable to Keep Playing the Smuggling Game

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# The Harm Principle, Legal Moralism, and the “Disintegration Thesis”: On Lord Devlin Being Unable to Keep Playing the Smuggling Game†

MIGUEL NOGUEIRA DE BRITO\*

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## I. INTRODUCTION

The topic of the legal enforcement of morals, understood as the “question of the legitimacy of ‘vice crimes’ or ‘victimless crimes,’”<sup>1</sup> is a special facet of the more general issue of the limits of the law.<sup>2</sup> It is the subject

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1. LARRY ALEXANDER, *The Legal Enforcement of Morality*, in A COMPANION TO APPLIED ETHICS 128, 128 (R.G. Frey & C.H. Wellman eds., 2003).

2. See generally John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA PHIL. (Feb. 27, 2006), <https://plato.stanford.edu/archives/win2014/entries/law-limits/> (acknowledging that

of the long-standing debate as to whether law—all law—can be used as a support for moral conceptions as such, or, more generally, whether there are limits on the use of law to enforce morality, as when it is claimed that the law must remain neutral as between different views of the good, be they religious or otherwise.<sup>3</sup> Whether understood in this more general manner, or in the context of the legitimacy of vice crimes, the issue of legal enforcement of morality is one of the most significant problems in legal theory and one of the most unrelenting challenges the law poses to liberal theory.

The challenges that legal moralism pose for liberalism are clear if one notes that, for a considerable sector of liberal thought, the question of the limits on legal enforcement of morality is no longer simply whether such enforcement is subject to certain limiting conditions, as was the case for centuries within the natural law tradition.<sup>4</sup> For these liberals, the link between illegality and immorality is far less narrow.<sup>5</sup> They are not quite so concerned with finding out whether a specific course of action is immoral in order for it to be punished or prohibited by law, but only whether it falls afoul of a punishment-limiting principle.<sup>6</sup> According to this theory, an action is to be proscribed by law only if it causes harm to persons other than the agent and his consenting partners.<sup>7</sup> This idea was formulated by John Stuart Mill, and is better known as the “harm principle.”<sup>8</sup> It represents the model liberal answer to the issue of legal moralism. In this Article, I want to explore some of the ways in which liberalism has changed the issue of legal enforcement of morality, and some of the resulting implications.

I shall begin by discussing the historical evolution of the theses regarding the “enforcement of morals” issue. Then, I shall comment on the particular view whereby the issue of the legal enforcement of morality is considered from the standpoint of the necessary preservation of society. This, as is well known, was the view defended by Lord Devlin in his debate with Herbert Hart. While most people today tend to side with Hart on this debate, the truth of the matter, as generally acknowledged, is that the challenge put up by Devlin has not yet been met. Devlin claimed that “it is not possible to set theoretical limits to the power of the State to legislate

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the law undoubtedly has limits, but questioning whether those limits are principled, and suggesting that finding principled limits is an “elusive task.”).

3. *Id.*

4. *See, e.g.,* JOHN FINNIS, *Limited Government*, in 3 HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS 93 (2011).

5. *See* John Stanton-Ife, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

against immorality” as a means toward the preservation of society.<sup>9</sup> I want to explore this challenge and its implications for a liberal society. More precisely, I want to explore the possibility that the issue of how the preservation of society should be conceived is one of the most compelling problems for the future of liberal societies. But, more importantly, I argue that Devlin’s view on legal moralism is not quite as opposed to the liberal model as one might expect. In fact, Devlin adopts the same detached posture toward the issue of the legal enforcement of morals as do some liberals; that is, keeping a distance from the intrinsic immorality of an act when deciding to punish or otherwise prohibit that act.<sup>10</sup>

## II. THE “CLASSICAL THESIS” AND THE “MODERN CONTROVERSY”

Hart once alluded to a “classical thesis” regarding the role of law in the enforcement of morality: this is the thesis defended by Plato and Aristotle whereby “the law of the city state exists not merely to secure that men have the opportunity to lead a morally good life, but to see that they do”.<sup>11</sup> Fostering moral virtue is one of the goals of a society and one of the reasons it develops a legal system.<sup>12</sup> This thesis is associated not only with a virtue conception of morality, but also with a conception of morality “as a uniquely true or correct set of principles—not man-made, but either awaiting man’s discovery by the use of his reason or (in a theological setting) awaiting its disclosure by revelation.”<sup>13</sup>

A completely different way of envisioning the same issue is what Hart called “the disintegration thesis,” a thesis that is characteristic of modern controversy and according to which “society is not the instrument of the moral life; rather morality is valued as the cement of society[.]”<sup>14</sup> This thesis is associated with a relativist conception of morality and the morality to which it refers does not necessarily have a rational content,

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9. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 12 (Liberty Fund 2009) (1970).

10. In fact, as argued by Bernard E. Harcourt and others, one can even affirm that Devlin’s argument also relies on harm. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 125 & n.51 (1999). I further discuss this issue below.

11. H.L.A. HART, *Social Solidarity and the Enforcement of Morality*, reprinted in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 248, 248 (Clarendon Press 1983) (1967).

12. *Id.*

13. *Id.*

14. *Id.*

but merely a conventional or positive one.<sup>15</sup> As Hart sees it, the case for the enforcement of morality on this view, which is the view he attributes to Patrick Devlin, “is that its maintenance is necessary to prevent the disintegration of society.”<sup>16</sup>

Lord Devlin also acknowledges a distinction between two grounds to which the state may lay claim in order to legislate in matters of morals. One of these grounds is the Platonic ideal whereby “the State exists to promote virtue among its citizens.”<sup>17</sup> For Devlin, “[t]his is not acceptable to Anglo-American thought. It invests the State with power of determination between good and evil, destroys freedom of conscience and is the paved road to tyranny. It is against this concept of the State’s power that Mill’s words are chiefly directed.”<sup>18</sup> The alternative ground is simply that “society may legislate to preserve itself.”<sup>19</sup>

Lord Devlin considered that “the essential difference between the two theories is that under the first the law-maker must determine for himself what is good for his subjects.”<sup>20</sup> Conversely,

under the second theory the law-maker is not required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about right and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity.<sup>21</sup>

The mandate of the law-maker, according to this second theory, “is to preserve the essentials of his society, not to reconstruct them according to his own ideas.”<sup>22</sup> What he must ascertain is “not the true belief but the common belief.”<sup>23</sup>

Hart acknowledged that, in “older controversies,” advocates of milder positions—according to whom “the state could punish only activities causing secular harm”—challenged the classical thesis.<sup>24</sup> The political philosophy tradition includes not only the Platonist-Aristotelian stream, which authorizes punishing immoral acts as such, but also the Thomist tradition, which authorizes punishment only when the immoral act has a public character and jeopardizes public order, public morality, or the rights of others.<sup>25</sup>

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15. *Id.*

16. *Id.* at 248–49.

17. DEVLIN, *supra* note 9, at 89.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 89–90.

22. *Id.* at 90.

23. *Id.* at 94.

24. See H.L.A. HART, *LAW, LIBERTY AND MORALITY* 23 (1963).

25. For Saint Thomas Aquinas, human laws should not “forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for

This, as John Finnis stresses, is expressed in Section 19 of the Argentinean Constitution of 1853: “[t]he private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges.”<sup>26</sup>

Just as the radical legal moralist encountered opposition in the classical tradition of natural law from milder positions such as those of Aquinas, so too is there discord within utilitarianism between defenders and critics of legal moralism. This was the backdrop for the debate between John Stuart Mill and James Fitzjames Stephen in the nineteenth century,<sup>27</sup> apparently revisited in the twentieth century in the debate between Hart and Devlin.<sup>28</sup>

The soft version of legal moralism defended by Aquinas looks somewhat similar to Mill’s harm principle. In the words of John Stuart Mill, this is a

very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . [t]hat the only purpose for which power can be rightfully exercised over any member of a civilized 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

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the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and such like.” THOMAS AQUINAS, 2 THE SUMMA THEOLOGICA 96, *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD 232 (Robert Maynard Hutchins et al. eds., Fathers of the English Dominican Province trans., Encyclopedia Britannica, Inc. 1952) (1941).

26. JOHN FINNIS, *Hart as a Political Philosopher*, in 4 PHILOSOPHY OF LAW: COLLECTED ESSAYS 268, 270 (2011). Finnis says that Hart ignores the Thomist position. *Id.* at 270 n.52. This is only true if one considers just Hart’s essay *Social Solidarity and the Enforcement of Morality*, which was mentioned above, but not if one also takes into account his 1962 Harry Camp Lectures at Stanford University, published under the title *Law, Liberty and Morality*. In this last work, Hart certainly had the Thomist tradition in mind, even if he did not mention it explicitly, when he stated: “No doubt in older controversies the opposed positions were different: the question may have been whether the state could punish only activities causing secular harm or also acts of disobedience to what were believed to be divine commands or prescriptions of natural law.” HART, *supra* note 24, at 23.

27. It can be argued that by interfering in people’s lives the state succeeds in keeping them safe and happy. See JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 72 (Univ. of Chicago Press 1991) (1873); see also JOHN GRAY, MILL ON LIBERTY: A DEFENCE 134–47 (2d ed. 1996).

28. Hart did not fail to notice the similarity in the general tone and sometimes in the arguments of the two debates. See HART, *supra* note 24, at 16. Devlin also acknowledged this similarity. See DEVLIN, *supra* note 9, at vii. I say “apparently” because, as we shall see, even if the debate between John Stuart Mill and James Fitzjames Stephen is similar to the natural law debate between the Platonic-Aristotelian stream and the Thomist stream, the dispute between Hart and Devlin is not simply a reenactment of the first debate.

do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.<sup>29</sup>

Both Aquinas and Mill adopt a restraining attitude toward punishment. The similarity between their views, however, is minimal. For Aquinas, there is a clear distinction between the immorality of an act and the limiting conditions that may rule out its legal punishment, as is the case when an act hurts nobody.<sup>30</sup> If such conditions apply, however, the immorality of the act itself is not affected.<sup>31</sup> Immorality is not displaced by the conditions limiting its legal punishment or prohibition.<sup>32</sup> For Mill, on the contrary, a limiting condition of legal punishment or prohibition, such as harm to others, is elevated to the only legitimate principle of punishment.<sup>33</sup> Immorality is displaced by harm.<sup>34</sup> After Mill, it is not so much the case that “[h]arm, not morality, structures the debate,”<sup>35</sup> but that the moral relevance of an act is reduced to the harm it may cause to others.

Mill’s principle looks irresistibly simple: “[i]f an activity is not harmful, government must leave it alone. Conversely, if the activity causes harm, government may regulate it.”<sup>36</sup> The simplicity of the harm principle, however, comes at a price: its emptiness.<sup>37</sup> What constitutes a harm is essentially an open question. If we adopt a subjective conception of harm, such as pain or individual preferences, it will be difficult for any two people to reach an agreement as to whether a certain act is to be considered harmful. Furthermore, a merely subjective conception of harm will probably lead to results that

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29. JOHN STUART MILL, *ON LIBERTY* (1859), *reprinted in* *ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM* 13 (Stefan Collini ed., Cambridge Univ. Press 1989).

30. *See* AQUINAS, 25 note 25.

31. *Id.*

32. *Id.*

33. *See* HART, *supra* note 24, at 4.

34. *See* ROBERT P. GEORGE, *MAKING MAN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 72–73 (1993).

35. Harcourt, *supra* note 10, at 112. For Harcourt this is a development of the debate on legal moralism. As he sees it,

[t]he harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate. Today, the issue is no longer whether a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent. This is a radical departure from the liberal theoretic, progressive discourse of the 1960s.

*Id.* at 113. In my opinion, Harcourt’s account describes a necessary development of the harm principle.

36. STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 74 (2010).

37. Smith speaks of the harm principle as a hollow vessel, to be filled at each one’s convenience. *Id.* at 72.

are inconsistent with liberty. Within a subjective conception of harm, in fact, it will always be possible that my conduct will cause harm to others, giving the community a right to restrict my freedom. Mill was undeterred by such obstacles. He regarded the value of liberty, of which the harm principle is a specification, as essentially compatible with his notion of utility.<sup>38</sup> For him, utility is “the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.”<sup>39</sup> Those interests, he contends, “authori[z]e the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act that is hurtful to others, there is a *prima facie* case for punishing him.”<sup>40</sup> As this quote demonstrates, the concept of harm—according to Mill—is rather elusive: a harmful act is an act that hurts other people; that is, an act that affects the interest of other people, which is to be construed on the basis of utility as grounded on the “permanent interests of man as a progressive being.”<sup>41</sup> These considerations are enough to confirm the extreme malleability, to say the least, of the harm principle. On the other hand, it seems as if Mill is replacing the harm principle with a more complex liberty principle “constructed in order to promote the ideal of individual self-development in its richest diversity.”<sup>42</sup>

Regardless of this ambiguity, or perhaps precisely because of it, Mill’s attack on legal moralism has proven extremely influential in criminal and political theories. After Mill, two possible strategies remain to the legal moralist: to reinstate some version of the natural law midstream, or to adopt harm arguments within a moralist framework. The first strategy is the one adopted, most notably, by Michael Moore with his theory of legal moralism; that is, “the theory that all and only moral wrongs should be prohibited by the criminal law.”<sup>43</sup> Moore’s account of legal moralism is closely related to his account of retributivism, according to which criminal

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38. MILL, *supra* note 29, at 14.

39. *Id.*

40. *Id.*

41. *Id.*

42. Bernard Harcourt, *The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court’s Opinion in United States v. Windsor, John Stuart Mill’s Essay On Liberty (1859), and H.L.A. Hart’s Modern Harm Principle* 13 (Univ. of Chicago Law Sch., Public Law & Legal Theory, Working Paper No. 437, 2013).

43. MICHAEL S. MOORE, *Liberty’s Constraints on What Should be Made Criminal*, in CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 182, 191 (R.A. Duff et al. eds., 2014).

law should “punish all and only those who are morally culpable in the doing of some morally wrongful action.”<sup>44</sup> Morality, however, is viewed from a critical standpoint and is unconcerned with sexual practices such as obscenity, homosexuality, prostitution, and the like. Furthermore, Moore appears to recognize several grounds on which the reach of the criminal sanction may be limited, even when immorality is involved, such as legality, convenience, epistemic modesty, and the protection of basic liberties.<sup>45</sup>

What concerns me here, however, is the second strategy, the strategy of Lord Devlin. The point I want to stress in all of the above concerns the novelty that liberalism introduces into “modern controversy” with respect to the legal enforcement of morality. What is at stake is no longer the intrinsic immorality of an act but the harm such an act may cause to others. This is clearly true in respect of John Stuart Mill’s harm principle. Yet, it also holds true for Lord Devlin’s “disintegration thesis,” as already demonstrated by Bernard Harcourt. One way to describe this thesis is to say that an act should be punished, or otherwise prohibited, if it causes harm to society in general; that is, if it endangers the maintenance of society. In the words of Bernard Harcourt:

Devlin appeared to be arguing that morality should be enforced in order to protect society from the danger of disintegration—an argument that relied on harm. On this view, the only difference between Hart and Devlin was that Hart focused on harm to the individual, whereas Devlin focused on harm to society as a whole.<sup>46</sup>

In this sense it is certainly true that the debate between Lord Devlin and Herbert Hart “has been carried on in a completely utilitarian framework.”<sup>47</sup>

Some clarification is needed at this point. As noted by Hart, Devlin sometimes adopts a moderate thesis, according to which a common morality is “the cement of society.”<sup>48</sup> This is the thesis I am primarily exploring in this article and the one Devlin seems to endorse a majority of the time. But, at other times, Devlin seems to subscribe to an extreme thesis, far closer to James Fitzjames Stephen’s views, whereby the “enforcement of morality is regarded as a thing of value, even if immoral acts harm no one directly, or indirectly by weakening the moral cement of society.”<sup>49</sup> In the apt words of Bernard Harcourt,

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44. MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 35 (1997).

45. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 197 (2008).

46. Harcourt, *supra* note 10, at 125 (citation omitted).

47. Jeffrie G. Murphy, *Another Look at Legal Moralism*, 77 *ETHICS* 50, 50 (1966). In this sense, it is possible to construe Devlin’s position as consequentialist, “because he believes that the preservation of morality through the criminal sanction is essential to protect society.” HUSAK, *supra* note 45, at 196 n.79.

48. HART, *supra* note 24, at 49.

49. *Id.*

[u]nder the second interpretation, referred to as the extreme thesis, Devlin argued that morality should be enforced for the sake of morality *tout court*: morality for morality's sake. If Devlin's claim (that private acts of immorality present a danger to society) was not intended to be an empirical claim, Hart suggested, then Devlin equated morality with society.<sup>50</sup>

Devlin appears to embrace this thesis more decidedly when he openly airs his most personal views, those relating to the relationship between morality and religion:

No society has yet solved the problem of how to teach morality without religion. So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—but for the compelling reason that without the help of Christian teaching the law will fail.<sup>51</sup>

Lord Devlin's stance on the legal enforcement of morals—more precisely, his stance as articulated in the moderate thesis mentioned above—is heavily influenced by the liberal terms of “modern controversy.”<sup>52</sup> However, the fact that he relied on harm to society as a whole, and not on harm to the individual, fundamentally affects his position. In this context, the main points of Lord Devlin's position are: (i) legal moralism refers to positive, or conventional, morality, not critical morality<sup>53</sup>; (ii) its main purpose is the preservation of society by means of its public or common morality; (iii) “it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter.”<sup>54</sup>

I believe this third point to be true and the first one to be false. In other words, there is no justification whatsoever for the law to uphold the positive morality, as such, of a given society, even if there are prudential reasons, or justice and rights-based reasons for not upholding critical morality in a particular case.<sup>55</sup> Nonetheless, once we accept that the morality in question

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50. Harcourt, *supra* note 35, at 128.

51. DEVLIN, *supra* note 9, at 25.

52. See HART, *supra* note 24, at 23.

53. In Devlin's own words, “[w]hat is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference.” DEVLIN, *supra* note 9, at 114.

54. *Id.* at 12–13.

55. See GEORGE, *supra* note 34, at 44 (“Nevertheless, the existence of justice-or rights-based grounds, as well as prudential reasons, for ‘not representing every vice’, does

is critical morality, there are no criteria for principles that would allow us to rule out in advance the legal enforcement of morality as such.<sup>56</sup> In this sense, Lord Devlin was right.<sup>57</sup>

What really interests me, however, is exploring the following questions, which are more focused on Devlin's second point: (i) Does the preservation of a society rest on maintaining a common morality? And, if so, what is to be understood in our modern pluralist societies by a common morality?; and (ii) Does Devlin's oscillation between a moderate and an extreme thesis, the first focused on public harm and the second on legal moralism, rest on a mere unsophisticated philosophical construction or is it revelatory of something more profound?

### III. THE PRESERVATION OF SOCIETY IN UNIFORM SOCIETIES

Lord Devlin is of the opinion that “[s]ociety is entitled by means of its laws to protect itself from dangers, whether from within or without.”<sup>58</sup> But what exactly does this mean?

The first comment in this regard is that while it was Devlin who defended a conventional morality as the cement of society, Hart, his opponent in the legal moralism debate, advanced the theoretical elaboration of his moderate position. Hart called this position the “disintegration thesis,” and even went so far as to identify its precursors in sociological literature, who he saw as being Émile Durkheim and Talcott Parsons.<sup>59</sup>

Devlin, in fact, does not elaborate much on his views. He draws on a “political parallel” for their presentation: just as society cannot tolerate rebellion or treason because an established government is necessary for the existence of society, so too should moral vices be legally persecuted

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not entail that there are never valid reasons to legally prohibit *any* vice on the ground of its immorality.”).

56. See Danny Scoccia, *In Defense of “Pure” Legal Moralism*, 7 CRIM. L. & PHIL. 513, 514 (2013) (“But Hart’s demolition of Devlin’s argument left unscathed the case for a ‘legal moralism’ that ignores positive morality and appeals directly to critical morality.”).

57. See Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999). Regarding the criminal law in particular, I agree with Anthony Duff that “[w]e should not assume (as too many theorists tend to assume) that we can create a rational and properly limited system of criminal law only if we can articulate a single master principle, or set of principles, that provides substantive general criteria by which we can identify the kinds of conduct that are in principle criminalizable . . . .” R.A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217, 232–33 (2014).

58. DEVLIN, *supra* note 9, at 13.

59. HART, *supra* note 24, at 252 (“The determination of the precise status and the role of these propositions in Parson’s complex works would be a task of some magnitude, so I shall select from the literature of sociology Durkheim’s elaboration of a form of the disintegration theory, because his variant of the theory . . . is also specifically connected with the topic of the enforcement of morality by the criminal law.”).

because an established morality is necessary for the maintenance of society.<sup>60</sup> For Devlin, “the suppression of vice is as much the law’s business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.”<sup>61</sup> Hart, in his first published critique of Devlin’s views, denounced this analogy between moral vice and treason as absurd; that is, we can make immorality seem like treason “only if we assume that deviation from a general moral code is bound to affect that code, and to lead not merely to its modification but to its destruction.”<sup>62</sup> On the contrary, for Hart “we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty, and dishonesty, merely because some private sexual practice which they abominate is not punished by the law.”<sup>63</sup>

Against these contentions, the alternative that Hart has to offer Devlin is to supplement his thesis with empirical evidence or to accept that “his statements about the necessity of a common morality for the existence of society were not empirical statements at all but were disguised tautologies or necessary truths depending entirely on the meaning given to the expression ‘society,’ ‘existence,’ or ‘continued existence’ of society.”<sup>64</sup>

Given the lack of evidence presented by Lord Devlin, one is forced to subscribe to the second alternative, according to which his statements about the necessity of a public morality for the continued existence of society were not empirical statements at all. Hart considers several hypotheses in this regard.

First of all, the disintegration thesis could be perceived as a disguised conservative thesis, which simply claims that the majority in a society have a right to defend their existing moral environment against change.<sup>65</sup>

Second, the disintegration thesis could refer to the possibility that “the common morality which is essential to society, and which is to be preserved by legal enforcement, is that part of its social morality which contains only those restraints and prohibitions that are essential to the existence of any

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60. DEVLIN, *supra* note 9, at 13.

61. *Id.* at 13–14.

62. H.L.A. Hart, *Immorality and Treason*, LISTENER, July 30, 1959, at 162, 163.

63. *Id.*

64. HART, *supra* note 24, at 250. Devlin’s inability to provide evidence of his claims about public morality was also pointed out by Ronald Dworkin. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 246 (1978).

65. *See* HART, *supra* note 24, at 251.

society of human beings whatever.”<sup>66</sup> This is the thesis defended by Aquinas, as mentioned above, and many other philosophers since.<sup>67</sup> The problem with this thesis, of course, is that all defenders of the harm principle would accept it. In fact there is very likely an overlap between the restrictions essential to the existence of any society and the restrictions envisaged by the harm principle.

Third, the disintegration thesis might refer not to that part of morality that is essential to the maintenance of any society whatever but only to the preservation of what is essential to a particular society, or “a central core of rules or principles which constitutes its pervasive and distinctive style of life.”<sup>68</sup> This is what Lord Devlin has in mind when he speaks of monogamy as a moral principle.<sup>69</sup> Yet, even if we could produce empirical evidence of the importance of this central core for the maintenance of a given society, this would not, according to Hart, be equivalent to an empirical claim regarding the connection between maintaining a common morality and preventing the disintegration of a society.<sup>70</sup> It would only mean the disappearance of the central core of a certain society at a certain historical moment, not its complete disintegration.<sup>71</sup>

In any event, Hart discusses the types of evidence that might conceivably be relevant regarding the alternatives to maintaining a common morality.

One of these alternatives “is general uniform *permissiveness* in the area of conduct previously covered by the common morality.”<sup>72</sup> In this alternative, the thesis to be tested would presumably be that “without the discipline involved in the submission of one area of life, e.g.[,] the sexual, to the requirements of a common morality, there would necessarily be a weakening of the general capacity of individuals for self-control.”<sup>73</sup> This would effectively contribute to the disintegration of society.<sup>74</sup> To this argument, Hart objects that permissiveness in certain areas of conduct might not have the effect of contaminating moral life in its entirety; on the contrary, it just “might make it easier for men to submit to restraints on violence which are essential for social life.”<sup>75</sup>

This interpretation of Lord Devlin’s views on the disintegration of society has been disputed. Robert George asserted that, for Devlin, permissiveness

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66. *Id.* at 258.

67. *See* AQUINAS, *supra* note 25.

68. HART, *supra* note 24, at 258.

69. DEVLIN, *supra* note 9, at 76.

70. HART, *supra* note 24, at 259.

71. *Id.*

72. *Id.* at 261.

73. *Id.*

74. *Id.* at 261–62.

75. *Id.* at 262.

of acts condemned as grossly immoral in a society under its prevailing morality would not necessarily lead to chaos.<sup>76</sup> As George notes, “[p]eople might continue to live in proximity to one another in a state of peace and order. They would, however, cease being a society; for ‘society,’ Devlin supposed, is something more than people living in proximity to one another in a state of peace.”<sup>77</sup> According to this view, the price to be paid for failing to maintain a shared morality is social disintegration, not in the sense of individuals being deprived of safety for their person and property, but in the sense of losing the good of interpersonal integration. The problem with this view is that even if we agree with the intrinsic value of the community for the lives of individuals, this does not justify criminalizing acts that are contrary to the dominant morality of a given society, including purely private immoral acts.

George was certainly correct when he claimed, “Hart’s criticisms of Devlin’s disintegration thesis lose their force if we do not take Devlin to have supposed that social order will break down whenever social cohesion is lost.”<sup>78</sup> In other words, “Devlin . . . need neither claim nor suppose that the price of failing to maintain a shared morality is an inevitable descent into Hobbes’ state of nature.”<sup>79</sup> The disintegration thesis need not only mean either (i) the breakdown of order; or (ii) the destruction of a society that is defined as identical with its morality at any given time in its history. In the disintegration of society, “society” could mean “a state of affairs in which individuals identify their own interests with those of others to whom they understand and experience themselves as integrally related by virtue of common commitments and beliefs.”<sup>80</sup> This kind of communal good could effectively be destroyed by a spreading general permissiveness of immoral acts even if these acts would cause no harm to others. However, for Robert George, unlike Patrick Devlin, the morality that condemns such acts must be true, and only if it is true can the law enforce it.<sup>81</sup> Yet, if this is the case, one question remains to be answered: does the immoral act fall foul of the law because it is intrinsically immoral or, because, in addition or alternatively,

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76. See GEORGE, *supra* note 34, at 68 (1993) (“Devlin did not assert that a society’s toleration of acts condemned as grossly immoral under its prevailing morality would necessarily lead to chaos . . .”).

77. *Id.*

78. *Id.* at 69.

79. *Id.*

80. *Id.* at 70.

81. *Id.* at 71.

it endangers the good of communal life? This question does not arise in Devlin's scheme because for him the immorality as such of an act is only relevant if it endangers society. But for George it appears there are two moral wrongs: (i) the moral wrongness of the act in itself; and (ii) the moral wrongness such an act causes as a consequence of destroying a communal good. This second moral wrong, however, seems to be dependent on an empirical question; that is, ascertaining—as a matter of fact—whether the doing of an immoral act in itself endangers or destroys the good of communal life. If this is so, then Hart's criticisms of Devlin remain unanswered.

The second alternative considered by Hart is "*moral pluralism*[,] involving divergent sub-moralities in relation to the same area of conduct."<sup>82</sup> In this case, the thesis to be tested "would presumably be that where moral pluralism develops . . . quarrels over the differences generated by divergent moralities must eventually destroy the minimal forms of restraint necessary for social cohesion."<sup>83</sup> The counter-thesis would of course be tolerance, or the fact of "divergent moralities living in peace" in the same society.<sup>84</sup>

What is striking in this account is, in the first place, the consideration of moral pluralism exclusively from the standpoint of providing evidence in support of or against the disintegration thesis. The other possibility is to consider moral pluralism as a new model of common morality, but one that dispenses with the very idea of preservation of a society resting on the convergent positive moralities of all its members in relation to the same areas of conduct. I will explore this possibility, and its relationship with political liberalism, in the next section.

A second reason for confusion regarding Hart's account is the obvious absence of a third alternative, in addition to permissiveness and moral pluralism. This would be the spread of paternalism into the area of conduct previously covered by common morality. It is true that this alternative would not have made much sense to Lord Devlin since he doubted the very possibility of drawing a theoretical distinction between moral paternalism and the enforcement of morality.<sup>85</sup> He even restated "the famous sentence" in Mill so as to accommodate paternalism and the result, as he puts it, is clearly "unattractive."<sup>86</sup> As a consequence of this restatement, Mill's sentence would have to read as follows:

the only purposes for which power can be rightfully exercised over any member of a civilized community against his will are to prevent harm to others *or for his own physical or moral good*. His own good either physical or moral is *therefore*

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82. HART, *supra* note 24, at 261.

83. *Id.* at 262.

84. *Id.*

85. DEVLIN, *supra* note 9, at 136.

86. *See id.* at 134.

a sufficient warrant. He *can* rightfully be compelled to do or forbear because it will be better for him to do so or because it will make him happier, *but not* because, in the opinion of others, to do so would be wise or even right.<sup>87</sup>

In other words, adding paternalism to the harm principle necessarily produces some kind of legal moralism.

Hart, on the contrary, believed it is possible to differentiate between paternalism, which he somewhat inadequately defines as “the protect[ion] [of] people against themselves,”<sup>88</sup> and legal moralism. As he saw it, even if Mill rejected both, this does not mean that he was unaware of the differences between them.<sup>89</sup>

I believe Hart was unable to make a convincing distinction between paternalism and legal moralism. However, that is of no concern to us in the present context. In any event, if Hart believed that paternalism differs from legal moralism, he would have to admit the hypothesis that a combination of physical and moral paternalism with moral individualism would be sufficient to prevent the disintegration of society. In this case, the spread of paternalism would probably lead to the dismantling of a common morality without necessarily having as a consequence the disintegration of society.<sup>90</sup>

#### IV. THE PRESERVATION OF SOCIETY AND THE FACT OF PLURALISM

There is little doubt that modern societies are no longer built, if indeed they ever were, on a single positive morality shared by all their members. Instead of this common morality, we tend to adopt the view whereby modern societies are characterized, in the words of Hart, by the coexistence of divergent sub-moralities in relation to the same areas of conduct. Would this necessarily entail the end of a common morality and the disappearance, for want of subject matter, of the disintegration thesis?

Lord Devlin’s thesis that the preservation of society rests on the maintenance of a positive common morality is allegedly built exclusively

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87. *Id.* (emphasis added).

88. HART, *supra* note 24, at 31.

89. *Id.*

90. There are contrary readings of this possible development. Compare GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* 263 (1994) (voicing displeasure with what she views as a new species of “moral correctness”), with CASS SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* 123 (2014) (arguing that soft paternalism offers new opportunities for liberty).

on empirical foundations.<sup>91</sup> What about Hart's suggestion that a modern alternative to a common morality would be moral pluralism? He admits that moral pluralism could lead to disputes generated by divergent moralities that could eventually destroy the minimal forms of restraint necessary for social cohesion.<sup>92</sup> However, as an alternative, he also admits tolerance, or the fact of "divergent moralities living in peace" in the same society.<sup>93</sup> The interesting point of this moral pluralism is that it is conceived as an alternative to the disintegration of society. The preservation of society no longer depends on the maintenance of a positive common morality but upon a kind of second-order morality; that is, the development of habits of tolerance that render possible the coexistence of divergent first-order moralities. There must be limits to this tolerance, even if it is conceived within the context of a mere *modus vivendi*,<sup>94</sup> beyond which the goal of assuring the preservation of society as-built on the coexistence of different moralities can no longer be attained.

What precisely is the nature of the concepts, which I use here for mere ease of expression, of first-and-second-order moralities? It would be tempting to say that first-order moralities are Rawls' comprehensive and general doctrines and that second-order moralities are his political principles and values.<sup>95</sup> Yet, first order-moralities are still viewed in the discussion above on moral pluralism as positive moralities existing in modern societies.<sup>96</sup> They may, or may not, be comprehensive doctrines. This coheres with the fact that most people do not actually possess fully-comprehensive moral, religious and philosophical doctrines.<sup>97</sup> On the other hand, the habits of tolerance which allow the coexistence of divergent positive first-order moralities are apparently generated within such moralities and do not refer to something imposed from the outside.

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91. See DEVLIN, *supra* note 9, at 94.

92. HART, *supra* note 24, at 262.

93. *Id.*

94. For the concept of *modus vivendi*, see CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 74–75 (1987) (explaining that the "*modus vivendi* view is the one most readily suggested by the argument for political neutrality") (emphasis added), and JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 147 (1996) (noting that a typical use of *modus vivendi* "is to characterize a treaty between two states whose national aims and interests put them at odds.>").

95. RAWLS, *supra* note 94, at 11–15 (1993).

96. Hart opposed Devlin's view of social morality as a "seamless web," which he found unconvincing, but he did not oppose the view of morality as composed of beliefs rather than of critical principles. See HART, *supra* note 24, at 51; DEVLIN, *supra* note 9, at 115.

97. GERALD F. GAUS, CONTEMPORARY THEORIES OF LIBERALISM: PUBLIC REASON AS A POST-ENLIGHTENMENT PROJECT 181 (2003).

Nonetheless, the idea of a second-order morality as implicit in first-order moralities may perhaps assist in clearing up an inherent ambiguity in Rawls' account of the relationship between comprehensive doctrines and political principles. One of the features of these principles is that "they can be presented independently from comprehensive doctrines of any kind."<sup>98</sup> But how can a political principle be justified if not within a comprehensive doctrine? A possible answer to this question might lie in yet another feature of Rawls' account of political principles and values, which is that "they can be worked out from fundamental ideas seen as implicit in the public political culture of a constitutional regime, such as the conception of citizens as free and equal persons, and of society as a fair system of cooperation."<sup>99</sup> But this is circular: a political principle is political if it belongs to the public political culture of a constitutional regime. In other words, Rawls presumes the answer in the very act of asking what political principles are. This is precisely where the idea of second-order morality as implicit in first-order positive moralities of a society can be of assistance. It helps us to understand that the idea of the political as freestanding makes no sense,<sup>100</sup> and that political principles and values cannot be shielded from the problems of moral pluralism.<sup>101</sup>

What are the implications of this for the disintegration thesis? Second-order morality consists essentially of developing habits of toleration and reasonableness in all the members of a community. These are constituent habits of a certain type of community and have an evident normative content. Hence, Hart's basic objection to the disintegration thesis—that the shift in positive morality does not necessarily mean the destruction of the corresponding society, merely its modification—no longer applies. A pluralist society must be able to defend by way of law, if necessary, its habits of toleration and reasonableness, and this entails protecting all the different positive moralities that generate such habits as well as protecting itself, at least, from all those other positive moralities that reject them.

I would now like to draw some implications from the relevance of the disintegration thesis to modern pluralist societies. The first point concerns how to understand state neutrality toward conceptions of the good, especially

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98. JOHN RAWLS, *THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED"* 143 (1999).

99. *Id.*

100. On political principles and values as freestanding, see RAWLS, *supra* note 94, at 374–401.

101. GAUS, *supra* note 97, at 190.

religious ones.<sup>102</sup> Liberals usually acknowledge that the state should maintain necessary neutrality toward conceptions of the good and convictions of conscience.<sup>103</sup> Yet it is doubtful whether such neutrality on the part of the state will impose an equal burden on all citizens. A neutral attitude may in fact take different forms: the state can abstain from interference in the citizens' system of beliefs and values, but it can also adopt a more active stance in defending citizens' freedom and equality in the pursuit of their own aims.

Neutrality is at risk of being incomplete if it is to be perceived as a non-supportive attitude of the state toward its citizens' system of beliefs and values.<sup>104</sup> Certainly, the liberal neutral state defends the principle that individuals are to be considered autonomous moral agents, free to choose and define their own conception of the good life, and it is precisely this view that will be favored in public schools. Consequently, "[i]n exposing students to a plurality of worldviews and modes of life, the democratic and liberal state makes the task more difficult for parents seeking to transmit a particular order of beliefs to their children."<sup>105</sup>

Conversely, if state neutrality is perceived as an attitude that is more supportive of or promotes its citizens' religious worldviews, the state should accept the public coexistence of religions and their participation in civic discourse. Examples of this supportive attitude are allowing religion to be taught in public schools, provided that all religious faiths are afforded similar conditions, the presence of chaplains in caregiving facilities or prisons, or tax benefits for religious associations. Without doubt, even in this version of neutrality, the state must be strictly separate from religion. This does not mean, however, that religious worldviews are only relevant in the private sphere of individuals. As stressed by Charles Taylor and Jocelyn Maclure,

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102. According to Devlin, positive morality almost always presupposes a religious base: "Most men take their morality as a whole and in fact derive it, though this is irrelevant, from some religious doctrine." DEVLIN, *supra* note 9, at 115. At some points he is more assertive about this religious base of positive morality, as when he says that, after the admission of freedom of conscience, the judges "continued to administer the law on the footing that England was a Christian country. Reluctantly they recognized respectful criticism of Christian doctrine as permissible and the crime of blasphemy virtually disappeared. But Christian morals remained embedded in the law." *Id.* at 87 (citation omitted).

103. See, e.g., STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* 25–33 (2d ed. 1996).

104. See JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 16 (Jane Marie Todd trans., 2011) ("[I]t is clear that such neutrality on the state's part will not impose an equal burden on all citizens.").

105. *Id.*

the public-private distinction turns out to be too general and indeterminate in many cases to allow us to assess the appropriate place of religion in the public space. There is also a vast space, often called ‘civil society,’ lying between the state and private life, where a host of social movements and organizations, including some motivated by spiritual or religious convictions, will engage in debate on questions of public interest and will become involved in charitable or humanitarian causes.<sup>106</sup>

A strong civil society, not positive morality, is the cement of modern pluralist societies.

How is the state to choose between the non-supportive and promotional attitudes to which I have referred? The answer lies in developing habits of tolerance, as well as the virtue of civility,<sup>107</sup> within the religious and philosophical worldviews that coexist in a given society and their acceptance of participation in civic discourse within civil society.

A second point concerns the concept of disintegration of society. Hart, as already mentioned above, considered that even if some part of conventional morality became more permissive, “the society in question would not have been destroyed or ‘subverted.’”<sup>108</sup> Such a development could not be compared, along the lines of Devlin’s parallel between moral vices and seditious acts, “to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance.”<sup>109</sup>

This may be valid when what is at issue is the positive morality of a given society, but it is very unlikely to be the case when we are faced with the values of moral pluralism. This is at the core of the public harm interpretation of Devlin’s thesis. In this domain, a parallel between immoral acts—in the sense of acts contrary to the values of pluralism—and seditious acts, is certainly more plausible. Overthrowing habits of tolerance and civic discourse carries the risk of destruction of a given society

106. *Id.* at 40.

107. See EDWARD SHILS, *THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY* 340–41 (Steven Grosby ed., 1997) (noting that “civility is a mode of political action” whereby “antagonists are also members of the same society,” and that “civility is [also] a mode of conduct which protects liberal democratic society from the danger of extreme partisanship[.]”). Rawls speaks of the duty of civility; that is, the duty “to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made”. RAWLS, *supra* note 94, at 217 (citation omitted).

108. HART, *supra* note 24, at 52.

109. *Id.*

as a liberal society, and this is equivalent to a seditious act against a liberal constitutional regime. In this spirit, Article 46(4) of the Portuguese Constitution prohibits armed associations, military, militarized or paramilitary type associations, and organizations that are racist or display a fascist ideology,<sup>110</sup> while Article 21(2) of the German Basic Law provides that parties which, by reason of their aims or the behavior of their members, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, are unconstitutional.<sup>111</sup>

Disintegration of society in this sense is not to be equated with the breaking of social order—as Hart interpreted Devlin—or even to the loss of the sense of community as an intrinsic value for the well-being of all its members—according to Robert George’s alternative interpretation.<sup>112</sup> In this sense, the disintegration of society is a possible outgrowth of all modern societies and not simply some form of antithesis to liberalism which combines atomism and collectivism.<sup>113</sup> In modern pluralist societies, the disintegration of society involves totalitarianism and fundamentalism, both understood as the “nightmare” of liberalism.<sup>114</sup>

## V. THE SMUGGLING GAME

I will now turn, albeit briefly, to the second question raised at the end of Section II above.<sup>115</sup> The question was whether Devlin’s oscillation between a public harm view and a legal moralist view of legal punishment and prohibition is just a product of philosophical clumsiness, so to speak, or whether it has a deeper source. The correct answer may be that Devlin’s “ruminations of an English judge of no philosophic formation,” as John Finnis described his position,<sup>116</sup> expose more crudely than sophisticated philosophical training would allow the inner tensions of the liberal discourse on the limits of the state’s coercive power based on the harm principle.

The inner tensions I have in mind are the ones exposed by Steven Smith when he brilliantly conceived of smuggling as the key to understanding why the constitutional reasoning of lawyers and judges continues to work

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110. Constituição da República Portuguesa [Constitution] April 25, 1976, art. 46(4).

111. Grundgesetz [GG] [Basic Law], art 2., translation at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0114](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0114) [<https://perma.cc/8T95-G4P8>].

112. See HART, *supra* note 24, at 259; see also GEORGE, *supra* note 34, at 69.

113. This alludes to the nightmarish combination of methodological individualism and the precedence of collective goals over individual differences as described by Charles Taylor. See CHARLES TAYLOR, *Cross-Purposes: The Liberal-Communitarian Debate*, in PHILOSOPHICAL ARGUMENTS 181 (1995).

114. See MICHAEL HALBERSTAM, TOTALITARIANISM AND THE MODERN CONCEPTION OF POLITICS 113–18 (1999).

115. See *supra* Section II.

116. FINNIS, *supra* note 26, at 270.

relatively well despite the fact that it is spectacularly unpersuasive, at least to many of us.<sup>117</sup> Smith's point is that our public discourse is based on the exclusion of our deepest normative commitments as a condition for forming public deliberations. Since we cannot avoid such commitments, we are condemned to live in a state of permanent dissatisfaction with how public deliberation functions.

We can see this scheme at work in Devlin's oscillation between the moderate and extreme theses on the legal enforcement of morals. In general, Devlin's argument is based on the definition of conventional morality in terms of harm to society.<sup>118</sup> Yet it is precisely the fact that he focuses on harm to society as a whole, and not to its individual members, that adds to his difficulties in defining the mechanism of public harm, as we saw above.<sup>119</sup> This mechanism has an empirical basis that Devlin the judge was unable to deliver or simply to evade, as I have attempted to do in Section IV above.<sup>120</sup> Amidst such difficulties, Devlin could not help revealing his deepest conviction on the issue of legal morality: "without the help of Christian teaching the law will fail."<sup>121</sup> In other words, beyond a certain point, Devlin was unable to keep on smuggling his normative convictions into the language of public harm and directly addressed the real truth of the matter as he saw it. He was just not able, or willing, to keep on playing the smuggling game.

Steven Smith sees smuggling as an unavoidable condition of our contemporary public discourse.<sup>122</sup> As he sees it, this does not necessarily make it worse "than public discourse was two centuries or ten centuries or two millennia ago"; in fact, "[i]n some respects modern public discourse may deserve higher marks than public discourse of many past times did[.]"<sup>123</sup> In his view, smuggling is, however, a "discursive shortcoming" that is especially characteristic of our times.<sup>124</sup> This failing is because smuggling implies that an argument is based on undisclosed premises.<sup>125</sup> These premises are not revealed because the conventions that govern the kind of argument

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117. SMITH, *supra* note 36, at 26.

118. *See generally* DEVLIN, *supra* note 9.

119. *See supra* Section III.

120. *See supra* Section IV.

121. DEVLIN, *supra* note 9, at 25.

122. SMITH, *supra* note 36, at 37.

123. *Id.*

124. *Id.* at 38.

125. *Id.* at 35.

into which they are smuggled seek to exclude them, as is the case when we say that public deliberation is not to be based on religious considerations.<sup>126</sup>

Conversely, smuggling could perhaps be viewed in the manner La Rochefoucauld saw as hypocrisy: as a tribute that vice pays to virtue,<sup>127</sup> but this does not seem accurate unless we are willing to envision our deepest convictions as “vice” and public secular discourse as “virtue.” Steven Smith’s hypothesis is precisely that sometimes, or perhaps most of the time, we use public discourse as a convenient vehicle to smuggle in our pre-existing values and commitments, as an instrument that allows us to deliver an air of neutrality and objectivity to the fact that the principles we arrive at in the public use of reason were the ones we already held from the start.<sup>128</sup> In this light, public discourse must be the smuggling vice and our deepest convictions are surely the virtue. We can also look at things differently and see public reason not as an expression of some sort of freestanding view of political values but as a necessary outgrowth of our commitments in a setting of inevitable pluralism of values and commitments.

Adapting Kant’s famous phrase, we could perhaps say that public reason without our deepest commitments is empty, but these are blind without some sort of public use of reason.<sup>129</sup> This would call for a “togetherness principle” regarding the public use of reason and the adoption of any sort of religious or philosophical values and convictions, in the sense of the necessary complementarity and interdependence of both. Smuggling may well be understood as a way of making proselytism look like an offering of secular and objective reasons, but that may not necessarily be bad for the quality or even the continuation of our public life, at least if we keep playing the smuggling game.

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126. *Id.* at 36.

127. Cf. FRANÇOIS DE LA ROCHEFOUCAULD, *MAXIMS* 97 (Leonard Tancock trans., Penguin Books 1959) (1678).

128. See SMITH, *supra* note 36, at 26–27.

129. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 93 (Norman Kemp Smith trans., Palgrave Macmillan rev. 2d ed. 2003) (1929) (“[T]houghts without content are empty, intuitions without concepts are blind.”).