

# THE INTERSECTION OF LAW AND MORALS

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In 1959 Sir Patrick Devlin, then a judge of Queen's Bench, delivered a lecture criticizing the *Report* of the Wolfenden Commission which two years earlier had recommended that homosexual acts between consenting adults should no longer be treated as crimes in England.<sup>1</sup> The Wolfenden *Report* had argued, following John Stuart Mill, that there was an area of "private morality" which was "not the law's business".<sup>2</sup> Devlin objected to this position, and claimed that a recognized morality was necessary for a society's existence and therefore that the law could properly protect that morality.<sup>3</sup>

There had been a great deal of scholarly response to Devlin's lecture and almost all of it has been extremely critical of Devlin's argument.<sup>4</sup> I agree with much of the criticism and I believe that much of Devlin's argument was muddled and that his conclusions were wrong. But, in their rush to defend liberty against what they saw as neanderthal puritanism, Devlin's critics ignored the solid emotional ground of his lecture. As is too often the case with academic debate, a great deal of effort went into making nonsense of Devlin's position; almost none into making sense of it.

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<sup>1</sup> P. Devlin, *The Enforcement of Morals* (1965).

<sup>2</sup> Comm. on Homosexual Offences and Prostitution, Cmd No. 247, *Wolfenden Report* (Authorized Am. ed., 1963), para. 61.

<sup>3</sup> Devlin, *op. cit.*, footnote 1, p. 13: "An established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."

<sup>4</sup> *E.g.* Dworkin, *Lord Devlin and The Enforcement of Morals* (1966), 75 *Yale L.J.* 986; Hughes, *Morals and The Criminal Law* (1962), 71 *Yale L.J.* 662; Hart, *Law, Liberty and Morality* (1963); Hart, *Social Solidarity and The Enforcement of Morality* (1967), 35 *U. of Chi. L. Rev.* 1; Hart, *Immorality and Treason*, *The Listener*, July 30th, 1959, p. 162; Wollheim, *Crime, Sin and Mr. Justice Devlin*, *Encounter*, November 1959, p. 34.

Devlin straightforwardly set out his real interest in the question, but no one has paid any attention to it. He said:<sup>5</sup>

As a judge who administers the criminal law and who has often to pass sentence in a criminal court, I should feel handicapped in my task if I thought that I was addressing an audience which had no sense of sin or which thought of crime as something quite different.

It is not clear whether Devlin felt that his audience had or lacked the senses he wished them to have; whether, that is, this passage was a description of the audience Devlin did face, a recollection of one he had once faced, a criticism of one he feared he would come to face, or a wishful fantasy of the one he would have liked to face. Whichever, "handicapped" is hardly a strong enough word to describe the emotions a criminal court judge would feel if the people he dealt with did not have both a sense of values and a feeling that the law more or less embodied those values. Increasingly, people have neither, and a great many judges and policemen have said more plainly than Devlin did, that they feel alone, unappreciated and unrespected; that they think they are sneered at as sanctimonious, old-fashioned and narrow minded.

The criminal law has a heavy moral charge to it. And inevitably the people who administer the criminal law absorb the moral charge it bears. It must be very hard to send someone to jail unless you believe that what he did was bad — not just illegal, but bad. Deterrence and reformation, for all we talk about them, are at best our justifications and not our motivations for punishing people. Our penal system is built on the idea that criminals are people who have done something wrong. The system of criminal justice takes the power to punish those who do wrong out of the hands of those who have been wronged and puts it in the hands of the state. But the state is a fiction; real people catch, and punish criminals and undoubtedly they think that what they are doing involves good and bad, and not simply mutable laws, "pretty playthings" without moral charge.

The people who criticized Devlin forgot that the logical relationship between law and morals is not the same as the psychological one. Of course, as most of the critics have pointed out, there is no necessary logical relationship between the statements "X is illegal" and "X is immoral". Nor is there any necessary logical relationship between the statements "X is not illegal" and "X is not immoral". But, if immorality is not a *logically* necessary condition of illegality, thinking an act is immoral is a

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<sup>5</sup> Devlin, *op. cit.*, footnote 1, p. 4.

*psychologically* necessary condition for punishing someone who has done it. Judgments about punishing people are, and in a coherent society must be pregnant with judgments about morals.

Because he, unlike his critics, was actually sentencing people to jail, Devlin saw the psychological relation of law to morals quite clearly. Unfortunately, he made a logical mistake in expounding it. A judgment about morals is only a *psychologically necessary* condition of punishment, it is not a *sufficient* condition. Devlin, I think, confused the two: from the sensible claim that there can never be *any* reason to get into the business of punishment *unless* immorality is present, Devlin slid to the claim that there is *always* at least *some* reason to get into the business of punishment *whenever* immorality is present. He was, of course, quick to acknowledge that *some* reason is not always *enough* reason,<sup>6</sup> but he insisted that where immorality is present there is always some reason to think about punishment. He formulated his position in a negative way: one cannot, he said, preclude the criminal law from getting involved wherever immorality is present; no area of immorality can be said to be beyond the criminal law.<sup>7</sup>

The mistake in Devlin's argument is not in his assertion that law and morals are, in a coherent society, tied to each other, but in his description of the way they are tied to each other. And despite the serious errors in his arguments, his feelings about his role as a judge led him to explore a real problem. Judges, as they now appear in our courts do not make any sense unless there is an intersection between law and morals, and that intersection seems for many people to be narrowing. Unfortunately, Devlin misunderstood the problem he felt, and, when he charged off in the wrong direction, he lured his critics after him. The battle when it finally took place, was far from the real problem.

If a society is to function, the people who are subject to its criminal laws must feel that the law makes a moral, and not just a legal claim on them. Contracts and wills may be conventional. Crimes cannot be. This, I think, is what Devlin meant when he said he needed as a judge to address an audience that had a sense that crime and sin were not completely different.

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<sup>6</sup> Devlin, *op. cit.*, *ibid.*, pp. 16-22.

<sup>7</sup> Devlin, *op. cit.*, *ibid.*, pp. 12-13: "I think, therefore, that 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."

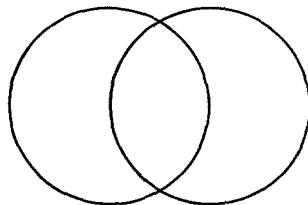
We talk a lot about enforcing the law, but it would be very hard, probably impossible, for a society to really enforce its criminal laws. If even a small number of people in a society obeyed the law only because they feared enforcement, then the society would either crumble or pay the price of a police state. This is the lesson of terrorism and it is one way to make sense of Devlin's feeling that a society could be destroyed if its criminal law were precluded from reflecting its morality.

Almost everyone must obey the law almost all the time without thinking "How likely is it that I will get caught?" or "What will it cost me if I am caught?". Almost everyone must feel that the criminal law makes claims to which one ought accede. And, it is not enough to say that people ought to obey the law because it is the law, because it reflects the social will, because social life benefits us all, because of political theories about society, authority or democracy. Such reasons may justify obedience to the law, but they do not motivate people to obey. The criminal law must in some ways embody the values which people have. Only then will they feel that the claims the law makes are ones to which they *ought* accede.

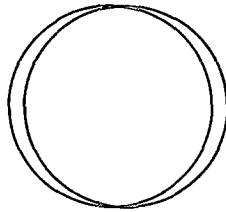
The law is able to make moral claims only where there is an intersection between law and morality. And, while it is not clear precisely how extensive this intersection must be, it is clear that if the intersection is too narrow, the law will lose its ability to make moral claims.

This brings me to my major criticism of Devlin. The intersection of a society's law and morals may shrink for a number of different reasons, and, if Devlin correctly perceived that our law was losing its ability to make moral claims, he seized on the least important cause for this.

The point may be made graphically if we represent law and morality by two circles



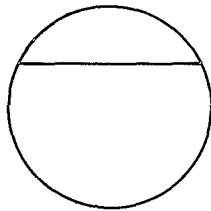
The greater the intersection between law and morality the more the people in the society will feel that the law makes a moral claim on them. Thus, in puritan society, law and morality were virtually coextensive



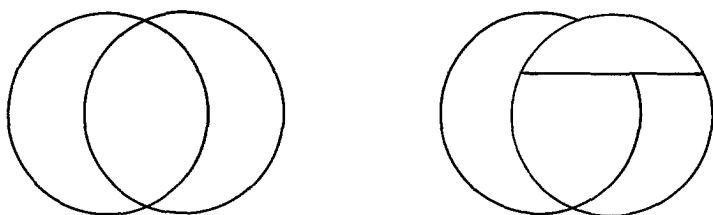
and the puritans had to an extraordinary degree the sense that it was wrong to break the law.

Where the law and morality intersect very little or where they contradict each other, people lose the sense that it is wrong to break the law. They may obey the law, but they will do so out of fear or habit, and only so long as and in so far as they have something to be afraid of or nothing to gain.

Devlin's claim that it is dangerous to allow an area of private morality boils down to this: if we allow that some part of our morality is not the law's business, then we cut away some of the area in which law and morals might intersect. He is right. If we say in advance that some part of our morality is not the law's business,



we necessarily cut down the potential intersection of law and morals and almost certainly cut down the actual intersection.



It is, no doubt, a very risky matter for a society to allow that some of its morality is not the business of the law. Only a society which was confident that its people strongly felt that moral charge of the law could take the risk. Devlin fears that our society may not be able to take this risk but he does not inquire about this. He admits that there are great benefits in taking the risk — great benefits in allowing people the liberty to make their own moral choices. But he feels that the risk is too great. Why? Why is our sense that the law makes a moral claim on us so weak? Why can't our society afford to take the risk of liberty? Devlin does not address this question; and because he does not his answer to the real problem is somehow beside the point.

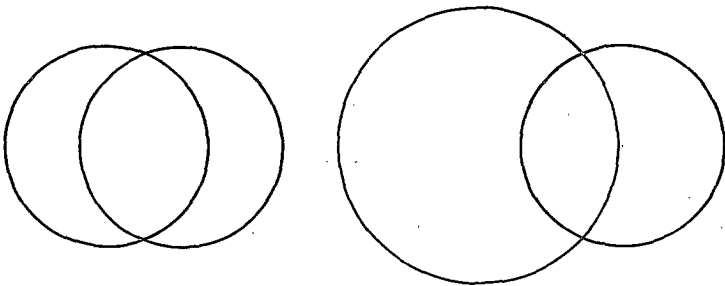
There are, it seems to me, at least three distinct ways in which we have eroded much of the intersection of our law and our morals. Anyone of these is a more serious threat to our society than the one Devlin is so worried about.

(1) In modern societies, a great deal of the criminal and quasi-criminal law has nothing to do with moral values; many acts are illegal which are not bad. Societies often regulate behaviour because some order is necessary rather than because particular acts are thought to be right or wrong. Modern societies are so complex and so divorced from organic order that they need a high degree of amoral, inorganic order — order which is neither tied to recurrent, inevitable natural phenomena, nor cloaked in religious or moral imperatives. Thus, no one says that it is wrong to drive on the left hand side of the road, to drive a taxi without a special licence, or to pay taxes after April 30th. Such acts are illegal but not bad.

People tend to be blasé about rules without moral content. It is not as though such rules are never obeyed; they are, of course, obeyed almost all the time. But we do not invest them with much, if any, moral authority and most people are not

ashamed to disobey them occasionally, boast about getting past them as though they were a challenge, and see it as sanctimonious when someone takes infractions seriously. This attitude is particularly common in young people because they regularly run up against arbitrary, if sometimes necessary, rules for dividing children from adults.

Society runs a risk in having too much law of this sort. As the amount of law unrelated to morality increases the intersection of law and morals appears to shrink.



Since it is people's perception of the intersection which gives the law its power to make moral claims the appearance that the intersection has shrunk is potentially very dangerous.

In some areas the danger has been realized. Businessmen see the rules regulating commerce as obstacles to be circumvented or overcome. The rules are obeyed when there is a fear of enforcement and are largely ignored the rest of the time. The process is so far advanced in some businesses that they no longer seem to be part of what we take to be civilized society. The consumer sees himself as in the jungle. Devlin's fear that society will be destroyed is in such cases at least partially fulfilled.

(2) A great many immoral acts which even Mill would say that the law could prohibit are not illegal. Our criminal law ignores a great many acts which obviously cause harm to people. It is not illegal to profiteer. It is not illegal to risk disastrous and statistically certain oil spills. It is not illegal to build or sell cars which can exceed all speed limits, nor to stress speed in automobile advertising. It is not illegal to use very subtle and powerful techniques to encourage people to smoke cigarettes, even though smoking cigarettes kills people. It is not illegal to advertise or

sell as food a product which has no nutritive value. It is not illegal to encourage people to borrow beyond their ability to repay. It is not illegal to advertise in a technically true but misleading way. It is not illegal to buy the patent rights to a useful invention and then suppress it for business reasons. It is not illegal to waste scarce resources. It is not illegal to throw money away while other people starve.

Nobody asserts that these questions are in principle "not the law's business"; nobody says, as Mill and the Wolfenden Commission did about sexual matters, that resources or advertising should never be regulated. Rather, the law regulates them selectively. And when the law is actively involved in an area and fails to take account of immorality in that area, people come to perceive the law as only selectively concerned with morals. We are sophisticated enough to see that the law often selects the immoralities with which it chooses to deal on a political basis. The more powerful a group is, the less its immoralities will be legally prohibited. In addition, there is the common complaint that powerful people get a break in the *enforcement* of the criminal laws that do exist. The sense that the law is merely political weakens people's feeling that it makes a moral claim on them. "If only I were powerful enough", people think, "I could get away with this". In so far as that is true, they do not respect the law, and do not feel that it makes a moral claim on them.

(3) Finally, the private morality which the law does embody is often not the morality of the society. The law is often allied with moral notions which may once have commanded universal adherence, but no longer do so. Thus, the laws prohibiting consensual divorce may have reflected the general moral climate at one time, but they substantially outlasted that climate. Until the divorce laws were changed, (and in some jurisdictions they are not yet changed) people were obliged to lie in court, either about their residence in a jurisdiction which permitted consensual divorce or about their fidelity. Lawyers and judges connived in the lying and all of this produced a great deal of callousness both towards the law and towards telling the truth. When good people are regularly seen to break the law, the law loses its moral force. And when the law forces good people to lie, it erodes morality.

Many of the laws relating to the sale and consumption of alcoholic beverages reflect an outdated morality — a morality which, if it is still the morality of some people, no longer commands general acceptance. The same might be said for abortion



and smoking marijuana: everyone does not approve of them, but neither do all "right thinking" people think they are wrong.

Lord Devlin's feeling that law and morals must support each other is certainly right. Unfortunately, he did not correctly identify the real threats to that alliance. The tremendous expansion of non-moral criminal law — of amoral order — weakens people's perceptions that the law can and does sometimes make serious moral claims. It also breaks down our willingness and ability to distinguish between what is *technically* wrong and what is *morally* wrong. The law's failure, for economic and political reasons, to prohibit harmful behaviour, erodes people's sense that the law really cares about right and wrong. And the association of the law with outmoded morals makes it seem irrelevant.

Too often, in the face of serious social evil, the law seems either to be impotent or to be allied with what is wrong rather than what is right. And that, rather than its failure to prohibit homosexuality is what is eroding the intersection of law and morals.

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