FROM THE EDITOR

After a long and productive life, Herbert Hart died on December 19, 1992, at the age of 84. Two years later a second edition of his most influential work, *The Concept of Law*, appeared with his long awaited “Postscript”, posthumously edited by Penelope Bullock and Joseph Raz. This issue of the *Newsletter on Philosophy and Law* is devoted to a review of some of Hart’s major contributions, focusing particularly on the intellectual debates between Hart and Ronald Dworkin, his student and successor to the Chair of Jurisprudence at Oxford, between Hart and Lon Fuller of Harvard University over the respective merits of a natural law theory and Hart’s brand of legal positivism, and between Hart and British jurist Patrick Devlin over the possibility and wisdom of legislating morality.

In “Hart’s Legacy”, this issue’s opening article, Charles Kelbley reviews Hart’s attempt to separate descriptive and normative questions we might ask about the law, and Dworkin’s critique of that enterprise. Kelbley uses the Supreme Court’s 1986 decision to uphold Georgia’s sodomy law (*Bowers v. Hardwick*), together with the current legislative race to ban same-sex marriages, to illustrate the traditional understanding of the difference between Hart’s reliance on rules and Dworkin’s appeal to principles.

Where Kelbley focuses primarily on the original text of *The Concept of Law* and Dworkin’s response to it, Wil Waluchow argues that Hart’s 1994 “Postscript” confirms his own previous analysis of Hart’s conception of secondary rules of recognition (in *Inclusive Legal Positivism*, Clarendon Press, 1994), according to which moral principles and values may be included in the range of criteria which serve to determine what putative primary rules may count as valid laws. If Hart’s account of secondary rules does not have to be restricted to content-neutral “pedigree criteria” delimiting the legitimate forms of law-creation, then Dworkin’s criticism can be defused.

Of course Waluchow’s analysis of Hart’s real views about the nature of secondary rules raises new questions about the extent to which we can count Hart as a legal positivist. A partial answer to that question emerges in Scott Landers’ contribution, “The Primacy of Primary Rules”. Landers focuses on the charge, made by Stanley Fish and others, that Hart’s conception of primary rules is inherently defective because they cannot regulate social conduct without supplementation by secondary rules. Landers defends the contrary view by attributing a Wittgensteinian conception of rules to Hart.

The last two essays, Dan Wueste’s “Hart-Fuller Debate Revisited” and my own contribution, “Legal Moralism”, move back from a focus on *The Concept of Law* to other aspects of Hart’s legal philosophy. Wueste examines one of the central questions of the dispute between Hart and Fuller: how it is that the law successfully commands normative respect from the citizens it governs? Wueste contends that Fuller, like Hart (and despite what Hart says about Fuller’s views), provides an account of how law regulates its own creation. Moreover, this account incorporates a reliance on social or conventional morality exhibited by most citizens. Wueste goes on to suggest that Hart, somewhat inadvertently, moves away from this social rule conception of rules of recognition to embrace a theory under which only government officials need accept rules of recognition. Wueste concludes with some speculation as to why Hart chose this divergent path, and how it is significant for understanding the Hart-Fuller debate today.

My contribution on the issue of legal moralism is a brief literature survey with an eye towards the challenges of teaching that topic given the scarcity of current material in print. There are, however, two especially good and relatively recent contributions, one on each side of this debate, to which I devote some more extensive remarks: Joel Feinberg’s *Harmless Wrongdoing*, and Robert George’s *Making Men Moral*.

Turning now to future *Newsletter* projects, topics and topic editors for the next three issues are as follows:

**Spring 97**

**LEGAL ETHICS AND THE AMERICAN JURY SYSTEM**

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Endnotes

2. Augustine The City of God, Bk iv, Ch iv.
8. See Fuller, Morality, Ch. 2, especially 39, 33-38, 46-91. The principles emerge in a story about a hapless King Rex who tries but fails to make law.
9. Hart, Review of The Morality of Law, 1284; but compare 1291 n.9 (noting that Bentham urged these principles on his contemporaries in the name of utility).
12. See Wueste, 1217-1229 (arguing that Fuller's internal morality of law is a morality of interaction, in particular, a role morality). Fuller spoke of the principles of legality in various ways. Most famously, he referred to them as the morality internal to law. Interestingly, in Anatomy of the Law (1968), published between the original (1964) and revised (1969) editions of The Morality of Law, Fuller calls them "the implicit laws of lawmaking." See Kenneth I. Winston, "Editor's Note," in Fuller, Principles, 158-59.
13. Thus, for example, Fuller claims that throughout The Concept of Law Hart uses "the rule of recognition...to give neat juristic answers to questions that are essentially questions of sociological fact." Fuller, Morality, 141.
16. Hart, Concept, 56; and see 93, 97-98 (identifying this rule as a rule of recognition).
17. Ibid., 85. See also Hart, "Positivism and Separability," 603. Here too, it is plain that the acceptance of citizens is important.
18. Hart, Concept, 110-11 (to insist that in a complex modern state both citizens and officials consciously accept the rule of recognition "would be to insist on a fiction").
19. See Hart, Concept, 59. Compare, however, Rolf Sartorius, "Positivism and the Foundations of Legal Authority," in Issues in Contemporary Legal Philosophy, Ruth Gavison, ed. (Oxford: Clarendon Press, 1987), 53 (suggesting that there is "a middle ground between the claim that citizens accept the constitution in the same sense that officials do and the claim that they merely obey 'the law' that the constitution validates").

LEGAL MORALISM: FROM HART AND DEVLIN TO FEINBERG AND GEORGE

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In 1959 H. L. A. Hart published "Immorality and Treason" in response to Patrick Devlin's 1958 Maccabaean Lecture to the British Academy, "The Enforcement of Morals." There Devlin contended that the government-appointed Committee on Homosexual Offenses and Prostitution was mistaken when it recommended a year earlier that Parliament should decriminalize homosexual acts between consenting adults on the ground that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." (Report of the Wolfenden Committee, para. 61) On Devlin's view, "one cannot talk sensibly of a public and private morality...Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two." (Devlin [1959], 16) Consequently, legal moralism is legitimate public policy: the coercive power of the criminal law can sometimes be used to enforce the settled moral convictions of a society, even when the prohibited behavior takes place behind closed doors, involving only mentally competent consenting adults. There is no principled way of demarcating a sphere of private morality immune from state intervention:

The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to
explain the division between crime and sin. The Report finds it in the principle that the criminal law exists for the protection of individuals; on this principle fornication in private between consenting adults is outside the law...But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. (Deviin [1959], 22)

Hart took issue with Devlin both with respect to his method of determining when the community of moral ideas was sufficiently threatened by individual immorality to warrant criminal sanctions, and with respect to the idea that there is no principled division we can make between public and private behavior. On the first point, Devlin suggested that law-makers should “ascertain the moral judgments of society” by relying on the judgment of “the reasonable man” who:

is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street..the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgments of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. (Deviin [1959], 15)

To this Hart retorted:

it is fatally easy to confuse the democratic principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits. Certainly there is a special risk in a democracy that the majority may dictate how all should live...But loyalty to democratic principles does not require us to maximize this risk; yet this is what we shall do if we mount the man on the street on the top of the Clapham omnibus and tell him that if only he feels sick enough about what other people do in private to demand its suppression by law no theoretical criticism can be made of his demand. (Hart [1959], 54)

With this salvo, the now familiar debate between the Oxford law professor and the British High Court judge began to unfold. After Devlin responded by professing his democratic sensibilities (Devlin [1962]), Hart elaborated his views in the Harry Camp lectures delivered at Stanford University in 1962, and subsequently published as the short classic, Law, Liberty, and Morality:

Ought immorality as such be a crime? To this question John Stuart Mill gave an emphatic negative answer in his essay On Liberty one hundred years ago..."The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."

...Some critics have urged that the line which Mill attempts to draw between actions with which the law may interfere and those with which it may not is illusory. "No man is an island"; and in an organized society it is impossible to identify classes of actions which harm no one but the individual who does them...I do not propose to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right. (Hart [1963], 4-5)

The debate continued through Devlin [1964] & [1965], and Hart [1967]. It was also enlarged by other contributors, with, e.g., Rostow [1960] and Wolff [1968] taking up Devlin's cause, while Dworkin [1966] and Feinberg [1973] defended variants of Mill's liberty-limiting harm principle. Wasserstrom [1971] provides a nice short anthology of some of the additional literature from this period, mostly on the Millian side. Indeed, it is fair to say that throughout the Sixties and the early Seventies, Devlin's detractors held the upper hand. Their success was, in part, a consequence of the relatively permissive and liberal academic and political climate of the period, but it also owed a good deal to Devlin's contentious rhetoric and dubious examples.

The tide has gradually shifted, as reflective participants in this debate began to recognize the difficulties inherent in the task of formulating plausible principles to delimit classes of acts which deserve unconditional immunity from government intervention. Thus, despite the fact that Mill's formulation of the harm principle is accompanied by a strict injunction against psychic and physical paternalism as well as legal moralism," Mill himself was not entirely rigid about the harm principle. He formulated his doctrine of "assignable duties" to justify some direct paternalism when "the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him...[in such a way that] by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons." (Mill, 79) Mill was
also willing to countenance wide-ranging economic paternalism, reasoning that:

trade is a social act. Whoever undertakes to sell any description of goods to the public does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. As the principle of individual liberty is not involved in the doctrine of free trade, so neither is it in most of the questions which arise respecting the limits of that doctrine, as, for example, what...arrangements to protect workpeople employed in dangerous occupations, should be enforced on employers. (Mill, 94)

Although Mill characterized such legislation as falling under the purview of the harm principle, contemporary libertarians have argued that employees can be, and often are, willing participants in unregulated contractual arrangements. The cost of imposed safety measures can adversely affect wages and employment prospects in such a way that employees might voluntarily choose the safety risks over the economic ones. In that case, state coercion would constitute straightforward paternalism rather than an application of the harm principle to protect vulnerable workers.

In a similar vein, Mill wonders whether it might not be appropriate to prohibit pimping or running a gambling house for profit, even though he does not think prohibition of prostitution or gambling themselves would be consistent with the harm principle. Perhaps society is entitled to prohibit premeditated efforts to spread acknowledged vice, when the agents of corruption aren't motivated by moral conviction. This vacillation provoked an acerbic comment from Devlin: "Mill's doctrine caters bountifully for good men who are unorthodox. The only bad men he sees at his table are those who are trading in vice and then he does not quite know what to do with them." (Devlin [1964] 109) In other words, Mill is dangerously close to accepting at least some forms of legal moralism.

Contemporary Millians have also been unwilling to restrict themselves to the harm principle. Hart in particular is quite explicit about his support of paternalistic legislation (Hart [1963], 30-34), and an offense principle, permitting state intervention in cases of behavior which is sufficiently offensive, but not actually harmful (Hart [1963], 38-48). On the issue of Hart's advocacy of paternalism, Devlin points out that Hart "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?" (Devlin [1965], 133) He then goes on to question both Hart's distinction between physical and moral paternalism, and his rationale for simultaneously embracing physical paternalism and moral individualism: "If paternalism be the principle, no father of a family would content himself with looking after his children's welfare and leaving their morals to themselves. If society has an interest which permits it to legislate in the one case, why not in the other? If, on the one hand, we are grown up enough to look after our own morals, why not after our bodies?" (Devlin [1965], 135-36)

Concerning the offense principle, Hart argues that such a principle can be consistent with the spirit of the harm principle, provided that we recognize that "a [putative] right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value." (Hart [1963], 46) That problem can be resolved, Hart contended, by punishing only publicly offensive displays which are "thrust upon unwilling eyewitnesses" (Hart [1963], 45). Thus, laws governing public decency are permissible, while laws governing the private sexual practices of consenting adults are not. But critics have been quick to point out that the public/private distinction is inadequate. It will be the case, for example, that racist or homophobic observers will be seriously offended by the prospect of interracial or gay couples holding hands, and stealing an occasional kiss, as they stroll through a public park. And yet Hart surely would not want to endorse criminalization of such behavior in response to those sentiments of moral outrage. (See Grey [1983], 15-16.)

First, Millians propose some version of the principle of liberty as a kind of constitutional limitation on the ordinary lawmaking power. Devlinites respond that the principle proposed is too broad, that it disables the polity from passing laws that all would agree should be within legislative discretion. They offer examples. Millians agree that some of the suggested results are unacceptable but argue that the principle of liberty as proposed has been too broadly interpreted; it can be qualified or amended to meet the difficulty. Now the Devlinites may respond that the amendment or reinterpretation has softened the proposed principle to the point where it is no longer definite enough to be a real principle; it has been reduced to a vague admonition against excessive moralistic zeal in lawmaking, a sentiment Devlinites can endorse...and the dialogue goes on. (Grey [1983], 13)

With this kind of track record in the literature, there is a temptation to write off the whole line of investigation as a fruitless exercise, or to simply concede the field to the Devlinites. Nonetheless, debate over the wisdom of, or
appropriate limits on legal moralism has continued to flourish, in various guises, going on for decades now. The debate has had a steady, if usually indirect, influence on systematic liberal political theorists who continue to advocate some principled limitations on government coercion (e.g., Rawls [1971] & Hart [1973], Dworkin [1977] & [1988], Richards [1982], Raz [1986], Feinberg [1984-86], and Gaistion [1991]), on libertarian expansionists who want to apply the harm principle more broadly than Mill ever envisioned (e.g., Nozick [1974], Coleman [1988]), and on critics presenting more sophisticated Devlinian arguments against liberal orthodoxy (e.g., Finnis [1980], George [1993]). Moreover, these issues continue to appear in the classroom, as standard material in political philosophy, philosophy of law, and introductory ethics courses. They have an immediacy which appeals to undergraduates, and current examples for policy debates are always readily available.

Unfortunately, relevant textbooks suitable for introductory courses have not kept pace with this demand. Devlin's *Enforcement of Morals* has been out of print for a number of years now, as have Mitchell [1970] and Grey [1983]. Grey's introduction constituted one of the best short summaries of the Hart-Devlin debate, but the demise of Devlin's book is the biggest loss. The opening chapter, "Morals and the Criminal Law," is still frequently anthologized. But Devlin [1962], Devlin [1964], and the last chapter, "Morals and Contemporary Social Reality", are almost as important for a full appreciation of his position.

We have not yet arrived at the point where Devlin's arguments should be consigned to the 'historical curiosity' section of philosophy anthologies. For those interested in treating the legal moralism debate at the introductory level today, besides Hart [1963] the only appropriate texts currently available are Wasserstrom [1971] and Lee [1986]. Baird & Rosenbaum [1988], an anthology combining articles on the Hart-Devlin debate with another set on civil disobedience, has nothing to recommend it over Wasserstrom's earlier anthology. Despite its more recent publication date, the articles are of equal antiquity, and a less inclusive representative sample of the first decade of the debate. Wasserstrom also has the advantage of providing a few judiciously edited early court cases, including Shaw v. Director of Public Prosecutions, the case which features heavily in Devlin [1982]. Lee [1988], a 100-page single author treatment of the debate, does a better job of making the issues a bit more current, although it too could stand updating. Written for a British audience, the presentation may seem a bit alien to U.S. undergraduates. But Lee's style is very engaging and accessible, which should overcome that hurdle for most readers. Heavily supplemented with more recent material, either Hart and Wasserstrom, or Lee, can still do a serviceable, if less than ideal job at the introductory level.\(^2\) For more advanced courses the options are better. Joel Feinberg's magisterial four-volume series, *The Moral Limits of the Criminal Law*, reviewing the entire range of liberty-limiting principles from a liberal perspective, is a wonderful example of just how rich this whole line of investigation can be. Unfortunately, the entire set is simply too much for any undergraduate course. Given Feinberg's penchant for carefully drawn multi-faceted conceptual distinctions, coupled with an exhausting appetite for concrete examples, one volume would be quite enough. * Harmless Wrongdoing (Feinberg [1988]) is the most directly relevant, and it begins with a cogent summary of the principal theses defended in the earlier three volumes. On the other side of the fence, for advanced courses I would strongly recommend Robert George's defense of legal moralism, *Making Men Moral*. Even though George [1993] is pitched at the same level of sophistication as Feinberg [1988], it is actually a much more manageable, and broader-ranging treatment which I think could even be used profitably in an introductory course, provided that the students were sufficiently ambitious. As these two books (especially George) may be less familiar to *Newsletter* readers, I will close this survey with a few remarks about each of them, to give you some sense of the flavor of the issues addressed.

* Harmless Wrongdoing, the last leg of Feinberg's odyssey, constitutes his assessment of the case for legal moralism, in which he attempts to delineate a position 'in the spirit of Mill'. But Feinberg begins with a concession Mill was unwilling to make, arguing that, along with Mill's prima facie case for the value of individual liberty, there is also a presumptive case for legal moralism. (Feinberg [1968], 4-5) Just as there are reasons to suppose that prevention of interference with individual liberty would be a good thing, so it would be a good thing to prevent evils in general, including moral evils in particular. Consequently, Feinberg is prepared to concede that the mere immorality of an activity carries some weight in assessing policy questions about what should be legally prohibited. The burden of Feinberg's project is to make the case that such a consideration doesn't carry very much weight, when balanced against the countervailing evil of imposing further restrictions upon people's liberty.

Feinberg's strategy is to enumerate a more or less comprehensive catalog of moral evils which might be considered, together with an equally systematic classification of varieties of legal moralism, and then argue, by means of numerous examples, that upon reflection, the prevention of each of the relevant classes of evils doesn't count for very much weight at all. Feinberg constructs his taxonomy of relevant evils\(^3\) by first defining an evil as "any occurrence or state of affairs that is rather seriously to be regretted" (Feinberg [1988], 18), and then paring away various sorts of evils which have no bearing on the question of legal moralism: acts of God or nature (theological evils); and any evils caused by human beings which harm the interests of
others in ways which also violate their rights (grievance evils). The remaining class consists of non-grievance evils, those which are imputable to people but do not involve violations of rights. Within this family, there are two major genera, both of which are relevant to the question of legal moralism.

Welfare-connected non-grievance evils are those which adversely affect human interests even though nobody's moral rights are violated. If there were such a thing as a non-profit tobacco manufacturer, the practice of manufacturing cigarettes for the purpose of supplying the existing market among nicotine addicts (for only the costs of production) would count as a welfare-connected non-grievance evil. The evil would be welfare-connected because of the adverse effect on the health of nicotine addicts, brought about by furthering their cigarette habits. But the evil is also a non-grievance one: since the nicotine addicts willingly consent to this kind of economic arrangement, their rights are not violated.

Pure free-floating evils, on the other hand, are intrinsically evil events or states of affairs brought about by human agency, despite their having no adverse effect on human interests. Feinberg's standard examples mirror Mill's concern about the wisdom of tolerating the evil of trafficking in vice: e.g., the manufacture and sale of pornographic materials, running a brothel, and pimpling. (Feinberg [1988], 208-209, 217-220) Feinberg argues that the practice of purchasing sexual favors and the kind of voyeurism associated with pornography are not harms to human interests in the strict sense, because the participants embrace aberrant interests which these activities fulfill. But the types of conduct in question are commonly regarded as a form of voluntary degradation "which offends against an ideal of human excellence held by many people." (Feinberg [1988], 217) Consequently, the fact that someone is profiting by abetting the degradation of others is especially morally offensive. Nonetheless, as in the previous case (the non-profit tobacco manufacturer), voluntary consent implies that no rights have been violated. Therefore the economic exploitation should not be criminalized, however distasteful we may find it. The countervailing concern to sustain individual liberty simply outweighs our distaste for the evil thereby permitted.

Although Feinberg concludes that most cases of non-grievance evils will lead to the same conclusion as these two, he does nonetheless unearth a few examples in each genus which he himself finds more troublesome. Irving Kristol [1971], for example, invites us to reflect on the spectacle of paid professional gladiators fighting to the death before a throng of enthusiastic New Yorkers thirsting for blood in Yankee Stadium. Consenting adults all, the New Yorkers, the popcorn vendors, the huge national closed circuit television audience, and even the gladiators, ask only to be left in peace to pursue their "harmless" amusements. Thanks to the closed circuit television revenues, the loser's heirs will receive ten million dollars. For that kind of money, not a few people will probably enter the arena quite willingly. Whether the resulting harm to the slaughtered gladiator and the maimed survivor, the evil is a non-grievance one for those who voluntarily undertake the risk. Moreover, this evil is not welfare-connected. The gladiators share the view that they are made better off by the prospect of ten million dollars and a blaze of macho glory than they would have been by the prospect of increased longevity. The liberal doctrine of the absolute priority of personal autonomy, which Feinberg endorses (Feinberg [1988], 130), requires that we accede to the gladiators' judgment on this matter.

On Feinberg's analysis, this spectacle is a multi-faceted free-floating evil. Besides the physical evil to which the gladiators voluntarily propose to subject themselves, there is the voyeuristic evil committed by the spectators, and the economic exploitation undertaken by the promoters. How is the discomfited liberal supposed to respond to this morally repulsive tableau?

At the outset of Harm to Others, Feinberg adopts a position which I'll call bald liberalism; asserting his ambition to establish that "the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions. Paternalistic and moralistic considerations, when introduced as support for penal legislation, have no weight at all." (Feinberg [1984], 14-15) Feinberg [1988], however, has quite self-consciously abandoned this project in favor of two less ambitious alternatives which he labels bold liberalism and cautious liberalism. Feinberg the bold liberal is a toned down version of Feinberg [1984], the bald liberal. The bold liberal declares that the harm and offense principles provide the only good reasons for criminalization of some activity; paternalistic and moralistic considerations are always trivial (but not nonexistent) by comparison. (Feinberg [1988], 324) The bold liberal dismisses the troublesome features of the gladiator case by arguing that it is disturbing only because of the prospects for unconscionable-to-indirect harms: the effect when the barbarous mob in Yankee Stadium is unleashed on the innocent citizens of the Bronx. If Kristol argues that we should assume instead that the carnage in Yankee Stadium serves as a beneficial cathartic outlet for pent-up neuroses afflicting New Yorkers, Feinberg the bold liberal will reply that the example has now lost most of its force, and we can in fact tolerate such abhorrent behavior. (Feinberg [1988], 132-133)

I find, however, that my own intuitions about the moral suasion of the gladiator example do not hinge on the welfare of the denizens of the Bronx. Cathartic or not, the image of fans in Yankee Stadium drooling over the prospect of live gore is quite appalling enough in its own right. This reduces us to Feinberg's second alternative, cautious liberalism, under which Feinberg is prepared to concede that moralistic considerations might occasionally, albeit very rarely, provide good reasons for criminalization. Feinberg the cautious...
liberal will concede that the conflict between preserving liberty and preserving morality is a close call in Kristol's gladiator example. Feinberg then seeks some comfort in the observation that this case is merely hypothetical. Real life cases of free floating evils, Feinberg claims, are much tamer stuff. Those who advocate the prohibition of prostitution, obscene books and the like are making mountains out of moral molehills. (Feinberg [1988], 131)

Feinberg himself seems to be torn between cautious liberalism and bold liberalism. But I argue elsewhere ("Dwarf-Tossers, Price Gougers, and Communitarians: The Liberal Case for Legal Moralism," forthcoming) that the logic of his reasoning in Harmless Wrongdoing makes the cautious variety Feinberg's only viable option, and that real-life examples analogous to Kristol's fictitious one are readily available. Although I think cautious liberalism should be no source of embarrassment for the liberal, it is nonetheless a major concession to the moral conservative. For now there is a new agenda: just how many exceptions to the harm principle are we inclined to permit? Devlin would say that the battle has already been won with Feinberg's concession.

In Making Men Moral, Robert George offers us a revisionist account of Devlin's enterprise, directed against Hart's [1963] analysis of Devlin's justification for legal moralism, and coupled with a perceptive and succinct critical review of subsequent literature generated by some of the most prominent liberal critics of legal moralism. He concludes with a defense of legal moralism from a natural law perspective.

George's literature survey is particularly illuminating, giving the reader a good grasp of the progress of the debate since Hart and Devlin (although he neglects Feinberg's work). He begins with Ronald Dworkin's attack on legal moralism as a violation of a fundamental individual right to equal concern and respect. George questions both Dworkin's derivation of the right (contending that Dworkin's division between collective interests and individual rights rests on an indefensibly aggregative conception of collective goods), and his conception of the meaning of equal concern and respect (contending that such a right, properly understood, might actually justify, rather than prohibit, some forms of legal moralism). George then moves on to tackle Jeremy Waldron's [1981] argument that legal moralism violates a putative right to do wrong, which George denounces to the status of a claim right against government interference, pointing out that it does not follow that each individual then has a liberty right to behave immorally.

George finishes up his survey with critiques of anti-perfectionist (Rawls [1971] and Richards [1982]) and perfectionist (Raz [1986]) liberal defenses of autonomy. Anti-perfectionists hold that governments are morally obligated to remain neutral between controversial conceptions of a morally good life, possibly out of skepticism about our epistemic capacity to discern moral truths, possibly out of moral relativism, or in Rawls' case (according to George), because an individual's conception of the good life, right or wrong, is partially constitutive of that individual's identity. Perfectionist liberals concede that there is a discernable correct conception of the good life (or multiple ones), but insist that personal autonomy is an essential ingredient of all of them, and that legal moralism would violate this, not because autonomy requires government neutrality (since perfectionists believe moral ideals are accessible), but because it requires a respect for moral pluralism between a range of equally viable conceptions of the good life.

The details of George's responses to these attacks on legal moralism, and his own defense of a natural law approach, are beyond the scope of this survey. But before he undertakes any of this, he offers a very interesting commentary on the Hart-Devlin debate itself. (George [1993], 48-82) He defends Devlin, partially at least, by arguing that Hart's now canonical interpretation of Devlin's justification for legal moralism makes Devlin's position considerably less plausible than it might otherwise be.

On Hart's view, Devlin embraces a social disintegration thesis, according to which the orthodox morality of a society is the glue which holds society together, so that threats to that orthodoxy can be threats to the very existence of that society. If this thesis is construed as a necessary truth, so that any change in the existing morality destroys the identity of the society, then Hart contends that it incorporates an indefensible conception of what it is to be a society. If the thesis is empirical, then it lacks evidentiary support: moderate revisions in the moral norms of a society have not destroyed the social order, in the sense of reducing a society to a Hobbesian state of nature.

George argues that Devlin's position, construed in either of these ways, certainly is untenable, but that there is no need to saddle Devlin with such unpalatable views. He offers instead a communitarian interpretation of Devlin, for which he finds at least as much textual support as Hart's alternatives, and suggests that we ought to apply a principle of charity, if only to investigate the most promising view. On this view, what occurs when we tolerate "serious deviance from a society's constitutive morality" is not the collapse of social order, but the collapse of social cohesion, "the loss of a distinctive form of interpersonal integration in community understood as something worthwhile for its own sake." (George [1993], 65) The danger of this kind of erosion of a valued aspect of society is far more plausible than Hart's version of Devlin's empirical thesis.

Having said this much in Devlin's defense, George does not choose to embrace even his revisionist version of Devlin. As a natural law theorist, George is ultimately dissatisfied with Devlin's quasi-positivist approach to the task of determining what is required for the maintenance of social cohesion: the unanimous view of twelve citizens randomly dragged from the Clapham omnibus. For this approach
neglects to address the possibility that the form of social cohesion thus sustained might itself fail to satisfy objective moral standards. Devlin's defense of this method of ascertaining the moral standards to be enforced is based on a fear that, if we instead allow the State to determine how virtue should be promoted among the citizens, we run the risk of authoritarian tyranny. (Devlin [1962], 89-90) On this point, George sides with Hart, pointing out that it is ironic for Devlin to be criticizing advocates of an objectively grounded critical morality based on reasoned judgments, when Devlin himself proposes to substitute majoritarian tyranny based on positive morality, the morality which happens to be currently shared and accepted by a given social group.6

George speculates that Devlin is driven to rely on popular sentiment to determine what legal standards to enforce because his moral non-cognitivism—his belief that moral judgments are ultimately a matter of feeling rather than reason—lead Devlin to a form of moral relativism: there is nothing left to enforce other than the deeply-felt shared moral sentiments of a society, whatever they might be. (See George [1993], 80-82.) But Devlin's position has always been hard to categorize. For he at least clearly does not think his non-cognitivism leads to relativism:

Those who do not believe in God must ask themselves what they mean when they say that they believe in democracy. Not that all men are born with equal brains—we cannot believe that; but that they have at their command—and that in this they are all born in the same degree—the faculty of telling right from wrong. This is the whole meaning of democracy, for if in this endowment men were not equal, it would be pernicious that in the government of any society they should have equal rights. (Devlin [1962], 100)

Perhaps it's appropriate to let Devlin have the last word, at least for the moment. For Devlin has, to some extent at least, anticipated the charge of tyranny coming from natural law theorists like George, and redirected the irony: "If a common opinion on any point is held by an educated elite, what is obtained except to substitute for the voice of God the voice of a Superior Person. A free society is as much offended by the dictates of an intellectual oligarchy as it is by those of an autocrat." (Devlin [1992], 93) The question of the desirability, or even the possibility, of formulating liberty-limiting principles to constrain the scope of government coercion, is still alive, and a richer vein of ideas, thanks to Devlin, Hart, and their intellectual successors. It will surely repay further study, and continues to be an important source of material for the maturation of our students as citizens of their communities and their nation.

Endnotes

1. "His own good, either physical or moral, is not a sufficient warrant [for restricting a community member's liberty]. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right." (Mill, 9)

2. Another viable strategy, adopted in Gerald Dworkin [1994], is simply to ignore the Hart-Devlin debate and approach the issue of legal moralism through the more recent debate between communitarians and liberals. Dworkin does include a sample of the original 19th century debate between Mill and Stephen [1874], and his selections, both theoretical and applied, are much more contemporary than what Wasserstrom and Lee have to offer. Nonetheless, I believe the contributions made by Hart and Devlin still represent a component in the debate which ought not be neglected.

3. Because space is limited, I will forego a discussion of Feinberg's classification of the varieties of legal moralism.

4. This is the point of entry for George's critique of Rawls. (George [1993], 130-39). Richards, on one analysis, he accuses of being a closet perfectionist. (George [1993], 141-46)

5. George offers a nice brief summary of the distinction between personal and Kantian autonomy (George [1993], 147-55).

6. On the distinction between positive and critical morality, see Hart [1963], 17-24. For George's critique of Devlin on this point, see George [1993], 77-79.

Bibliography


Shaw v Director of Public Prosecutions, 2 All English Reports 446 (1961); Appeal Cases 220 (1962). Edited version reprinted in Wasserstrom.


As a new experiment, in addition to our conventional detailed abstracts of single articles, we are also including a set of brief abstracts surveying the contents of single issues of two journals, the Canadian Journal of Law and Jurisprudence and the Notre Dame Journal of Law, Ethics and Public Policy. CJLJ, an international journal of legal thought, publishes two issues annually in the area of general jurisprudence and legal philosophy. Most of its articles are therefore relevant to the concerns of Newsletter readers. A guest-edited special issue on a prescribed topic is published each January, and a general issue of unsolicited articles each July. NDJLEP is also a journal likely to be of general interest to readers of this Newsletter. Please let us know whether you like or dislike this practice of providing global summaries in such cases. (And special thanks to Roger Shiner of the University of Alberta for help with this issue's abstracts.)


Susan P. Koniak, "Law and Ethics in a World of Rights and Unsuitable Wrongs."