

**Moral Legislation and Democracy:
The Devlin-Hart-Dworkin Debate Revisited**

By

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Abstract

In the latter half of the last century, the prominent legal theorists Lord Patrick Devlin, Ronald Dworkin, and H.L.A. Hart engaged in a debate over the issue of moral legislation and democracy. Lord Devlin argued for the right of society, through democratic institutions, to protect and preserve its moral traditions. Dworkin and Hart each effectively criticized Devlin's arguments in their own way, but it will be argued that even Dworkin and Hart do not completely close the door to moral legislation. More importantly, it will be argued that Devlin's argument for the right of society to enact moral legislation fails on its own grounds. Political and economic theory and history inform us that granting the power of moral legislation to the State, even a democratic one, actually has the opposite effect Devlin expects. Rather than preserve existing moral institutions, the power of the State tends inevitably to be commandeered by (coalitions of) vocal minorities who favor alternative institutions, giving them a disproportionate influence over legislation and the vast coercive power of the State compared to that of the silent majority. This leads to significantly faster change in traditional institutions than would result from moral suasion and laissez-faire social evolution. It will also be argued that Devlin's rights-based argument suffers from two logical fallacies: composition and misplaced concreteness. Finally, a distinction will be made between vices and crimes, and it will be argued that only the latter should legally justify the use of force.

I. Introduction

The issue of moral legislation is a perennial one in modern politics, particularly in the United States. Can we make a distinction between the criminal and the merely immoral, between vice and crime? Should there be a realm of private morality that is none of the law's business, and, if so, how large (or small) should it be and what should it encompass? Or, conversely, is there a realm of public morality and, if so, how expansive is it? Those who favor moral legislation – *i.e.*, legislation designed to promote or require virtue or criminalize and prevent vice, to create a moral social order by the threat or use of initiatory force – fall on both sides of the mainstream political spectrum. Conservatives tend to favor using the state to preserve 'traditional' values by, for example, restriction or prohibition of drug and alcohol use, anti-pornography laws and other crimes of indecency, anti-prostitution laws, anti-sodomy laws, strict criteria for divorce, and laws against same-sex marriage. Indeed, the issue of homosexuality features prominently in the Devlin-Hart-Dworkin debate. On the other side of the spectrum, left-liberals tend to favor using the state to prevent and punish acts of discrimination, hate speech, and insensitivity to certain classes of minorities considered to be official victim groups. I will even submit that social-welfare policies, economic regulations, and environmental regulations favored by left-liberals and conservatives qualify as moral legislation insofar as they are predicated upon promoting virtue or good socio-economic outcomes, prohibiting vice or bad socio-economic outcomes, or the protection of the environment, always at someone else's expense; but not insofar as they are predicated merely upon the maintenance or expansion of governmental, bureaucratic, and/or plutocratic privilege.¹

¹ Both left-liberals and conservatives in America favor different sorts of economic regulations for differing moral reasons but both are moralistic in this regard. Similarly, with social-welfare policies, although this is traditionally the province of left-liberal policy it can now (at least) be said of neoconservatism as well: are not social-welfare policies predicated on a notion of social justice such that certain social outcomes demand

The same applies equally as well to executive-bureaucratic regulations and decrees as to legislation.

In this essay I will challenge the arguments Lord Devlin has made in favor of moral legislation and provide counterarguments to show that moral legislation is not only undesirable and wrong but also counterproductive. I will follow Ronald Dworkin (1977) in considering separately two arguments that Lord Devlin seems to make: that society has a right to protect itself and that society has a right to follow its own lights. Dworkin briefly considers the first argument, primarily to summarize H.L.A. Hart's critique of it, then focuses on the second. Hart critiques Lord Devlin's first argument by challenging his conception of society. Dworkin critiques Lord Devlin's second argument by clarifying the concept of a moral position, distinguishing between genuine moral convictions which we can provide a reason for holding and arbitrary moral positions that lack adequate justification. Dworkin argues that Lord Devlin's argument relies on the latter and thus fails.

Hart's and Dworkin's critiques strike telling blows against Lord Devlin's arguments. However, I do not think they are conclusive, nor do they go far enough. In the next section I will briefly lay out Lord Devlin's first argument and Hart's and Dworkin's critiques of it. As we shall see, Hart's critique is rather weak and Lord Devlin has an answer for Hart. In section three, I will lay out Lord Devlin's second argument and Dworkin's counter-argument. It will become clear that neither Hart's nor Dworkin's counter-arguments closes the door to moral legislation. In section four, I will briefly critique an argument by Joel Feinberg, an admirer of Hart, on legal paternalism which

that some groups must be forced by taxation and other means to render unto other groups certain goods and services they are thought to be owed? Analysis and categorization of particular policies must be done with care, however, as many are ostensibly justified in terms of moral legislation or legal paternalism but really have the aim of maintaining or furthering governmental, bureaucratic, and plutocratic privilege.

(intentionally or unintentionally) serves to sneak moral legislation and legal paternalism in through the back door. Finally, in sections five and six I will present my own arguments against Lord Devlin's position, focusing first on the nature of society and individual rights and then on moral legislation and democracy. And, in section seven, I will summarize my conclusions.

II. Lord Devlin's First Argument and Critiques by Hart and Dworkin

Lord Devlin's first argument is essentially and explicitly that society has a right to protect its own existence. For Lord Devlin, society "means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist" (Devlin, 10). All societies, even those that place a premium on individual liberty, must have some standards that "the majority places beyond toleration and imposes on those who dissent" if they are to survive (Dworkin, 243). These standards, Lord Devlin argues, fall into the realm of public morality. Because some degree of conformity to its public morality is essential for society to survive, it is therefore "entitled by means of its laws to protect itself from dangers, whether from within or without" (Devlin, 13). Moreover, since it is not possible to settle in advance which immoral practices might endanger society, or at what point they might do so, "it is not possible to set theoretical limits to the power of the State to legislate against immorality" (Devlin, 12).²

Hart (1962) argues that Lord Devlin's argument appears to be based on "a confused definition of what a society is" (82). Concerned with Lord Devlin's seeming (to

² Hamilton makes a similar argument in the Federalist Papers against setting absolute constitutional limits on the federal government's ability to raise and support a standing army. Whether or not this is a good argument for standing armies, the argument appears less plausible when applied to a society's moral institutions; a hefty burden of proof would, I think, be on the shoulders of the one who would argue in favor of moral legislation.

Hart) lack of concern for the need for empirical evidence that a particular immoral act is actually a danger to society's existence, Hart makes the following argument:

[Lord Devlin] appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable position that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society had changed, and would compel us instead to say that one society had disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence. (Hart, 51-52. Italics in original.)

Hart further argues that even on the former (conventional) conception of society, as opposed to the latter (artificial) conception, it is absurd to think that all acts the majority in society view as profoundly immoral threaten society's existence.

Lord Devlin's answer to Hart, in a new footnote, is that he does not "assert that *any* deviation from a society's shared morality threatens its existence any more than I assert *any* subversive activity threatens its existence. I assert that they are both activities which are capable of their nature of threatening the existence of society so that neither can be put beyond the law" (Devlin, 13). Although society has a right to punish immorality by law, and no *absolute* limits should be placed on its doing so, Lord Devlin does not think that this power should be exercised against every single kind and act of immorality. Society should exercise this power only when the moral sensibility of the majority regarding a given immoral activity rises to the level of profound "intolerance, indignation, and disgust" (17). Lord Devlin, then, *does* seem to think that some limiting

principles must be placed on society's right to legislate against immorality. This seems to beg the question of standards for evidence, however.

Hart's critique, though weak, does to some extent undermine Lord Devlin's argument, especially in conjunction with Dworkin's critique. If society should not legislate against all immorality, because not all immoral activities and acts endanger its existence, then what standards for evidence and action will be used to justify society's right to enforce its morality in any given case? Dworkin finds that Lord Devlin's answer to this question involves "an intellectual sleight of hand" (Dworkin, 245). The threshold criterion that Lord Devlin offers is public outrage, but this very threshold criterion becomes for Lord Devlin "a dispositive affirmative reason for action" so that "nothing more than passionate public disapproval is necessary after all" (245). This provides us with a nice segue into Dworkin's critique of Lord Devlin's second argument. But before moving on, it must be pointed out that Hart's and Dworkin's critiques of Lord Devlin's first argument do not close the door to moral legislation; at best, they merely serve to suggest that a stronger and more substantive threshold criterion is needed.

III. Lord Devlin's Second Argument and Dworkin's Critique

Lord Devlin's second argument is not as obvious as his first. Dworkin finds it to be implicit primarily in the latter half of Lord Devlin's book. It bears some similarity to the first, but is more complex. It goes something like this: If those who wished to practice certain immoral activities were allowed to freely indulge in them, then our social environment would change in some way impossible to determine with precision. Some

important and cherished customs could slowly be eroded and destroyed.³ While this does not by itself give society the right to conserve all its customs by force, “it does mean that our legislators must inevitably decide some moral issues.”

They must decide whether the institutions which seem threatened are sufficiently valuable to protect at the cost of human freedom. And they must decide whether the practices which threaten that institution are immoral, for if they are then the freedom of an individual to pursue them counts for less. We do not need so strong a justification, in terms of the social importance of the institutions being protected, if we are confident that no one has a moral right to do what we want to prohibit. We need less of a case, that is, to abridge someone’s freedom to lie, cheat or drive recklessly, than his freedom to choose his own jobs or to price his own goods. This does not claim that immorality is sufficient to make conduct criminal; it argues, rather, that on occasion it is necessary.⁴

The legislator has the duty to act upon the consensus of the majority of society for “two closely connected reasons”:

(a) In the last analysis the decision must rest on some article of moral faith, and in a democracy this sort of issue, above all others, must be settled in accordance with democratic principles. (b) It is, after all, the community which acts when the threats and sanctions of the criminal law are brought to bear. The community must take the moral responsibility, and it must therefore act on its own lights – that is, on the moral faith of its members. (Dworkin, 246-247)

Dworkin points out that there are a number of aspects of this argument on which one could challenge Lord Devlin. One might hold the position that a change in social institutions is not the sort of harm from which a society has a right to protect itself. One

³ Why this justifies the threat or use of initiatory force in an effort to maintain them is unclear and remains an unstated assumption in Lord Devlin's arguments. Indeed, this conservative view rather appears to be a hubristic revolt against nature, for it is in the very nature of societies to evolve.

⁴ Again, why this is the case is also unclear. It is an unargued assumption that liberty is just one among a batch of goods against which its value must be weighed and balanced, rather than being a necessary constitutive part of all forms of flourishing and moral action. Notice, also, that there is a conflation in this passage of rights and what is right. We may call this, following Rasmussen and Den Uyl (2005), the moralist fallacy. For Devlin, one does not have a right to do what is not right, but the logical implication of this is that one has no rights at all for rights lose their meaning when they do not guarantee us freedom of action to do what we think best, even when that means doing what others may think wrong. It is also unclear how choosing one's own job or pricing one's own goods are any less moral matters than one's choices in dating, marriage, child-rearing, religion, recreation, and so forth.

might also argue that society's right to act should be restricted to demonstrable and imminent rather than speculated and distant harm. One might also argue that only certain institutions should be protected, such as economic ones. It is also possible to question, although Dworkin does not, the sacred cow of democracy (at least as it is popularly understood).⁵ One can wonder how the consensus of the majority will be determined and what will count as consensus, and if such consensus ever really exists. Dworkin is not concerned with these and other potential objections. Rather, Dworkin argues that even on his own terms Lord Devlin's conclusions are not valid, "because he misunderstands what it is to disapprove on moral principle" (247).

In clarifying the concept of a moral position, Dworkin points out that terms like moral position or moral conviction "function in our conventional morality as terms of justification and criticism, as well as of description." When we speak of a group's 'morality' or 'moral position' in a descriptive way such as to "refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals[.]" then we are using the terms in an anthropological sense. But we also use these terms in a discriminatory sense to provide some sort of justification for our actions or criticisms in contrast to positions we would describe as "prejudices, rationalizations, matters of personal aversion or taste, arbitrary stands, and the like" (248).

Accordingly, to prove that the belief we hold is a genuine moral conviction, we must provide some reason for it. Not all reasons count, however; the four most important that do not count are: prejudice, mere emotional reaction, rationalization, and parroting.

A prejudice is a reason that does not meet conventional criteria for meaningful

⁵ It is an unargued for assumption in Lord Devlin's argument that statist democratic principles are good and justified. But why should we take this for granted? There are formidable arguments not only against majority-tyranny democracy but against statist democracy as such; e.g., see Hoppe (2002, 2003).

judgments, such as superficial physical characteristics that people cannot help having. A moral position is supposed to justify an emotional reaction, not the other way around. Dworkin describes rationalization as basing one's position "on a proposition of fact... which is not only false, but is so implausible that it challenges the minimal standards of evidence and argument [one] generally accept[s] and impose[s] on others...even though sincere" (250). Parroting Dworkin describes as habitually citing the beliefs of others to support one's own position or as one's own position.

A genuine moral position is one that is held sincerely and consistently, but one need not be able to articulate the specific moral principle or general moral theory to which one subscribes. Most do not have the ability to do so. Whatever genuine reason we give would presumably presuppose the acceptance of some moral principle or general moral theory, but it is not necessary that we know that or be able to state it. Dworkin points out that "there is an important difference between believing that one's position is self-evident and just not having a reason for one's position" (252).

Dworkin argues that Lord Devlin's argument would have some plausibility if, by the moral consensus of society, he meant its genuine moral conviction. However, it is quite plain that he means moral position in the anthropological sense. The ordinary man whose opinion society must enforce, Lord Devlin says, "is not expected to reason about anything and his judgment may be largely a matter of feeling." Lord Devlin "quotes with approval Dean Rostow's attribution to him of the view that 'the common morality of a society at any time is a blend of custom and conviction, of reason and feeling, of experience and prejudice'" (Dworkin, 253-254).⁶ Lord Devlin's conclusions fail because

⁶ Rostow, "The Enforcement of Morals," *Cambridge Law Journal* 1960, pp. 174 & 197; reprinted in E. V. Rostow, *The Sovereign Prerogative* (1962), pp. 45 & 78. Quoted in Devlin, p. 95.

our democratic principles do not call for or justify enforcing any consensus of society based on mere prejudice, personal aversion, rationalization, or parroting. The duty of the legislator, then, “who is told a moral consensus exists” is to “test the credentials of that consensus” (254).

It seems, however, that Dworkin would not be averse to moral legislation based on the genuine moral conviction of the majority in society. What Dworkin finds so objectionable in Lord Devlin’s argument is “not his idea that the community’s morality counts, but his idea of what counts as the community’s morality” (255). Moreover, while Dworkin’s critique strikes a telling blow against Lord Devlin’s argument, it is clear that it does not close the door to moral legislation. Lord Devlin might say ‘so what?’ to Dworkin’s critique; it is enough that the public be outraged, as Lord Devlin’s first argument suggests. Lord Devlin’s argument might be reformulated to require genuine moral convictions as the threshold criterion for society to act. This would only amount to the same thing in practice, for how does one insure that the prejudices of the majority meet the criteria for genuine moral convictions? Despite Dworkin’s distinction between genuine and arbitrary moral conviction, it is not clear what actually counts as a genuine moral conviction or how one can be distinguished from an arbitrary moral conviction in practice. Moreover, moralists often have a ready supply of reasons for their moral convictions, but Dworkin's criteria do not help much in determining whether they really are good reasons. The criteria Dworkin provides are rather vague and loose, and seem to depend upon conventional standards that can change and might be different in different societies, thus again leaving moral legislation up to the prejudices prevailing in society.

Similarly, Robert George (1993), a conservative natural law theorist, takes issue with Devlin's standard for justifying moral legislation but is himself in favor of moral legislation under certain conditions. George argues that moral legislation is justified against a morally controversial act *only* if it is in fact immoral. The belief that such an act is immoral, even if genuine by Dworkin's standards, is not enough. Even for acts that actually are immoral, it is a matter of prudence⁷ whether or not they should be prohibited (or certain moral acts required). But George's position is susceptible to the same problem that Dworkin has pointed out for Devlin's and which is also, as I have pointed out, a problem for Dworkin's own position. How are we to know beforehand whether something society wants to legislate against is indeed immoral? And how are we to ensure that it is only immoral acts that are legislated against? An argument analogous to the one commonly made against the death penalty is apropos here. An oops and an apology after the fact when mistakes are made, and they will be made, is hardly sufficient.⁸ (Assuming the mistake will eventually be recognized as such.) Once the power of moral legislation is granted, it is bound to be employed in an arbitrary fashion, for those with the power in society will at least some of the time and, if history is any guide, will often, mistakenly conflate their *beliefs* about what is immoral with what is *actually* immoral. In practice, the criterion that the act actually be immoral for moral legislation to be justified will amount to little better than a parchment barrier, which is to say next to nothing. Surely by now the state has had a long and sordid enough history that to expect anything else is to evince rank naïveté. Albert Jay Nock's Golden Rule of sound citizenship sums up this problem for moral legislation nicely: “You get the same order of

⁷ George's conception of prudence here is not the Aristotelian one of practical wisdom but rather something more modern.

⁸ States are notorious for at best making an apology, while neglecting to pay restitution; and better than paying restitution is not doing anything that requires making restitution in the first place.

criminality from any State to which you give power to exercise it; and whatever power you give the State to do things *for* you carries with it the equivalent power to do things *to* you” (1991: 274).

IV. Clarifying Paternalism: A Critique of Feinberg’s Account

Before moving on to my own critique of Lord Devlin’s position, it will be useful to clarify the meaning of moral legislation and, in particular, the related term legal paternalism. In a chapter on legal paternalism in his *Harm to Self*, Joel Feinberg attempts to do just that. His stated intention is to salvage what he can of 'traditional' liberalism. While he makes some useful distinctions, his project suffers from typical statist errors inherent in 'traditional' liberalism and he therefore makes too many liberty-limiting concessions.

Feinberg distinguishes between legal paternalism proper, or hard paternalism, and other policies that are commonly seen as paternalistic but arguably are not. Legal paternalism holds that “it is necessary to protect competent adults, against their will, from the [self-regarding] harmful consequences even of their fully voluntary choices and undertakings.” On the other hand, he argues that so-called soft paternalism, which does not really seem paternalistic at all, can actually be compatible with liberalism; it holds that “the state has the right to prevent self-regarding harmful conduct...*when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not” (12). However, it seems to me that such “soft paternalism” may or may not be paternalistic depending on how zealously the state takes it upon itself to intrude into the activities of its citizens in order to ensure that

they are substantially voluntary. Again, we are left to wonder about the standard by which paternalism and the state's behavior will be judged.

Aside from leaving the matter of standards up in the air, and thus in the hands of those in control of the state, Feinberg goes wrong in at least two key ways. First, he attempts to separate paternalism from other rationales for moral legislation, such as protecting the state or society, but it is not clear that this distinction is valid (21). Paternalism, in a very real sense, involves treating adults as if they were children (23-24). It is not paternalistic to defend or protect the helpless or incompetent, as children are to varying degrees, but it is unreasonable to treat the typical adult as incompetent to enter into voluntary associations with others and to judge what is best for him- or herself. All moral legislation is paternalistic,⁹ whether it is intended to protect adults from voluntarily self-inflicted harm or to protect the (moral) majority from the (immoral) minority. Feinberg recognizes the paternalism of moral legislation in the former case and is rightly wary of it, but he fails to recognize paternalism in the latter. He neglects to see that moral legislation, rather than being paternalistic to the (immoral) minority but not to the (moral) majority, is paternalistic to both: it treats the minority as children in preventing them from doing what they voluntarily choose, and it treats the majority as children in supposing they need to be protected from the 'bad' example of the minority. Similarly, Feinberg fails to recognize social-welfare and environmentalist policies as moralistic and paternalistic.

Second, Feinberg reifies the state and society, granting them unwarranted moral status over the individual in “garrison” situations (21-23). These errors are fundamental

⁹ But not all legal paternalism is moral legislation; there are executive-bureaucratic regulations as well, and we can conceive of customary or common law legal systems, for example, which do not involve legislation, as nevertheless involving legal paternalism.

features of Lord Devlin's arguments as well and will be critiqued in the next section. A few points can be made here, however. Feinberg writes that self-caused harm (injuries and deaths) and the choice to live a (relatively or entirely) nonproductive life are "a considerable public inconvenience, at the very least" (22). If such behavior becomes prevalent enough, say "ten percent" of the population and more, those engaging in it "become parasitical" and society is moved closer to "the garrison threshold" in which "it may become impossible for the remainder to maintain a community at all" (23). It is far from clear why this would be such a ready danger for a society, however, and why state action would be needed to prevent it. Indeed, Feinberg seems implicitly to assume that it is the state's duty to deal with these "parasites," by supporting them in their drug habits and nonproductivity, or by attempting to rehabilitate them, and by tying up their postmortem affairs. Only if such is indeed Feinberg's assumption does it make sense for him to claim that such behavior is a public inconvenience and a danger to community. But if the state does not subsidize irresponsible behavior by financially or otherwise supporting individuals who have chosen to live irresponsible, nonproductive or dangerous lives but rather leaves this burden to the individuals themselves and the choice to aid them (or not) up to voluntary, private initiative, then the danger Feinberg fears recedes and is revealed to be a matter of private concern and possible inconvenience, not of public concern and inconvenience. Left to their own devices and the goodwill of interested parties (family, friends, neighbors, churches, private charities, and so forth), individuals will have far less incentive to engage in parasitical behavior than they would if the burden fell entirely on society as a whole via the state.

V. Logical Fallacies, Society, and Individual Rights

Lord Devlin does indeed have a confused conception of society, as Hart thought, but not in the sense that Hart suspected. Feinberg makes the same mistake as does Lord Devlin. Even Hart's critique of Devlin seems to bear the markings of this same mistake though to a lesser degree. All three implicitly employ two well-known logical fallacies in their conceptions of society: the fallacy of composition and the fallacy of misplaced concreteness. The fallacy of composition involves moving illegitimately from the parts of a whole having a certain property to the whole having that property. The fallacy of misplaced concreteness involves forgetting the degree of abstraction involved in thought and treating an abstract concept as a concrete entity.

Lord Devlin, Feinberg, and Hart treat society as a concrete entity with properties that only its parts can possess. But society as such does not exist. Society is an abstract concept that represents a group of individuals, of concrete autonomous human beings, wholes in their own right, with some degree of shared ideas, values, and relations. This is not to say that society is an artificial construct or contract and that man is not naturally a social and political being; indeed, both propositions are false. It is merely to recognize that the true natures of man and society are somewhere between the collectivism of communitarians and the 'atomistic individualism' they accuse liberalism of entailing.¹⁰

¹⁰ While I think there may be some truth to this communitarian critique of liberalism, or at least of aspects of certain prominent theories of liberalism, the critique is overall a weak one and is in no small part predicated on simple misunderstanding or exaggeration of aspects of liberalism. Moreover, communitarians have thus far been unable to provide a positive alternative of their own that is clearly defensible and avoids the specters of paternalism and totalitarianism that still plague communitarianism.

It is worthwhile, also, to consider an ingenious observation by Irfan Khawaja, although I'm not altogether sure I would endorse it (1999: 90): "If so, I don't think that there's much to be gained by denying that classical individualism is 'atomistic'. It's worth remembering that atoms form bonds based on their natures – powerful and lasting ones. It's hardly an indictment of a naturalistic theory of individualism to recognize that, in our own way, we do the same thing – with the difference, to paraphrase Thomas Jefferson, that when the need arises, we can choose to dissolve our social bonds in the name of independence." This, of course, is still not meant to imply that certain features of Hobbesian and other

Autonomous is not here meant in the sense of the individual as being a 'radically free' 'unencumbered self' in complete isolation from influence and dependency of and on others. Such a conception of man would be just as guilty of the fallacy of misplaced concreteness as is the communitarian conception of society.¹¹ Rather, man is here considered to be autonomous in the uncontroversial sense that as a rational being he necessarily makes his own choices (however those choices might or might not be shaped or influenced by society, biology, and his physical environment), and capable of self-sufficiency in the Aristotelian sense.¹² Individual human beings are the locus of choice. The individualism of an *Aristotelian* liberalism¹³ recognizes that man is embedded in a network of social and historical relationships and that his very individuality is in many ways even dependent upon this, but man's political, social and historical nature cannot be taken to entail ethical and social determinism or historicism, nor can it be taken to mean that man is not or should not be free to choose for himself to affirm or reject (and replace) the ends and moral obligations others in his society uphold and seek to impose. If a man is not free to decide for himself whether particular values and virtues held by others, and which they would have him hold, are actually right and good or wrong and vicious (for him in his unique context) then he is not being allowed to be a man but is rather being

Enlightenment forms of liberalism are not problematic. The classical in classical individualism here is meant to indicate an individualism traceable to Aristotle, not modern Hobbesian individualism.

¹¹ This was rightly pointed out to me by my dissertation adviser, Cecil Eubanks, and I thank him for forcing me to clarify my position.

¹² See Aristotle's *Nicomachean Ethics* 1097b7-21 and Miller (2002).

¹³ I mean, of course, liberal in the classical or libertarian sense. My approach is an Aristotelian liberal synthesis. Obviously, despite some definite liberal tendencies, Aristotle was no liberal; nor was he fully a communitarian, however. Aristotelian liberals, on the other hand, recognize a greater degree of pluralism and demand a larger scope for individual autonomy. For the roots of liberal individualism and natural law and natural rights theory in Aristotle, see Fred D. Miller, Jr. (1995); and for a necessary amendment to it, see Long (1996). Also, on the ontological and moral priority of the individual in Aristotle's thought, see Zeller (1897), Machan (1998), and Khawaja (1999, 2000). On Aristotelian liberalism in general, see Rasmussen and Den Uyl (1991, 1997, 2005), Den Uyl and Rasmussen (1981), Rasmussen (1980), Den Uyl (1991), Rand (1964, 1966), Long (1994/95, 2000, 2001, 2002), Sciabarra (1995, 2000, 2005), Khawaja (1999, 2000).

treated as a child or a mere means: a tool, a slave, an animal, or a machine.

Societies can be tied to geographic proximity, but they need not be. We can identify societies of varying degrees of generality, such as the Society for Creative Anachronism, the society that is the United States of America,¹⁴ or the global society composed of all human beings on Earth. Moreover, any given individual may hold memberships in multiple, overlapping societies. Societies, then, at whatever level of generality, whether tied to geographic proximity or no, are groups of individuals with some degree of shared ideas, values, and relations. In no sense is any society or any of its institutions a concrete entity.

It seems clear from the arguments of Lord Devlin and Feinberg that they subscribe to some sort of rights, or at least entitlement, theory. I will not attempt to fully defend the validity of rights theories in general, nor theirs or mine in particular. It will suffice for my purposes here to show that Lord Devlin's and Feinberg's conclusions fail on their own merits. I fear the term society has taken on some sort of special significance for Lord Devlin and Feinberg above and beyond the value of the individuals who comprise it, but what is society other than these individuals and their shared ideas, values, and relationships? It is almost as if to speak of the rights of *society* is to grant one's theory special significance. But it would be strange indeed if society, being but an abstraction on the one hand and a group of individuals on the other, should have any rights or entitlements above and beyond those of the individuals that comprise it. Thus, when Lord Devlin speaks of the right of society to protect its moral institutions, either he has committed several logical fallacies and we can summarily reject his conclusions, or he really means that some individuals in society have the right to impose their views

¹⁴ Quite apart from the organization that is its state (or government).

(whatever they may be) on other individuals by force. But surely this is *prima facie* equally absurd and at the very least requires more justification than Lord Devlin has given us. The burden of proof, and it would seem to be a hefty one, should reside in he who seeks to move from the moral propositions “X is right and good, so X ought to be done” or “X is wrong and vicious, so X ought not to be done” to the legal propositions “X is right and good, so Y ought to be forced to do X” or “X is wrong and vicious, so Y ought to be forced not to do X.” The legal propositions do not automatically follow from the moral ones. Some sort of principle is required to justify making the leap and privileging one sort of human flourishing over others in the legal order, by justifying the threat or use of initiatory force by some privileged individuals in society against others. Lord Devlin has given us no such principle, and I daresay no such principle will ever be found.

It has been the special distinction of liberalism (in the classical or libertarian sense), however, to have discovered a principle which can not only guide us in the creation and maintenance of a social order that is not structurally biased in favor any form of human flourishing but which is even more importantly a necessary constituent of all forms of human flourishing: the individual, natural right to liberty.¹⁵ The right to liberty precludes moral legislation and legal paternalism, providing us with a clear demarcation line between vices and crimes.¹⁶ A clear understanding of the right to liberty

¹⁵ On the issue of structural bias and whether rights (properly conceived) can conflict, consider Herbert Spencer’s Law of Equal Freedom: “Every man has freedom to do all he wills, provided he infringes not the equal freedom of any other man” (Spencer, *Social Statics*, New York: D. Appleton and Company, 1897, p. 121). Murray Rothbard is correct, however, in pointing out that Spencer’s Law is redundant; the first proviso implies the second. “For if *every* man has freedom to do all that he wills, it follows from this very premise that *no man’s* freedom has been infringed or invaded. [...] The concept “equality” has no rightful place in the “Law of Equal Freedom,” being replaceable by the logical qualifier “every.” The “Law of Equal Freedom” could well be renamed “The Law of Total Freedom.” (Rothbard, *Man, Economy, and State with Power and Market*, Scholar’s Edition. Auburn: Mises Institute, 2004 [1962, 1970], p. 1312).

¹⁶ To be more precise, I am not here positing a dualism of vice and crime; rather, I conceive of crime as being a species of vice, albeit an especially egregious species – a special legal species that deserves to be

as protecting the possibility of self-direction, a necessary condition for moral agency common to all forms of human flourishing, reveals that no one can be forced to be moral and that it is only the threat or use of initiatory force by others that compromises self-directedness.¹⁷ Thus, the right to liberty logically entails the right to be and do wrong, to make mistakes, to behave immorally, even though one ought avoid these things. This is due to the very nature of morality and human flourishing: for an action to be counted as moral and contributory to one's flourishing it must not only be good and right but must also be desired and freely chosen for the right reasons.¹⁸ Violation of the right to liberty compromises the self-direction that is the basis for moral agency. It is thus rights-violating behavior – the threat or use of initiatory force (including fraud) – that is to be counted as fundamentally anti-social and a crime and thus subject to legal prohibitions and penalties, for it is this sort of behavior that prevents the pursuit of the good life for all parties involved and makes social life impossible.

Hence, the likely knee-jerk reaction from natural law conservatives that the right to liberty is contrary to natural law is mistaken. The right to liberty does not imply that we do not have a moral obligation to be virtuous and not vicious; we certainly do have such an obligation. Rather, the right to liberty means that we do not have the right, and it is not right,¹⁹ to force others to do what we think virtuous and not do what we think

prohibited, prevented, and punished. Analogously, promises in general are not legally enforceable but valid contracts are a special legal species of promising which, under the title transfer theory of contracts, are legally enforceable because they involve a transfer of title to property.

¹⁷ "Simplicity and truth of character are not produced by the constraint of laws, nor by the authority of the state, and absolutely no one can be forced or legislated into a state of blessedness; the means required are faithful and brotherly admonition, sound education, and, above all, free use of the individual judgment." (Benedict de Spinoza, *Tractatus Theologico-Politicus*)

¹⁸ See Aristotle, *Nicomachean Ethics*, II.4 (1105a18-1105b17) and III.1-5 (1109b30-1115a6).

¹⁹ Again, it is a common mistake to conflate a right with what is right. Following Rasmussen and Den Uyl (2005), we may call this the moralist fallacy. The two notions are distinct and not necessarily the same, although in the case of rights-violating behavior the two do coincide in the sense that one does not have a right to violate someone else's rights because it is not right to do so. Likewise, it is not right for others to violate our rights. Hence, contrary to conservative natural law theories, our obligation to do what is right

vicious. It is not simply that the right to liberty imposes an obligation on us not to threaten or use initiatory force. On the contrary, it is our obligation as rational, social, and political beings to live a fully human life characterized by reason – and thus the peaceful way of discourse, persuasion, and voluntary cooperation with fellow human beings who are also ends-in-themselves – rather than the life of a brute characterized by violence and domination, from which the right to liberty is derived.²⁰ Vice, while it is to be avoided, does not warrant the violation of an individual's rights. If one is truly concerned about the deleterious effects of vice on someone (and the rest of society), then one ought to start by setting a good example and then perhaps seek peacefully to persuade the other of the error of his ways; this is the only moral way to lead another to virtue.

VI. Moral Legislation and Democracy

I have endeavored to demonstrate that Lord Devlin's conclusions are invalid because they rest upon logical fallacies. Dworkin has shown that Lord Devlin's conclusions fail on their own merits because the threshold criterion Lord Devlin establishes for when society may legislate morality cannot count as a genuine moral conviction. I have argued that Dworkin's criteria for a genuine moral conviction and even George's criterion that an act actually be immoral will be of little help in limiting moral legislation in practice. And I argued that moral legislation is inherently paternalistic,

does not mean that no one has the right to do wrong; the truth is rather the opposite, and if we are careful to avoid the moralist fallacy it will be plain that this is not at all a contradiction. From the perspective of a social/legal order, the purpose of rights is to protect the *possibility* of human flourishing, but even if we grant the conservative natural law theorist that the purpose of rights is to (directly) *promote* human flourishing, it still does not automatically follow that only those activities that are not contrary to human flourishing are protected by rights. Moreover, conservative natural law theorists tend to have a strangely unitary and universal (Platonic) notion of human flourishing such that individuals are merely the locus of flourishing, a notion that liberals – who hold that flourishing is highly individualized – do not accept.

²⁰ This, of course, should not be taken to preclude the use of retaliatory force in self-defense and the defense of others against those who initiate its use. The right to liberty does not logically entail pacifism, but only precludes the threat and use of initiatory force.

immoral, and unjust. In this section I seek to demonstrate that the very nature of the state, and of the modern democratic state in particular, necessarily ensures that granting society the power of moral legislation through the state will be counterproductive in the long run.

If anything, Lord Devlin's conception of democracy seems rather naïve. He assumes that the law-maker, the democratic statesman, will faithfully represent the consensus of (the majority of) society. The law-maker, "will naturally assume that the morals of his society are good and true; if he does not, he should not be playing an active part in government. But he has not to vouch for their goodness and truth. His mandate is to preserve the essentials of his society, not to reconstruct them according to his own ideas" (Devlin, 90). But what is to guarantee that law-makers will act as Lord Devlin believes they should? It is not as if one can say that a law-maker represents the majority of society. The old adage in the United States that liberal democracy is majority rule with minority rights does not reflect reality. As a general rule in the United States voter turnout is typically below fifty percent. Voting in the United States is decided by a plurality not a majority. This means, to give an optimistic hypothetical example, that if a statesman wins fifty percent of the vote out of the fifty percent of eligible voters who turn out, then he represents a mere twenty-five percent of his so-called constituency and, due to the secret ballot, has no idea who most of them are! Moreover, different voters will have voted for the candidate for different reasons. One might argue that a statesman is supposed to represent even those who did not vote for him, but by the nature of the electoral and party systems his beliefs will be different from theirs. Lord Devlin might reply that he should not act except in conformity with whatever common beliefs are held by the majority, but why would he do that? The majority did not elect him. The nature of

democratic politics encourages rewarding the special interests and voters that got you elected, typically at the expense of those that did not.

Indeed, Lord Devlin himself says it best when he points out that “[u]nder a system in which no single question is submitted to the electorate for direct decision, an ardent minority for or against a particular measure may often count for more than an apathetic majority” (96). That Lord Devlin did not draw the obvious conclusion from this statement is surprising. The majority is often characterized by apathy, whereas those that feel fervently about a given issue typically make up a minority in society. If one’s goal is to preserve the existing institutions of public morality in a society, as Lord Devlin’s is, then is not the state the last institution to which one would want to give the power of moral legislation? A powerful institution such as the state, which claims a territorial monopoly over the legal use of force and ultimate decision-making, can be used by fervent and vocal minorities to impose their desires upon an apathetic majority by force. Indeed, left-liberal adherents of progressivism managed to do just this to an astonishing degree in the United States over the course of the past century through all three branches of the federal government as well as the public education system; and, through the public education system, the mass media. Not only the left but also those on the far right, a good deal more conservative than the bulk of the US population, have sought to use the state for this purpose. To give the power of moral legislation to the state is virtually to ensure that it will be used to reconstruct the institutions of society to reflect the desires of (coalitions of) fervent and vocal minorities. Once the power of moral legislation is allowed even for one or a few 'special' cases, and even if severely limited at first, it will only be a matter of time until the limits are gradually or drastically cast off and the scope increased. This is

precisely how the limited government designed by the Founding Fathers has grown into Leviathan.²¹

There is a particular aspect of the state, above all, in which Lord Devlin sees the ability to protect society: the jury. It is the ordinary man in the jury box whom Lord Devlin sees as the representative of the moral majority. However, even here his argument fails. Lord Devlin almost explicitly acknowledges that much of the jury's power upon which he relies, derives from the power of jury nullification, by right of which the jury can judge not only the facts of a case but also the justness of the law(s). This power is not *officially* recognized in the United States, however, despite its long common law history.²² Most, if not all, jury members are ignorant of it. And judges and lawyers often make it a point, falsely, to tell them that they can only judge the facts of a case. Indeed, I am given to understand that a lawyer who attempts to instruct the jury on their right of nullification can be severely penalized by a judge for doing so.²³ Nevertheless, juries still sometimes, but *all too seldom*, make decisions contrary to the law. Moreover, a jury consists of only twelve citizens, hardly a large enough number to ensure even a relatively close approximation of a random sample of the population, and in any case the composition of juries are habitually manipulated by lawyers.

All this has been to leave aside the question of whether it is even legitimate to speak of a moral majority in society. Indeed, in all but the most homogeneous societies, there is reason to doubt that there is a moral majority with regards to public morality as a whole (unless it be an exceedingly minimalist public morality), though there may be different moral majorities on individual issues. Even in this latter case, how many of such

²¹ See Higgs (1987).

²² See, for example, Lysander Spooner's essay "Trial by Jury" in the *Lysander Spooner Reader* (1992). It can also be found online at http://www.lysanderspooner.org/bib_new.htm.

²³ From personal conversation with Randy Barnett.

a majority, if they did not have the state to do something about it for them, really care enough about the issue to actually do something about it themselves? In other words, having the power of the state at their disposal lowers the opportunity cost for dealing with things they consider to be immoral, thus giving them an incentive to violently enforce or prohibit behavior (or lack thereof) that they otherwise would have tolerated. The consequence of this is that violence and other anti-social behavior are made more likely and prevalent, as individuals and groups vie with each other to use the power of the state against or in defense of their favorite peccadillos.

VII. Conclusion

In this essay I have endeavored to show that Lord Devlin's arguments for the right of society to protect its existence and enforce its public morality through the state do not succeed. I have shown that Hart's and Dworkin's, and even George's, counterarguments, while undeniably useful in undermining Lord Devlin's position, are not conclusive and do not go far enough. They do not close the door to moral legislation. I have also argued that moral legislation is inherently paternalistic, that because moral legislation invades the individual's right to liberty it is immoral and unjust. I have argued that Lord Devlin's and Feinberg's conceptions of society, and consequently their arguments, implicitly involve the commitment of two logical fallacies: the fallacy of composition and the fallacy of misplaced concreteness. And finally, if I have argued that if one's goal is to preserve the existing moral institutions of society, the state should not be given the power of moral legislation for it is all too easy for fervent and vocal minorities to gain control of it and use it to remold society. Voluntary association and moral suasion, while they

cannot ensure that social institutions will remain static (for nothing can), are the safest and only moral ways to preserve the institutions we cherish and change the one's we do not. The prudent course is the principled one.

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