ROCZNIKI FILOZOFICZNE
Tom LXXII, numer 3 – 2024
DOI: https://doi.org/10.18290/rf24723.11

STEFAAN E. CUYPERS

H. L. A. HART ON LEGAL MORALISM AND SOCIAL MORALITY

INTRODUCTION

In *Law, Liberty, and Morality* (*LLM*) (1963) the eminent British philosopher of law Herbert Lionel Adolphus Hart (1907–1992) discusses the intricate relationships between legal moralism, moral principles and social morality in the context of the special topic of sexual morality. The present paper about this central part of Hart's philosophy of law unfolds as follows. In section 1, I explain legal moralism and introduce the so-called "Hart-Devlin debate". In section 2, I review Hart's revisions of John Stuart Mill's no-harm principle to cope with examples which seem to favour the legal enforcement of morality even when consent is present or physical harm absent. In section 3, I examine the main arguments for both the disintegration and conservative theses of the legal moralists Patrick Devlin and James Fitzjames Stephen, together with Hart's response to them. In section 4, after reframing the Hart-Devlin debate as a controversy between "thin" and "thick" legal moralists and relating it to different conceptions of social morality in the 1950–1960s Oxford philosophy, I indicate why a qualified moral conservatism, also regarding sexual morality, is warranted if the very notion of morality is given due consideration.

STEFAAN E. CUYPERS, Full Professor at the University of Leuven (KU Leuven), Institute of Philosophy, Centre for Logic and Philosophy of Science; correspondence address: Kardinaal Mercierplein 2, P.O. 3200, B-3000 Leuven, Belgium; email: stefaan.cuypers@kuleuven.be; ORCID: https://orcid.org/0000-0002-8503-6015.

Articles are licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0)

1. LEGAL MORALISM

Legal moralism is a particular position in the debate on the relation between law and morality. It has to be distinguished from legal positivism and moral criticism, both of which are different positions about the influence of *morality* on the law. As against natural law theory, legal positivism holds that moral justification is not necessary for legal validity and, consequently, that the law is a self-standing system of rules posited by convention. In contrast, moral criticism in general—not necessarily based on natural law—holds that morality has the authority to criticize laws for being "unjust" or "bad". In *The Concept of Law* (1961/2012), chapters 8 and 9, Hart deals with morality's influence on the law, whereas in *Law, Liberty, and Morality* he discusses, conversely, the impact that the *law* has on morality or, more specifically, the legal enforcement of morality, "what might be termed *legal moralism*" (*LLM*, 6).

Is it ever justified to use the law to enforce morality in a society? Discussing the issue of legal moralism involves taking up all these questions: Which justification? Which law? Which enforcement? Which morality? Which society? I begin by clarifying "legal enforcement". The law does not positively reward good, moral behaviour but limits itself, in this context, to negatively sanction bad, immoral behaviour. And for the reason that it sanctions immoral conduct that is bad in itself (*malum in se*), as opposed to conduct that is prohibited only by virtue of enactment (*malum prohibitum*), legal moralism implies enforcement by *criminal* law. So, the sanctioning is not a function of contract law or tort law. As a consequence, the variety of enforcement at issue does not just consists in coercion (e.g. by threat) into conforming behaviour but also and prominently in criminalization and actual state punishment (e.g. by imprisonment) of immoral behaviour (*LLM*, 55–60).[1]

Legal moralism is "the thesis that the criminal law might justifiably be used to enforce morality" (*LLM*, 53). Which morality? This is a central question and I will take it up separately in detail in section 4. For now, I just re-

[1] Here I do not further distinguish between different theories of punishment. Suffice it to say that advocates of legal moralism generally adhere to a retributive or denunciatory theory of punishment (*LLM*, 60–66). Hart himself defends a so-called "mixed theory," which includes some principles of justice or fairness into an utilitarian theory of punishment; see Herbert L. A. HART, "Prolegomenon to the Principles of Punishment" (1959), in *Punishment and Responsibility*, 2nd ed. (Oxford: OUP, 2008), 1–27. For a further differentiation of theories of punishment, see Arnold BURMS, Stefaan E. CUYPERS, and Benjamin De MESEL, "P.F. Strawson on Punishment and the Hypothesis of Symbolic Retribution," *Philosophy* 99, no. 2 (2024): 165–90.

mind you that Hart critically discusses legal moralism "in relation to the special topic of *sexual* morality" (*LLM*, 5; my italics). Lord Patrick Devlin in his 1959 Maccabaean lecture in jurisprudence "The Enforcement of Morals" defends, like James Fitzjames Stephen nearly a century before, the view that "the enforcement of sexual morality is a proper part of the law's business" (*LLM*, 6).[2] The immediate cause that triggered Devlin's defence was the 1957 Report of the Committee on Homosexual Offences and Prostitution, laid down by the Wolfenden Committee which was appointed in 1954. Hart's critical reaction to both Devlin and Stephen in his *Law, Liberty, and Morality* is the beginning of the so-called "Hart-Devlin debate" on sexual morality.[3] In Great Britain's society during the 1950–1960s homosexuality between adult men—but *not* between adult women—still was a criminal offence until it was decriminalized by the Sexual Offences Act of 1967. Devlin considers gay sex as *immoral* sexual behaviour on a par with state-undermining treason, against both of which the state should legislate: "The suppression of [homosexual] vice is as much the law's business as the suppression of subversive activities; … There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality."[4] Conversely, legally permissible sexual behaviour includes "'normal' relations between husband and wife and solitary acts of masturbation" as well as, whether morally permissible or not, "adultery, which has not been criminally punishable in England since Cromwell's time,… [and also] fornication is not a criminal of-

[2] See Patrick DEVLIN, "Morals and the Criminal Law," in *The Enforcement of Morals* (Oxford: OUP, 1965), 1–25; James Fitzjames STEPHEN, *Liberty, Equality, Fraternity* (New York: Holt & Williams, 1873). For a recent discussion of Devlin's book, see Nicola LACEY, "Patrick Devlin, The Enforcement of Morals" (1965), in *Leading Works in Criminal Law*, ed. Chloë Kennedy and Lindsay Farmer (London: Routledge, 2024), 82–134.

[3] Even after sixty years the Hart/Devlin debate is still prominently present in the discussion on legal moralism. From the extensive bibliography on this debate, I select a few noteworthy contributions: the early response of Ronald DWORKIN, "Lord Devlin and the Enforcement of Morals," *The Yale Law Journal* 75, no. 6 (1966): 986–1005, and the additional elaboration of Herbert L. A. HART, "Social Solidarity and the Enforcement of Morality," *University of Chicago Law Review* 35, no. 1 (1967): 1–13; twenty-five years on, Joel FEINBERG, *Harmless Wrongdoing* (Oxford: OUP, 1988), 124–75; fifty years on, Jeffrie G. MURPHY, "A Failed Refutation and an Insufficiently Developed Insight in Hart's *Law, Liberty, and Morality*," *Criminal Law and Philosophy* 7, no. 7 (2013), 419–34; and sixty years on, Steven WALL, *Enforcing Morality* (Cambridge: CUP, 2023), 44–63. For a good introduction to the further discussion of legal moralism in contemporary philosophy, see John STATON-IFE, "The Limits of Law," in *The Stanford Encyclopedia of Philosophy,* ed. Edward N. Zalta (Stanford: Stanford University, Spring 2022).

[4] DEVLIN, "Morals and the Criminal Law," 14. See also Herbert L. A. HART, "Immorality and Treason," *The Listener*, July 30, 1959, 162–63.

fence in England" (*LLM*, 26). Hart critically questions Devlin's defence of legal moralism: What justifies the use of the criminal law to enforce society's sexual morality by legally sanctioning (male) homosexuality, while tolerating adulterous heterosexuality, for example?

Because of the ensuing misery of criminal punishment, the brute fact of the criminalization of homosexual behaviour in a society calls for *justification*. The problem of the legal enforcement of society's sexual morality is, accordingly, an instance of the general problem of the justification of punishment. All punishment is *prima facie* objectionable in that it involves the intentional infliction of pain and suffering. Moreover, legal moralism in the case of homosexuality is *prima facie* objectionable in a special way. Not only the actual punishment by the state but also the threat of state punishment are aspects of the legal enforcement of society's sexual morality. State interference in individual liberty by threatening to punish homosexual behaviour "is itself the infliction of a special form of suffering—often very acute—on those whose desires are frustrated by the fear of punishment" (*LLM*, 22). Sexual desire is insistent, even to the point of being irresistible, unlike e.g., the desire to steal, except in the case of kleptomania. Going against a standing homosexual desire is, therefore, much more demanding and stressful than going against an occasional desire to commit a "common crime". Correspondingly, in comparison with abstaining from "ordinary crime" refraining from "homosexual crime" by suppressing one's sexual desires detrimentally "affects the development or balance of the individual's life, happiness, and personality" (*LLM*, 22). So, a society's practice of legally sanctioning homosexuality acutely faces the justificatory issue.

Until 1967, it was a social fact that Great Britain's society accepted the legal enforcement of a sexual morality which excluded homosexuality as immoral. The justificatory question about this fact is a critical question *of* morality *about* morality: "It is the question whether the enforcement of morality is morally justified; so morality enters into the question in two ways" (*LLM*, 17). Accordingly, Hart makes in his discussion of legal moralism the important distinction between a *positive* and a *critical* morality, between "the morality actually accepted and shared by a given social group" and "the general moral principles used in the criticism of actual social institutions including positive morality" (*LLM*, 20). This distinction between, roughly, a given, social morality (social fact) and a reflective, philosophical morality (moral theory) is common ground in the debate between Hart, Devlin, and Stephen. All disputants agree that "our question is one of critical morality about the

legal enforcement of positive morality" (*LLM*, 20). However, they strongly disagree about the critical principles and reasons that can be put to work to justify or criticize the given institutionalized morality of a society. In the next section I discuss Hart's critical morality and in section 3 Devlin's and Stephen's.

2. HART AND MILL ON HARM AND INDIVIDUAL LIBERTY

Hart works within the tradition of Jeremy Bentham and John Stuart Mill. In particular, he borrows from Mill's moral theory the utilitarian *no-harm* principle "that 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."[5] In correspondence with this critical moral principle, legal enforcement—"[legal] power against his will"—can only be morally justified—"rightfully exercised"—if harm to other people is thereby prevented. This no-harm principle is, according to utilitarians, the sole constraint on individual liberty, comprising sexual liberty. Hence, to justify an interference of social authority in a person's sexual life "the conduct from which it is desired to deter him, must be calculated to produce evil [harm] to some one else."[6]

According to proponents of legal moralism,[7] the application of the utilitarian view would be much too reformist and even destructive of accepted standards of behaviour:

> Thus, if the criminal law were to be reformed so as to eliminate from it everything that was not designed … to protect citizens [from harm]…, it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done … without offence to others … no one hitherto has gone so far as to suggest that [these specific acts] should all be left outside the criminal law as matters of private morality.[8]

[5] John Stuart MILL, "On Liberty" (1959), in *On Liberty and Other Essays* (Oxford: OUP, 1998), 14.

[6] MILL, 14.

[7] For the time being, I mean by "legal moralism" *non-utilitarian* legal moralism and by "legal moralist" *non-utilitarian* legal moralist. I will come back to this terminology in section 4.

[8] DEVLIN, "Morals and the Criminal Law," 7.

Hence, the no-harm principle cannot be the only justification for legal enforcement excluding all other considerations. To fortify their view, legal moralists argue that criminalization in "a civilized community" is not only legitimately used for the prevention of harm but also and solely for the enforcement of morality "as such" in some *non*-sexual cases. Why could its use then not, by analogy, be justified in sexual cases, e.g. in the case of gay sex? To show that the function of the criminal law can be "simply to enforce a moral principle and nothing else",[9] legal moralists give some examples of non-sexual cases to clear the ground for making the same point in the case of sexual morality. In response, Hart critically engages with these examples and tries to show that what is at stake in them can equally well be explained by a suitable modification or extension of Mill's no-harm principle. I discuss Hart's argumentative strategy as regards two examples.[10]

As a first example, legal moralists adduce the rule that, except in particular cases such as rape, "the criminal law has never permitted consent of the victim to be used as a defence."[11] The criminal law rules out consensual homicide in cases such as "euthanasia or the killing of another at his own request". Although in these cases no harm would be done to other people and the individual liberty of the victim would be respected, one cannot appeal to the consent of the victim as a defence to a charge of murder or deliberate assault. According to legal moralists, other moral principles than the no-harm principle have to be invoked to explain this rule of criminal law, among which the physical integrity of the person and, fundamentally, "one of the great moral principles upon which society is based,… the sanctity of human life."[12]

In his apologetics of Mill's no-harm principle, Hart tries to show that this rule of criminal law can equally well be explained by the state policy of *paternalism*. As an alternative to the moral legalist explanation, Hart's paternalistic strategy, however, involves an important modification of Mill's principle. Yet, this adaptation of the no-harm principle is, according to Hart, reasonable in light of Mill's naïve human psychology and the changed social context. Mill's own scepticism about paternalism—the protection of other people against themselves for their own good—is unrealistically based on an

[9] DEVLIN, 7.

[10] Jeffrie Murphy offers an excellent discussion of a third example in which the legal moralist points out that the proportionality of punishment correlates not only with the harm done but also, and importantly, with the moral seriousness of the crime; see MURPHY, "Failed Refutation," 420–24.

[11] DEVLIN, "Morals and the Criminal Law," 6.

[12] DEVLIN, 6.

autonomous adult psychology free from all external influences and a laissez-faire social climate in the Victorian era. To promote welfare in present day society, state paternalism takes care of human weakness by legal protection, even if this goes against individual liberty. As the criminal law today, for example, excludes "the supply of drugs or narcotics,… except under medical prescription" (*LLM*, 32) for the protection of the would-be drug users against themselves and not for the punishment of immoral drug dealers, it excludes consensual homicide for the protection of the would-be "self-harming" victims against themselves and not for the criminalization of immoral behaviour "as such". Hart modifies Mill's principle, accordingly, so that "harming others is something we may still seek to prevent by use of the criminal law, *even when the victims consent to or assist in the acts which are harmful to them*" (*LLM*, 33; my italics).

Secondly, legal moralists point out that although fornication, adultery, sexual cohabitation and fake marriage are not crimes, the law criminalizes bi- or polygamy in England.[13] The harm done or not done in the latter case seems, however, the same as in the former cases. Really going through the official ceremony of marriage twice (or several times) is, therefore, according to legal moralists, criminalized not on the basis of the no-harm principle but on the basis of religious or moral values and attitudes, such as the "deep religious significance of … monogamous marriage and … the [ceremonial] act of solemnizing it", as well as the safeguarding of "religious feelings from offence by a public [invalid] act desecrating the ceremony" (*LLM*, 41). So, monogamy is legally enforced because of its religious or moral meaning "as such". It is in this sense that the law against bigamy protects monogamous marriage as a social institution.

Hart's alternative to this moral legalist explanation involves an important extension of Mill's no-harm principle so as to also include *psychological harm* besides physical harm. The law should not only protect individuals from "bodily intrusion" but also their individual feelings from shock or public offence. The function of the law against bigamy is, accordingly, its protection of individual sensibilities from insult and outrage. That is to say, "the bigamist is punished neither as irreligious nor as immoral but as a nuisance … the law is … concerned with the offensiveness to others of his pub-

[13] What I here call "fake marriage", that is, pretending to be married only for show, should be distinguished from "sham marriage", which is marrying for reasons such as immigration or nationalization without having conjugal relations afterwards. Only the latter may or may not involve marriage fraud and be punishable. Although criminalized in, among others, European jurisdictions, polygamy may be legal, as, for example, under traditional Islamic law.

lic conduct, not with the immorality of his private conduct" (*LLM*, 41).[14] Hart's strategy here is roughly in line with Mill, who, moreover, insisted that the offence to feelings should be both (very) serious and invariably result from the same instances of public conduct. Furthermore, if, on balance, the sacrifice of liberty and the suffering imposed by the law surpassed the seriousness of the offence to feelings, then it would be unfair to punish the bigamist in addition to declare his second marriage void.

In both of his responses, Hart brings to light that the legal moralist makes the mistake to assume that "if a law is not designed to protect one man [from bodily harm] from another its only rationale can be that it is designed to punish moral wickedness…, 'to enforce a moral principle'" (*LLM*, 34). In his alternative explanations, Hart adapts Mill's critical no-harm principle so as to incorporate legitimate paternalism and psychological integrity. Although Hart works within the utilitarian tradition, he does not unrestrictedly and purely apply the no-harm principle and develops his own *mixed* view in response to moral legalism, as he also does in relation to the justificatory problem of punishment in general.[15] On the basis of his revised, critical principle, Hart demonstrates that the function of the criminal law in the discussed non-sexual cases is *not* the enforcement of morality "as such", thereby blocking an analogous appeal to legal moralism in sexual cases.

In addition, the lesson drawn from the bigamy case about the distinction between immorality and nuisance can be generalized for the sexual cases: "In sexual matters a similar line generally divides the punishment of immorality from the punishment of indecency" (*LLM*, 44). Both hetero- and homosexual intercourse in public are punishable offences because they are, as *public* offences, an affront to public decency. However, there is a clear and important distinction between public indecency and *private* immorality. Whereas private gay sex is immoral according to traditional morality, private husband-wife sex is not immoral. Yet, both types of sex in public affront public decency and are punishable so as to protect involuntary witnesses from offensive displays. So, on the revised, no-harm principle, utilitarians, like moral legalists, criminalize public sex. The latter, however, condemn this affront to public decency for other reasons than the former, e.g., to safeguard human dignity "as such". But utilitarians, unlike moral legalists, regard

[14] In this paper, like Hart, I take this protection from "nuisance" as an extension of Mill's no-harm principle and not as a second, independent no-offence principle, as Feinberg does in his *Harmless Wrongdoing*, 15–16.

[15] For Hart's "mixed view" on the principles of punishment, see note 1.

harmless private sex of whatever nature as not immoral and thus as legally permissible. Why would one criminalize some type of sexual activity *in private* if no harm is done?

3. LEGAL ENFORCEMENT, THE EXISTENCE OF SOCIETY AND THE PRESERVATION OF MORALITY

If not the no-harm principle, which other principle might then justify the use of criminal law to enforce morality, for example, a sexual morality excluding homosexuality? Legal moralists put forward two theses to positively justify the legal enforcement of morality. Both of them do not just dogmatically affirm an existing, positive morality on the *de facto* level but belong to reason-giving, critical morality on the *de iure* level. On the moderate, disintegration thesis, the legal enforcement of morality is deemed necessary for the existence of society, while on the extreme, conservative thesis, it is seen as conducive to the preservation of morality as a value in itself.[16] I review both theses and Hart's critical analysis of them.

The thesis that the legal enforcement of morality is necessary to prevent the disintegration of society can be interpreted as an *a posteriori* empirical generalization or an *a priori* conceptual claim. The latter claim is, according to Hart, quite implausible because such a conceptual identification of a given society with its morality implies that the slightest change in the moral code would cause the dead of an "old" society and the birth of a "new" one. But a society's code can perfectly well undergo some change *without* the total collapse of the societal framework. Is the idea that a morality is the cement of society interpreted as an empirical generalization more plausible? On the assumption of legal moralists that "all morality—sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty—forms *a single seamless web*", the disintegration thesis implies that "deviation from accepted sexual morality, *even by adults in private*, is something which, like treason, threatens the existence of society" (*LLM*, 50–51; my italics). Is there any good evidence to back up this bold

[16] Hart's distinction between the moderate and extreme thesis in *LLM*, 53 roughly corresponds to his distinction between the disintegration and conservative thesis in HART, "Social Solidarity and the Enforcement of Morality," 1–2. In the latter article, Hart instructively elucidates the disintegration theory by making use of the distinction between mechanical and organic solidarity as introduced in Émile Durkheim's classic *De la division du travail social* (1893) (Paris: Presses universitaires de France, 1991).

empirical claim? Hart thinks that the evidence is certainly insufficient. Even if we had some historical evidence, the generalization from traditional simple societies in the past to contemporary, modern complex ones is not valid. In addition, there is no unambiguous psycho-social evidence that sexual permissiveness and moral pluralism at large are invariably detrimental to society's continued existence. In the next section, I will come back to the legal moralist's assumption of social morality as a single seamless web, after reviewing and discussing the second, conservative thesis.

One might interpret the first, disintegration thesis still as a utilitarian or consequentialist theory of sorts. The continued existence of society is a desirable consequence of the legal enforcement of its morality. Society's survival is the valuable end, while morality's enforcement by law is the independent means. Without legal enforcement of morality, society would disintegrate and perish—that is, would be seriously "harmed". In contrast, on the conservative thesis, *morality itself and its preservation* are the ultimate ends for the sake of which morality is enforced by law: "the enforcement of a morality and its preservation are identical or at least necessarily connected" (*LLM*, 57). Morality is not primarily legally enforced for its social benefit but for the intrinsic value and conservation of morality itself. Hart first criticizes this thesis by giving some alternative explanations of how a morality is best preserved in a society. It might be that a given morality is kept in place not so much by legal enforcement as by non-punitive, good education and/or a common moral sensibility: "there is very little evidence to support the idea that morality is best taught by fear of legal punishment" (*LLM*, 58, see also 67). Conversely, it might be that a given morality is impaired or even ruined not so much by the absence of legal enforcement as by the presence of "free critical discussion" (*LLM*, 68).

Waiving such objections and assuming for the sake of argument that legal enforcement preserves morality, Hart then confronts the proponents of the conservative thesis with the central, justificatory question: What is the value of "the maintenance of the moral *status quo* in a society's morality" (*LLM*, 69)? How can "the preservation from change of any existent rule of a social morality, whatever its content, [be] a value [that] justifies its legal enforcement" (*LLM*, 72)? This question on the level of critical morality is especially pressing in the sexual cases, for example, in that of gay sex in Great Britain of the 1950–1960s. According to Hart, if no sufficient, justificatory reason can be given for the legal enforcement of conforming sexual behaviour, then the conservative values downgrade to dogma and taboo: "where there is no

harm to be prevented and no potential victim to be protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity,… is a value worth pursuing, *notwithstanding the misery and sacrifice of freedom which it involves*. The attribution of value to mere conforming behaviour, in abstraction from both motive and consequences, *belongs not to morality but to taboo*" (*LLM*, 57; my italics). To avoid the objection from dogmatism, legal moralists have adduced several reason-giving arguments in support of the conservative thesis. Although not very popular anymore in contemporary secularized and naturalized society, divine command theory and natural law theory are still approaches within critical morality capable of giving principles beyond the no-harm principle to justify the legal enforcement of some parts of morality "as such". However, Hart observes: "It is perhaps least plausible in relation to sexual morals, determined as these so obviously are by variable tastes and conventions" (*LLM*, 73).

Two other lines in defence of conservatism have been prominent. First, the historical-evolutionary argument, inspired by Edmund Burke and Georg Wilhelm Friedrich Hegel,[17] according to which an "existent rule of a social morality, whatever its content" is valuable because it is the stable outcome of a slow historical process and as such represents a translation of a basic need or vital aspiration of a society. Just the historical fact of its prolonged existence testifies of its cumulated wisdom in the past. Accordingly, heterosexual monogamy, for example, is legally enforced because of the value of the institution of monogamous marriage in the historical tradition of a society. Although this is a classical line of reasoning, Hart points out its weakness. As an argument for the static preservation of the moral *status quo* in a society at a time, this argument from the dynamic evolution of a social morality through time sounds contradictory. Why would the historical evolution of a social morality all of a sudden come to a standstill in e.g., the 1950–1960s? Why would, in particular, a sexual morality excluding heterosexuality and the marital institution excluding same sex marriages be immutable endpoints in a society's moral history?

Secondly, the socio-psychological argument based on the moral sense of a society, developed by Stephen and Devlin, according to which a rule of a social morality is valuable because its transgression incites "intolerance, indignation, and disgust" in the "overwhelming moral majority" of the socie-

[17] See, for example, Burke's and Hegel's texts in *Conservative Texts*, ed. Roger Scruton (London: Macmillan, 1991), 29–39 and 129–63.

ty.[18] Just the social fact that the majority experiences involuntary revulsion and feelings of strong disapproval in case of a certain offence testifies of its immorality and justified punishability. Accordingly, "[t]here is, for example, a general abhorrence of homosexuality. We should ask ourselves … whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it."[19] Hart's immediate objection to this line of reasoning is that it is naïve to assume that the same socio-psychological conditions obtain in the 1950–1960s England as in the 19th century Victorian England: "in sexual, as in other matters, there may be a number of mutually tolerant moralities" (*LLM*, 63).

On further reflection, however, he has to admit that the voice of the majority has to be respected in a *democratic* society. To ward off the conservative implications of democratic rule, while at the same time staying loyal to democratic principles, Hart makes a distinction between moral populism and authentic democracy. What is unacceptable is the populist view that an "overwhelming moral majority" dictates, immune from criticism, what is morally right and wrong, and, consequently, legally punishable or not. This would mean "the identification of *vox populi* with *vox Dei*" (*LLM*, 80), of the people's voice with absolute rule. Yet, authentic democratic rule is certainly not infallible and should never go unchallenged. On this fallibilist interpretation, democratic power is always in need of rational argument and permanently subject to critical discussion.

4. CONCEPTIONS OF SOCIAL MORALITY AND MORAL CONSERVATISM

Until now, I used the term "legal moralism" to stand for *non-utilitarian* legal moralism. But, of course, all utilitarians are also legal moralists in the *thin* sense that they legally enforce those parts of a positive morality which

[18] See STEPHEN, *Liberty, Equality, Fraternity*, 159: "To be able to punish, a moral majority must be overwhelming"; and Devlin, "Morals and the Criminal Law," 16–17: "Nothing should be punished by the law that does not lie beyond the limits of tolerance.… Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law,… if they … are not present the feelings of society cannot be weighty enough to deprive the individual of freedom of choice."

[19] DEVLIN, "Morals and the Criminal Law," 17.

need protection by the no-harm principle. In addition, utilitarians do not need to stay morally indifferent with regard to *harmless* aspects of a given morality. As long as no sanctioning coercion and social pressure but rational methods which "leave the individual 'the final judge'" (*LLM*, 77) are used, a follower of Mill can after critical examination justifiably adopt a harmless "existent rule of a social morality, whatever its content" into the moral family he or she cares for. Furthermore, Hart extends, as indicated in section 2, the no-harm principle to include paternalism and psychological harm, both of which come close to elements congenial to the conservative tradition and sensibility.

Still, these qualifications and adaptations of the no-harm principle cannot possibly accommodate Devlin's and Stephen's, what I call, "*thick* legal moralism". So, the issue between the thick and thin moral legalists remains real but, for clarity's sake, should better be reframed as that of "the *scope* of justifiable legal enforcement". Wide or narrow scope as to this issue is the outcome of, on the one hand, different moral principles—conservative or utilitarian—and, on the other, different conceptions of social morality. One can differ about "the *extension* of a social morality" in that one can be a maximalist or minimalist regarding its extension. In the remainder of this paper, I want to further discuss how the issue of scope depends on these two factors: the critical, moral principle applied and the specific conception of social morality in play. For comparison and contrast, I bring in some other views on the status of social morality in the Oxford philosophy of the 1950s–1960s. This conspectus will eventually lead to the upshot that a *qualified* moral conservatism is in the end unavoidable, at least, on the condition that we take our very conception of morality seriously.

As mentioned in section 3, Devlin assumes a maximal conception of social morality as *a single seamless web*, of which private sexual morality is as much part as public decency. In combination with conservative principles, this maximal conception results in a wide scope for the legal enforcement of morality. Contrariwise, Hart presupposes a minimal conception of social morality limited to *universal values*: "since all social moralities, whatever else they may contain, make provision in some degree for such universal values as individual freedom, safety of life, and protection from deliberately inflicted harm, there will always be much in social morality which is worth preserving *even at the cost in terms of these same values which legal enforcement involves*" (*LLM*, 70; my italics). Limiting the extension of a social morality by means of the utilitarian principles of liberty and no-harm results

in a narrow scope for the legal enforcement of morality. As to this minimal conception of social morality, Hart even accepts the disintegration thesis of the thick moral legalist that legal enforcement is necessary for the existence of society, not so much supported by an empirical generalization or a conceptual claim as by a *transcendental* argument: "society could not exist without morality which mirrored and supplemented the law's proscription of conduct injurious to others [such as killing, stealing, and dishonesty]" (*LLM*, 51).[20]

Hart participated in the so-called "Saturday Morning Meetings" organized by John Langshaw Austin during the 1950s in Oxford.[21] Other members of this informal group were, among others, Peter Frederick Strawson, James Opie Urmson and Stuart Hampshire. It is instructive to compare and contrast Hart's and Devlin's conceptions of social morality with theirs.

Like Hart, Strawson accepts the basic premise of the thick moral legalist in connection to his minimal conception of social morality: "Now it is a condition of the existence of any form of social organization, of any human community, that certain expectations of behaviour on the part of its members should be pretty regularly fulfilled: that some duties, one might say, should be performed, some obligations acknowledged, some rules observed.… This is a minimal interpretation of morality."[22] Again, like Hart, Strawson only includes "universal values" in the minimal moral package: "the recognition of certain general virtues and obligations will be a logically or humanly necessary feature of almost any conceivable moral system: these will include the abstract virtue of justice, some form of obligation to mutual aid and to mutual abstention from injury and, in some form and in some degree, the virtue of honesty."[23] So, also Strawson transcendentally argues for the disintegration thesis as restricted to the minimal extension of social morality.

[20] See also HART, "Social Solidarity and the Enforcement of Morality," 9: "The common morality which is essential to society, and which is to be preserved by legal enforcement, is that part of its social morality which contains only those restraints and prohibitions that are essential to the existence of any society of human beings whatever. Hobbes and Hume have supplied us with general characterisations of this moral minimum essential for social life: they include rules restraining the free use of violence and minimal forms of rules regarding honesty, promise keeping, fair dealing, and property."

[21] For an account of these meetings, see Geoffrey James WARNOCK, "Saturday Mornings," in *Essays on J. L. Austin*, by Isayah Berlin et al. (Oxford: Clarendon Press, 1973), 31–45.

[22] Peter F. STRAWSON, "Social Morality and Individual Ideal," *Philosophy* 36, no. 136 (1961): 5. For an elaboration of this conception, see Benjamin DE MESEL and Stefaan E. CUYPERS, "Strawson's Account of Morality and its Implications for Central Themes in 'Freedom and Resentment'," *The Philosophical Quarterly* 74, no. 2 (2024): 504–24.

[23] STRAWSON, "Social Morality and Individual Ideal," 12.

Urmson, by contrast, does not rely on the social disintegration thesis to identify the minimal conception of morality. Instead, he directly employs utilitarian, consequentialist principles to determine a minimal extension of a social morality: "morality … is something that should serve *human needs*,… a moral code should actually help to contribute to *human well-being*."[24] It is noteworthy that, like Devlin, he uses the conservative language of intolerance to set the minimal requirements: "we may regard the imperatives of duty [truth-telling; promise-keeping; abstinence from murder, theft, and violence] as prohibiting behavior that is intolerable if men are to live together in society and demanding the minimum of cooperation toward the same end."[25] So, Hart, Strawson and Urmson concur, for more or less the same reasons and principles, that the extension of a social morality is only minimal and that such a minimal conception excludes killing, injury, violence, stealing, and includes honesty, truth-telling, promise-keeping, mutual aid, justice. Accordingly, although Strawson and Urmson do not explicitly say so,[26] it is plausible to assume that all three agree on the narrow scope of justifiable legal enforcement.

Conversely, Hampshire takes on a maximal conception of social morality: "A morality is, at the very least, the regulation of the taking of life and the regulation of sexual relations, and it also includes rules of distributive and corrective justice: family duties: almost always duties of friendship: also rights and duties in respect of money and property."[27] This comes close to Devlin's conception of social morality as a single seamless web, in which a minimal core is interwoven with requirements about sexual, family and friendship relations, as well as "the celebration of the dead".[28] Although Hampshire does not speak about legal enforcement, he claims that not only the minimal core but also these *special* relations are governed by "absolute moral prohibitions".[29] It is plausible to assume that if Hampshire's absolutist moral view were transposed to a legal key, then he would opt for the wide scope of legal enforcement or, at least, for legal moralism to a considerable

[24] James O. URMSON, "Saints and Heroes," in *Essays in Moral Philosophy*, ed. Abraham Irving Melden (Seattle: University of Washington Press, 1958), 210–11 (my italics).

[25] URMSON, 214–15 [208].

[26] See, for some implicit textual support, Strawson, "Social Morality and Individual Ideal," 17: "I doubt if the nature of morality can be properly understood without some consideration of its relationship to law.… the spheres of [minimal] morality and law are largely overlapping,… their demands often coincide."

[27] Stuart HAMPSHIRE, *Morality and Conflict* (Oxford: Basil Blackwell, 1983), 87.

[28] HAMPSHIRE, 95.

[29] HAMPSHIRE, 92.

degree. So, if this transposition is acceptable, there emerges a striking resemblance between him and the thick legal moralist. What are, or would be, the justificatory reasons of Hampshire for his moral conservatism? Apart from sophisticated versions of both the historical-evolutionary argument and the socio-psychological argument of the thick legal moralists, reviewed in section 3, he also appeals to the very conception of morality itself, which expresses "a particular ideal of humanity in an ideal way of life".[30] I end this paper with briefly exemplifying this idea of the autonomy of morality in the case of sexual morality.

Contemporary western society is sexually pluralistic and tolerant, of which Gay Pride Parades are expressive, and to which, among others, the European LGBTIQ Equality Strategy 2020–2025 testifies. Yet, I agree with Jeffrie Murphy when he writes: "sex with a corpse or animal or child—to give three examples—would not be included within the scope of the specially protected liberty interest involved in homosexual relations."[31] We can be totally opposed to criminal laws against private sexual behaviour between consenting adults, but still find (private) necrophilia and bestiality morally shocking and deem these sexual activities subject to criminalization. Although no harm seems to be done when engaged in these practices, criminal laws against them are called for, yet not necessarily with harsh punishment. Hence, moral conservatism certainly might be qualified but only up to a certain point, and not further. Why is that so?

One might, no doubt, start arguing, give and weigh reasons for and against, appealing to, for example, "the [psychological] distress occasioned by *the bare thought* that others [as the case may be, necrophiles] are offending in private against morality" (*LLM*, 46; my italics) or a concern "with the *suffering*, albeit only of animals" (*LLM*, 34), to bring the legal sanctioning of these practices in line with a sophisticatedly revised and extended no-harm principle. Yet, against the backdrop of Hampshire's moral conservatism, this computational rationalism totally misses the moral point: necrophilia and bestiality are *absolute taboos*. Not understanding that these practices are categorically excluded by absolute moral prohibitions is dramatically losing

[30] HAMPSHIRE, 98.

[31] MURPHY, "Failed Refutation," 429. I do not further mention the complex case of pedophilia, on which I fully agree with Igor Primoratz's verdict that "[valid] arguments against it … provide sufficient ground for both its moral condemnation and legal prohibition" in his "Pedophilia," *Public Affairs Quarterly* 13, no. 1 (1999): 108. I also leave out the ambiguous case of sadomasochistic practices, whether or not they are an exception to the rule, discussed in section 2, that consent to harm—in this case, for obtaining sexual gratification—is not a defence.

contact with our very notion of morality. Morality as the expression of a distinctive human way of life *just consists in*, among other observances, respecting the sacredness of the dead and their bodies, as well as complying with the fundamental distinction between humans as persons and animals. Consequently, "certain fairly specific types of sexual promiscuity … are … absolutely … forbidden as being intrinsically disgraceful and unworthy, and as being, just for these reasons, ruled out: ruled out because they would be disgusting, or disgraceful, or shameful, or brutal, or inhuman, or base, or an outrage."[32] Criminal law formally affirms this basic moral sensibility by ruling out through legal enforcement aberrations that are not recognizably human anymore. Not all harmless private sex of whatever nature can be tolerated. As such, this enforced taboo-morality does not stand in need for additional rationalization or justification. It will remain opaque, to be sure, but it is the bedrock of our moral sensibility and comprehension. Since the absolute moral prohibitions and observances play an autonomous role in our moral life in our society, they do not have to fulfil any other additional social, psychological or biological function. Our distinctive human way of life is, accordingly, not instrumentally regulated; instead, it is typically expressed symbolically, for example in funerals: "ceremonies, rituals, manners and observances … imaginatively express moral attitudes and prohibitions".[33] Not acknowledging "this inexplicit morality of ritual and manners"[34] would be fatal for our very conception of morality.[35]

REFERENCES

BURMS, Arnold, Stefaan E. CUYPERS, and Benjamin DE MESEL. "P. F. Strawson on Punishment and the Hypothesis of Symbolic Retribution." *Philosophy* 99, no. 2 (2024): 165–90.

DE MESEL, Benjamin, and Stefaan E. CUYPERS. "Strawson's Account of Morality and its Implications for Central Themes in 'Freedom and Resentment'." *The Philosophical Quarterly* 74, no. 2 (2024): 504–24. https://doi.org/10.1093/pq/pqad062.

DEVLIN, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press, 1965.

[32] HAMPSHIRE, "Morality and Pessimism," 89. For the contrast between taboo-morality and utilitarian or instrumental morality, also see Alan RYAN, "Two Kinds of Morality—Causalism or Taboo," *The Hastings Center Report* 5, no. 5 (1975): 5–7.

[33] HAMPSHIRE, "Morality and Pessimism," 97.

[34] HAMPSHIRE, 97.

[35] I am very grateful to Przemysław Gut, Marcin Iwanicki, Piotr Biłgorajski, Patrycja Mikulska, and Olga Dzwonowska for the discussions held during our Lublin seminar in May–June 2023 at the KU Lublin on the Hart-Devlin debate, on the basis of which this paper is written.

DURKHEIM, Émile. *De la division du travail social.* 1893. Paris: Presses universitaires de France, 1991.

DWORKIN, Ronald. "Lord Devlin and the Enforcement of Morals." *The Yale Law Journal* 75, no. 6 (1966): 986–1005.

FEINBERG, Joel. *Harmless Wrongdoing. The Moral Limits of the Criminal Law. Volume Four*. Oxford: Oxford University Press, 1988.

HAMPSHIRE, Stuart. *Morality and Conflict*. Oxford: Basil Blackwell, 1983.

HART, Herbert L. A. "Immorality and Treason." *The Listener*, July 30, 1959, 162–63.

HART, Herbert L. A. *The Concept of Law.* Oxford: Clarendon Press, 1961. 3rd ed., with a new introduction by Leslie Green. Oxford: Oxford University Press, 2012.

HART, Herbert L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963.

HART, Herbert L. A. "Social Solidarity and the Enforcement of Morality." *University of Chicago Law Review* 35, no. 1 (1967): 1–13.

HART, Herbert L. A. "Prolegomenon to the Principles of Punishment" (1959). In *Punishment and Responsibility*, 2nd ed., with an introduction by John Gardner, 1–27. Oxford: Oxford University Press, 2008.

LACEY, Nicola. "Patrick Devlin, The Enforcement of Morals" (1965). In *Leading Works in Criminal Law*, edited by Chloë Kennedy and Lindsay Farmer, 82–134. London: Routledge, 2024.

MILL, John Stuart. "On Liberty" (1959). In *On Liberty and Other Essays*, edited by John Gray, 1–128. Oxford: Oxford University Press, 1998.

MURPHY, Jeffrie G. "A Failed Refutation and an Insufficiently Developed Insight in Hart's *Law, Liberty, and Morality*." *Criminal Law and Philosophy* 7, no. 7 (2013): 419–34.

PRIMORATZ, Igor. "Pedophilia." *Public Affairs Quarterly* 13, no. 1 (1999): 99–108.

RYAN, Alan. "Two Kinds of Morality—Causalism or Taboo." *The Hastings Center Report* 5, no. 5 (1975): 5–7.

SCRUTON, Roger, ed. *Conservative Texts. An Anthology*. London: Macmillan, 1991.

STANTON-IFE, John. "The Limits of Law." In *The Stanford Encyclopedia of Philosophy (Spring Edition),* edited by Edward N. Zalta. Stanford: Stanford University, 2022. https://plato.stanford.edu/archives/spr2022/entries/law-limits.

STEPHEN, James Fitzjames. *Liberty, Equality, Fraternity*. New York: Holt & Williams, 1873.

STRAWSON, Peter F. "Social Morality and Individual Ideals." *Philosophy* 36, no. 136 (1961): 1–17.

URMSON, James Opie. "Saints and Heroes." In *Essays in Moral Philosophy*, edited by Abraham Irving Melden, 198–216. Seattle: University of Washington Press, 1958.

WALL, Steven. *Enforcing Morality*. Cambridge: Cambridge University Press, 2023.

WARNOCK, Geoffrey James. "Saturday Mornings." In *Essays on J. L. Austin*, by Isayah Berlin et al., 31–45. Oxford: Clarendon Press, 1973.

H. L. A. HART ON LEGAL MORALISM AND SOCIAL MORALITY

Summary

After explaining legal moralism, this paper introduces the so-called "Hart-Devlin debate" on sexual morality in the philosophy of law. First, it reviews Hart's revisions of Mill's no-harm principle to cope with some counterexamples that favor the legal enforcement of morality even in the presence of consent or the absence of physical harm. Then, the paper examines the main arguments for both the disintegration and conservative theses of the legal moralists Devlin and Stephen, together with Hart's replies to them. Furthermore, it relates the Hart-Devlin debate, reframed as a controversy between "thin" and "thick" legal moralists, to different conceptions of social morality Oxford philosophy of the 1950s and 1960s. Finally, the paper indicates why a qualified moral conservatism, also with regard to sexual morality, is warranted if the very notion of morality is given due consideration.

Keywords: sexual morality; Hart-Devlin debate; legal moralism; no-harm principle; social morality; moral conservatism

MORALIZM PRAWNY I MORALNOŚĆ SPOŁECZNA W UJĘCIU H. L. A. HARTA

Streszczenie

Po wyjaśnieniu moralizmu prawnego niniejszy artykuł przedstawia tzw. „debatę Hart-Devlin" na temat moralności seksualnej w filozofii prawa. W części pierwszej zostają omówione modyfikacje Millowskiej zasady nieszkodzenia dokonane przez Harta w celu uniknięcia niektórych kontrprzykładów, które przemawiają za prawnym egzekwowaniem moralności nawet w wypadku zgody lub przy braku fizycznej szkody. Następnie artykuł analizuje główne argumenty z rozpadu [społeczeństwa], a także konserwatywne tezy moralistów prawnych Devlina i Stephena, wraz z odpowiedziami, jakich udzielił na nie Hart. Kolejna część artykułu wiąże debatę Hart-Devlin, przeformułowaną jako spór między „minimalnymi" a „maksymalnymi" moralistami prawnymi, z różnymi koncepcjami moralności społecznej w filozofii oksfordzkiej z lat 50. i 60. XX w. Na koniec artykuł wskazuje, dlaczego ograniczony konserwatyzm moralny, również w odniesieniu do moralności seksualnej jest całkowicie uzasadniony, o ile należycie rozważy się samo pojęcie moralności.

Słowa kluczowe: moralność seksualna; debata Hart-Devlin; moralizm prawny; zasada nieszkodzenia; moralność społeczna; konserwatyzm moralny