

Application of the Hart-Devlin debate to the ideas and arguments raised in ‘Legalising assisted dying would be a failure of collective human memory and imagination’

Jessica Hurwood, Northumbria University

The Hart-Devlin debate centres upon the strongly contested issue of whether or not the law should enforce morality. The debate between these two figures was sparked by the Wolfenden Report of 1957, which concluded that due to the importance of individual freedom, ‘there must remain a realm of private morality which is, in brief and crude terms, not the law’s business’.¹ The progression of our society into a more liberal entity has led to the argument that Hart, widely regarded as the twentieth century’s greatest British legal philosopher,² has ultimately superseded Devlin in this debate. Therefore, this essay shall re-examine each side of the debate in light of the changing legal landscape, specifically with reference to the public opinion on legalising euthanasia. The examination will seek to determine whether Hart’s liberal approach has in fact prevailed, or whether society is more inclined to accept the more conservative approach advocated by Devlin.

The article which is examined in this essay puts forward the arguments for and against legalising euthanasia, with the author evidently being opposed to such a measure. In order to apply Devlin and Hart’s theories to this issue, a prudent starting point would be to consider their respective views on morality. Devlin believed that a recognised morality was fundamental for society’s existence.³ This emphasis on morality links Devlin to the naturalist tradition which dictates that laws must have certain requirements, deemed the ‘inner morality of law’, in order to command fidelity to them.⁴ Devlin suggested that even immoralities which prima facie cause no harm, do in fact cause harm in the sense that the moral offender may weaken the moral bonds that act as society’s cement. Furthermore, he argued that this effect would be exacerbated if the law did not intervene in such behaviour,

¹ Wolfenden Committee, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) para 61.

² Gregory Bassham, ‘Legislating Morality: Scoring the Hart-Devlin Debate after Fifty Years’ (2012) 25(2) *Ratio Juris* 117, 121.

³ Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 11.

⁴ Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Hart’ (1958) 71 *HLR* 630, 645.

because citizens may perceive this to be the law condoning vice. A useful analogy is to consider society's moral code like a house of cards, so removing one or two of these vital cards would result in the whole structure collapsing.⁵ Devlin proposed this as a justification for the enforcement of morality through the law, 'society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'.⁶ Likewise, Hart acknowledged that some 'universal values' must exist if society is to survive, e.g. there must be laws restricting violence, theft and deception.⁷

However aside from these universal values, referred to as the 'minimum content of natural law',⁸ Hart did not believe that society must have a consensus on every aspect of morality. Indeed, Hart recognised that pluralistic, multi-cultural societies may contain a variety of moral views.⁹ In addition, Hart suggests that even if society does have a shared morality, the existence of such society is not dependent on protecting these moral values. Although Devlin states 'history shows that the loosening of moral bonds is often the first stage of disintegration'¹⁰ he offers no further elaboration on this point. Therefore, Hart critiques Devlin for proffering no empirical evidence to support his assumption that 'a change in [society's] morality is tantamount to the destruction of a society'.¹¹ In fact, Hart suggests that there is more evidence to the contrary. He argues that morality is not a single seamless web and therefore we can reject part of it, yet adhere just as strongly to the rest.¹² For example, within the European countries which have decriminalised homosexual conduct, there has been no evidence of any major social or moral disintegration, which Devlin prophesied, despite strong public disapproval of such conduct.¹³ Therefore, the crux of the disagreement turns on whether or not one believes in social contamination from laxness in one kind of standard, to laxness in others.¹⁴

⁵ Bassham (n 2) 119.

⁶ Devlin (n 3) 11.

⁷ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 346.

⁸ James William Harris, *Legal Philosophies* (2nd edn, Butterworths 1997) 140.

⁹ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, OUP 2012) 36.

¹⁰ Devlin (n 3) 13.

¹¹ HLA Hart, *Law Liberty and Morality* (Stanford University Press 1963) 51.

¹² *Ibid.*

¹³ *Ibid* 52. However note, some would argue that the lack of homogeneity in the UK is evidence of such social or moral disintegration.

¹⁴ Harris (n 8) 141.

Devlin's views on morality resound within the article, as the author warns of the 'slippery slope' which may result from legalising euthanasia. She refers to The Netherlands as an illustration of this point, where the legalisation of euthanasia has led to this measure becoming available to children.¹⁵ This in turn could address Hart's criticism regarding the lack of evidence in support of Devlin's assumption. On the contrary, it may be argued that this only shows the effect which legalising euthanasia has in terms of the broadening of euthanasia itself, it does not suggest that allowing euthanasia will erode other areas of established morality within society. Therefore, it does not address Hart's criticisms of the aspect of Devlin's theory which Hart termed 'the disintegration thesis'.¹⁶ Using the example outlined above, if decriminalising homosexual conduct has not led to the collapse of society, as Devlin feared, what basis is there for arguing that legalising euthanasia would produce this effect?

In any event, the disagreement is relieved to a certain extent by Devlin's response to Hart, 'I do not assert that any deviation from a society's shared morality threatens its existence...I assert that [it is] capable...of threatening the existence of society so that neither can be put beyond the law.'¹⁷ This qualifies Devlin's argument, limiting it to the contention that we cannot outright ban the law from enforcing public morality because the challenge to established morality may be so profound as to threaten the very existence of society.¹⁸ This re-formulation of Devlin's argument can be viewed as an acceptance by Devlin that morality can change over time and hence not every deviation from morality is a challenge to society. Therefore, the real area for dispute turns upon when exactly the law should intervene; how profound does the challenge to morality have to be?

¹⁵ Margaret Somerville, 'Legalising assisted dying would be a failure of collective human memory and imagination' *The Guardian* (London, 20 September 2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 27 March 2018.

¹⁶ Hamish Stewart, 'Legality and Morality in H.L.A Hart's Theory of Criminal Law' (1999) 52 *SMU Law Review* 201,215. 'Disintegration thesis' cited in HLA Hart, *Law Liberty and Morality* (Stanford University Press 1963) 50.

¹⁷ Devlin (n 3) 13.

¹⁸ Ronald Dworkin, *Taking Rights Seriously* (New impression with a reply to critics, Duckworth 2004) 244.

In order to formulate an answer to this question, it is fundamental to consider the views expressed by Mill, which predated both Hart and Devlin's theories. At the core of Mill's theory is the harm principle he devised. This proposed that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant'.¹⁹ Mill came to be viewed as the apostle of the 'permissive society'²⁰ and his views can be seen to influence the Wolfenden report, which declared that living off the earnings of prostitutes was to remain an offence, since this involves exploitation, which the harm principle warrants punishing.²¹ In terms of this exploitation, Mill's harm principle can thus be used to justify the argument against legalising euthanasia. This is because the article forebodes that 'early inheritance syndrome', (whereby a person uses a power of attorney to access an elderly person's financial assets for their own benefit), would morph into an 'early death syndrome' if euthanasia were to be legalised.²² Devlin and Hart's views on the harm principle shall be discussed in turn, in order to determine their opinions on when the law should intervene and whether legalising euthanasia would come within the scope for intervention.

Devlin fundamentally rejected the harm principle, he did not believe that an act must cause harm to some individual or group of persons before the law intervenes. His basic premise was that the criminal law is not just for the protection of individuals, but also for the protection of society.²³ As a result, he thinks that the law should intervene when conduct arouses widespread 'intolerance indignation and disgust'.²⁴ He argued that this should be judged by reference to the ordinary man, i.e. the 'man in the jury box'. On the one hand, this can be perceived as an adequate assessment because the jury does not give a snap judgement, its verdict should be based on argument, deliberation and guidance received from an experienced judge.²⁵ Since Devlin apparently conceded to the view that society's morality can change over time, it is arguable that the legalisation of euthanasia would be permitted under

¹⁹ John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1974) 68-69.

²⁰ Stephen Mavroghenis, 'Mill's Concept of Harm Redefined' (1994) *UCL Jurisprudence Review* 155, 157.

²¹ Harris (n 8) 132.

²² Euthanasia article (n 15).

²³ Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *The Journal of Ethics* 21, 22.

²⁴ Devlin (n 3) 17.

²⁵ Freeman (n 7) 344.

this assessment. This is because, if society is becoming more accepting of euthanasia, legalising it would be unlikely to invoke the 'intolerance, indignation and disgust' required for the law to intervene and prevent such action. This is particularly the case with passive euthanasia, involving the withdrawal of life-preserving treatment, as opposed to active euthanasia which requires positive steps to terminate life.²⁶

On the other hand, flaws can be exposed in the measure of society's morality proposed by Devlin. For example, Dworkin exclaims 'what is shocking and wrong is not [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality'.²⁷ Dworkin argues that we must distinguish opinions which are supported by moral reasons, from opinions which are based on prejudice, aversion or rationalisations (implausible propositions of fact). He argues that a legislator may take account of the former but must ignore the latter.²⁸ Devlin himself stated that the ordinary man, or man in the jury box, whose opinion we must enforce 'is not expected to reason about anything and his judgement may be largely a matter of feeling'.²⁹ This is the complete antithesis to the above assertion that the man in the jury box would base his assessment on argument, deliberation and guidance. For Devlin, the reasons for moral condemnation are irrelevant, provided such condemnation exists, the act ought to be forbidden by law.³⁰ Thus, there is a concern that allowing the ordinary man to be the ultimate arbitrator on issues of morality, without any qualification, has a frightening evocation to the Nazi regime.³¹ The article reinforces this point, by observing that the justification for the euthanasia program for people with 'lives not worth living' in the Holocaust, is 'eerily similar to present justifications for euthanasia'.³² Therefore, whilst Devlin's 'man in the jury box' may be a valid starting point by which to determine issues of morality, in order to guarantee that these decisions are reached systematically and not arbitrarily, it seems that such decisions must be subject to rational, critical appraisal.

²⁶ Euthanasia article (n 15).

²⁷ Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 Yale LJ 986, 1001.

²⁸ Harris (n 8) 139.

²⁹ Devlin (n 3) 15.

³⁰ Robert George, 'Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate' (1990) 35 American Journal of Jurisprudence 14, 19.

³¹ Graham Hughes, 'Morals and the Criminal Law' (1962) 71 Yale LJ 662, 675-6.

³² Euthanasia article (n 15).

Nonetheless, this concern is alleviated to some extent by certain principles which, according to Devlin, must be borne in mind when deciding whether legal intervention is necessary. These principles are: that there must be toleration of 'the maximum individual freedom that is consistent with the integrity of society'; the legislators must keep in mind that the limits of tolerance shift; privacy should be respected as far as possible and the law is concerned with a minimum, not a maximum, standard of behaviour.³³ Thus, these principles go some way to ensuring that the boundaries of an individual's liberty are not unreasonably restricted. They ensure that public disapproval is only a necessary condition for legal enforcement, not a sufficient one, since such disapproval must also be aligned with these principles.³⁴ Additionally, the notion of the 'man in the jury box' deciding issues of morality is not entirely novel because the courts have recognised an offence of conspiring to corrupt public morals since 1962,³⁵ which gives an important role to the moral opinion of juries. Similarly, the courts have held that the concept of 'dishonesty' employed by the Theft Act 1968 is not a term defined by the law, but is rather a concept which the jury must determine by reference to their own moral standards.³⁶

In regard to Hart, he extends Mill's harm principle to also encompass paternalism. This allows the law to intervene to prevent people from doing themselves physical harm and Hart favours this paternalist approach to that of legal moralism, the view that general agreement among members of society that conduct is immoral justifies legal prohibition.³⁷ In respect of the necessary 'harm', Hart seeks to incorporate offence caused by some public act within the reach of the law.³⁸ He makes a significant distinction between offence caused by some public display and offence caused by knowledge that certain things are done behind closed doors. He claims that the law cannot intervene in the latter instance because to do so 'would be tantamount to punishing them simply because others object to what they do; and the only liberty which could coexist with this...is liberty to do those things to which no-one seriously

³³ Devlin (n 3) 16-19.

³⁴ Bassham (n 2) 124.

³⁵ *Shaw v DPP* [1962] AC 220; *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435.

³⁶ *R v Feely* [1973] QB 530; *R v Ghosh* [1982] QB 1053.

³⁷ Harris (n 8) 135.

³⁸ Stephen Mavroghenis, 'Mill's Concept of Harm Redefined' (1994) *UCL Jurisprudence Review* 155, 160.

objects'.³⁹ This distinction between offence-through knowledge and offence-through witnessing was endorsed by the Williams Report of 1979.⁴⁰ Nevertheless, for others the harm principle goes too far. For example, Feinberg cites the crimes of consensual sodomy and incest which, in the USA, have attracted sentences ranging from twenty years' imprisonment to capital punishment. Since these are victimless crimes, he states that the penalty is presumably based on the assumed offensiveness of the behaviour, yet Feinberg maintains that causing offence is less serious than harming someone and therefore the sanctions should be less onerous.⁴¹ Consequently, from this perspective it would be necessary to have a distinction between how the law intervenes for acts which cause direct harm to someone, and acts which indirectly harm someone through causing offence.

The distinction between the public and private sphere, advocated by Mill and Hart, has been questioned in terms of its viability. Stephen argued that the distinction was fallacious and nebulous and could not be maintained.⁴² Similarly, Natrass claimed that if we follow Hart's reasoning, we reach the ludicrous conclusion '...that it is morally preferable...for a man to beat his wife at home rather than in the street'.⁴³ However, this assertion is flawed in that it concerns the infliction of harm on another individual, which therefore comes within the harm principle regardless of whether it was committed in public or private. Despite this, there is still a valid critique of the public and private sphere distinction, in the form of John Donne's 'no man is an island' proposition. This claims that any activity has an impact on someone else e.g. if one injures themselves through taking drugs, they cause harm to society in the form of the cost on the medical services.⁴⁴ Therefore, private acts will always have repercussions on society, to one extent or another and this denies the plausibility of the argument that there can be distinct categories of activities committed in the public sphere, and those committed in private.

³⁹ Hart (n 11) 47.

⁴⁰ Williams Committee, *Report of the Committee on Obsenity and Film Censorship* (Cmnd 7772, 1979).

⁴¹ Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (OUP 1984) and *Offense to Others: The Moral Limits of the Criminal Law* (OUP 1985).

⁴² James F Stephen, *Liberty, Equality, Fraternity*, (Reprinted edition, Cambridge University Press, 1967).

⁴³ Mark Natrass, 'Devlin, Hart and the Proper Limits of Legal Coercision' (1993) 5 *Utilitas* 91, 101.

⁴⁴ Harris (n 8) 135-136.

Paternalists like Hart have traditionally opposed euthanasia, presumably on the grounds that nothing could be more harmful to you than dying.⁴⁵ Hart's concern with allowing euthanasia is not that society may view this as immoral, but rather that people may harm themselves if they make the wrong decision, e.g. consent may be given without adequate reflection or in circumstances where their judgement was clouded.⁴⁶ However, this argument may be countered by the idea of subjective paternalism. This permits the law to intervene in preventing euthanasia, if there is a reasonable belief that the person denied this right will ultimately be pleased that such action was not taken. This would therefore prevent euthanasia's scope from extending to those without terminal, debilitating illnesses, who may, for example, have recently experienced teenage heartbreak and believe that life can hold nothing for them.⁴⁷ Nevertheless, this idea has been criticised 'not one genuine justification for providing autonomy for some and not for others has or can be made...If assisted suicide was really a right, it should surely be accorded to all.'⁴⁸ Similarly, it has been submitted that allowing doctors to determine the validity of euthanasia requests in this way, results in the individual's supposed autonomy being made redundant.⁴⁹ Thus, if the argument against subjective paternalism were to be espoused, it would be extremely difficult to argue that Hart would be in favour of legalising euthanasia in this unfettered form.

Alternatively, Hart's argument that no-one is bound to admit that the law may punish forms of immorality which involve no suffering, may be seen to provide a justification for the legalisation of euthanasia.⁵⁰ This is because if we interpret this to be stating that the criminal law should be used to prevent suffering, legalising euthanasia is undoubtedly justified.⁵¹ Therefore, the contradictory views which Hart puts forward in relation to euthanasia means that concluding on what side of the debate he would ultimately fall, is inevitably plagued with ambiguities. Despite this, it would seem that on balance, Hart would be more inclined to accept legalisation. This is because the potential harm of allowing euthanasia to those who

⁴⁵ Christine Pierce, 'Hart on Paternalism' (1975) 35 OUP 205, 206.

⁴⁶ Hart (n 11) 32-33.

⁴⁷ Ronald Dworkin, 'Euthanasia, Morality, and Law' (1998) 31 Loyola of Los Angeles Law Review 1147, 1151-1152.

⁴⁸ Jonathon Herring, 'Publication Review: Assisted Suicide, The Liberal Humanist Case Against Liberalization' (2014) International Journal of Law in Context, 273 citing page 57 of the book.

⁴⁹ Hallvard Lillehammer, 'Voluntary Euthanasia and the Logical Slippery Slope Argument' (2002) 61 Cambridge Law Journal 545, 546.

⁵⁰ Hart (n 11) 34.

⁵¹ Pierce (n 45) 206.

desire it, is outweighed by the enduring pain and suffering which individuals would be subjected to if legalisation was not permitted. Additionally, the caveat to Mill's harm principle enables the law to intervene to prevent children causing harm to themselves.⁵² Arguably, this addresses some of the concerns of those opposed to legalising euthanasia, as it would prevent the events cited in The Netherlands, namely the availability of euthanasia to children, from being lawful in our society. This, coupled with subjective paternalism, would limit the ambit of euthanasia, thus addressing Hart's concerns that people may request euthanasia momentarily, or without due reflection, when they do not truly want it.

Another aspect of this debate which causes disagreement amongst Hart and Devlin relates to the means of enforcement. Devlin believes that coercion should be used to enforce morality, yet Hart claims that there is 'little evidence to support the idea that morality is best taught by fear of legal punishment'.⁵³ Thus, Hart argues that if the threat of coercion does not compel people to behave morally, its justification can only be based upon the retributive theory of punishment.⁵⁴ However, this theory of punishment is only valid where the crime has harmed others and thus, in the case of immoral victimless acts committed in private, it cannot be logically argued that punishment is still called for.⁵⁵ This reflects the arguments cited by Feinberg, in relation to the crimes of consensual sodomy and incest. Additionally, Hart contends that enforcing morality by way of legal sanctions has the undesirable effect of curtailing the development of society's moral code.⁵⁶ Hart considers that if established morality is too stringently enforced, the opportunities to challenge an incorrect view of the majority would be removed and this could have detrimental effects, e.g. imagine if the monumental harms inflicted on Jews and other minorities by the Nazi regime were never challenged.⁵⁷ For Hart, enforcing morality through coercion is wrong in the sense that the price in terms of human misery and loss of freedom is too high.⁵⁸ This is clearly demonstrated in the case of euthanasia, because if this is not legalised, those individuals will be forced to

⁵² Mill (n 19) 68-69.

⁵³ Hart (n 11) 58.

⁵⁴ JG Riddall, *Jurisprudence* (2nd edn, OUP 1999) 310.

⁵⁵ Hart (n 11) 60.

⁵⁶ *Ibid* pg 69-71.

⁵⁷ Thomas Peterson, 'New Legal Moralism: Some Strengths and Challenges' (2010) 4 *Criminal Law and Philosophy* 215, 218.

⁵⁸ Hart (n 11) 83.

experience the enduring misery of their physical condition and would arguably feel robbed of their ability to determine their own life.

Consequently, Hart believes that the more appropriate means of ensuring that members of society adhere to its moral code, is through discussion, advice and argument.⁵⁹ Hart's reluctance to enforce morality by legal coercion demonstrates his ties to the positivist approach. Positivism states that the individual must choose whether to disobey immoral laws and suffer the consequences and therefore under this approach, it is more likely that legal intervention on issues of morality will be restricted.⁶⁰ However, an alternative understanding is that the typical law-abiding citizen chooses to obey the law not to avoid its legal sanctions, but because they consider it the right thing to do. In this case, legal intervention for issues of morality may be regarded as necessary, to ensure the preferred course of action in relation to a particular matter is taken, rather than being viewed as a violation of individuals' autonomy.⁶¹ However, even if this was the case, it is still unlikely that such a justification could be used against legalising euthanasia. This is because the majority opinion, particularly after consideration of concepts such as 'subjective paternalism', would be unlikely to believe that the law's intervention in order to prevent such a measure, would be the preferred course of action.

In conclusion, upon examination it is evident that the question as to whether Hart or Devlin's views would prevail in relation to legalising euthanasia is not as clear cut as it may initially appear. Although it is unlikely that such a measure would now invoke the 'widespread intolerance, indignation and disgust' required to prevent such action according to Devlin, issues still arise on the application of Hart's theory. This is because, if we take Hart to accept the legalisation of euthanasia, on the basis that preventing it would ultimately cause more harm to the individual, questions arise in relation to ascertaining an acceptable ambit of euthanasia. In other words, what conditions must be fulfilled in order for a person to be legally entitled to it. A sensible approach may be to determine society's moral views on this question and this resonates back to Devlin's 'intolerance, indignation and disgust'

⁵⁹ JG Riddall, *Jurisprudence* (2nd edn, OUP 1999) 311.

⁶⁰ H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 620.

⁶¹ Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 The Journal of Ethics 21, 45.

assessment. Thus, it has been argued that liberals such as Hart, who support limited paternalism, abandon the ground of legal intervention resting on individual complaint and once this occurs, the extension to legal moralism seems perfectly plausible.⁶² This in turn suggests that Devlin's theory has not been entirely disregarded, but rather it provides a useful tool in remedying the uncertainties which result from attempts to align Hart's theory to the arguments for legalising euthanasia. Thus, whilst Hart's liberal approach does seem to have prevailed in relation to legalising euthanasia, Devlin's theory may provide useful assistance in determining its scope.

⁶² Gerald Dworkin, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 *William and Mary Law Review* 927, 942.

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