

To what extent did J.S Mill's *Harm Principle* provide an effective basis for the conclusions reached by the Wolfenden Report and the issues it raised regarding the limits to the criminalization of 'immorality'?

The Wolfenden debate in 1957 was sparked by the question of whether the criminal law should have jurisdiction over homosexual activity behind private doors, which was, at the time, quite controversial. The legal issue was resolved through a committee chaired by Lord Wolfenden, which concluded that the role of the criminal law was:

*'...To preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide safeguards against the exploitation and corruption of others ... not to intervene in the private lives of citizens or to enforce any particular pattern of behaviour...'*¹

Although this was a relatively specific issue focused around moral and sexual behaviour, it raised several issues regarding what the criminal law should in fact control. Many suggested it should control only immoral actions, however some immoral actions remain decriminalized, such as adultery, for example. Others, such as the famous liberal J.S Mill, suggested that only actions that cause harm to others should remain criminal and therefore immoral. The debate itself was between Lord Patrick Devlin and Herbert Hart, who responded to Devlin's lecture on *The Enforcement of Morals* through his book *Law, Liberty and Morality* and began one of the most important jurisprudential debates of the 20th century. Hart used Mill's harm principle to pick apart Devlin's claim that society should have a 'common morality'² and should therefore allow the criminal law to limit anything that goes against consensus. We will return to Devlin's argument in further detail later in the essay.

The definition of a 'moral' person

Before we focus on the moral and legal consequences of the debate and the argument itself, we must first establish the definition of a person who shares in a moral viewpoint. Devlin stated that 'immorality, then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral.' Having said this, the 'reasonable man' was not to be confused with the 'rational man', according to Devlin, and was not expected to deliberate over an action, using a judgment mainly based upon 'feeling'. In other words, we must consider the 'moral' person or 'reasonable' person as the man in the 'Clapham omnibus'. He also considers the 'reasonable man' as being the man in the 'jury box', as he has been chosen randomly, has reached a unanimous decision, and has fully examined and deliberated an issue³. Although this is Devlin's definition, it is quite impartial and is a simple way of defining the 'average Joe' who holds his own interests and his societies best interests at heart.

Outlines of the debate

¹ Wolfenden Report, 1957

² Devlin, Patrick. *The Enforcement of Morals*. 1965.

³ *ibid*

The debate highlighted the ongoing battle between liberty and authority, present in every society, which demanded an answer. Of course, due to the diverse and complex nature of our Laws and societies, it is extremely difficult to draw a balanced line between what must remain our decision, using our liberty, and what must be coerced by the law so to uphold a working and ordered society. The opposing views of Devlin against the liberal views of Hart, inspired by Mill can be simplified in this way: Mill asks himself 'how much authority is necessary' and Devlin asks himself 'how much liberty is to be conceded'⁴. Evidently there is a fine line here, however each argument, as it branches out, wanders further and further from the other. Mill's objective was to establish a clear doctrine that could be used in any situation, 'perdurable' as he depicts it, so to shape a totally ordered society based upon the greatest good for the greatest number. Similar to the U.S constitution, it was designed to be permanent, however he wanted to avoid any amendments, and therefore saw it as 'inadequate'⁵. Where the constitution celebrated liberties in specific areas, such as freedom of speech and freedom to exercise religion, Mill wanted to gather these under one concept that governed all freedom.

*'The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant.'*⁶

Mill therefore encouraged man as an individual to pursue his own good in his own way, giving the State the power of protection and nothing more. For the next century this paragraph would be both heavily scrutinized by those wishing for the State to enforce morality and used time and time again by those who valued freedom intrinsically. This essay will test the harm principle against these countless concerns and evaluate the counter arguments so to find out whether Mill's idea of freedom should supersede the State's control over our private morality.

Mill's Pursuit of true freedom

The Wolfenden report, as Hart observed, was 'strikingly similar' to Mill's doctrine. It encouraged the pioneer of legal moralism, Devlin, to object. He highlights a clause in Mill's *On Liberty* that might bring about several problems in a society where each individual is responsible for themselves and not society as a whole: '...constructive injury which a person may cause to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear.'⁷ This concept therefore allowed any person in society, provided they were not harming anyone else, to carry on as they are. Of course Mill's idea of freedom was one of harmony between individuals, however Devlin pointed out that many might use their freedom incorrectly, creating 'debauchery' and bringing the moral standard of society down. Devlin reminds us that there will always be a 'small minority within society

⁴ Mill on Liberty in Morals – Ernst Freund Lecture on The Enforcement of Morals 1964 p. 1-2

⁵ *ibid*

⁶ Mill On Liberty 1859, ch. 1, para 9

⁷ Mill On Liberty – With The Subjection of Women 1989 p. 82

that yields only to compulsion' and gives us an example. He imagines a hundred men and women, ninety of them 'virtuous' and ten of them 'vicious.' He points out that if we were to live in Mill's world where these ten roamed under their free will, any attempt to help them would risk the 'spread of vice' and the 'collapse of society.' He states that Mill's system encourages the control of vice through 'passive resistance' and 'good works,'⁸ which simply wouldn't work.

Perhaps we shouldn't 'conform'

Of course, this society would be slightly dysfunctional without the State interfering, and, during the debate Devlin mentioned the 'disintegration of society as a whole.'⁹ However, Devlin often fails to recognize Mill's fall back in this argument, which raises the question, 'what is *true* freedom?' Here Mill states simply that *true* freedom is not the acceptance of 'half truths'. By 'half truths', he means opinions that we take from each other that are not truly our free choices, which join together in the 'unity of opinion' that we as a society share. For example, 10 people might share the opinion that drunkenness is wrong, however in Mill's society, true freedom would allow one or two people in this group to 'follow their own mode of action' and become drunk. He encourages this 'diversity of opinion', which he believes our present society lacks. Of course, allowing everyone to destroy his or her bodies isn't constructive, but the ideology Mill is using can be observed in a society 100 years after his essay was published. Fashion trends, for example, carry huge 'unity of opinion', each and every person caught up in a trend will buy whatever new item is released, usually whether they like it or not. If they do appear to like it and we take every other person out of the equation, that person will most likely no longer wear that item due to lack of united opinion. So Mill wasn't terribly concerned with the 'debauchery' that Devlin so feared, true freedom was priority, and understandably one might prioritize freedom above dealing with those 10 people who didn't conform to the system. A phrase that reminds me of this system is 'none of your business'. Providing a stranger is not 'molesting' anyone or causing harm, one should allow him to pursue his free will, no matter how 'diverse' it seems to be. It isn't our business and perhaps 'society can afford to bear' the burden of each man's free will.

The problem of *harmless wrongdoings*

Having established some of Mill's aims for a truly free society at the price of a 'burden,' it is inevitable that this doctrine will encounter several problems. This 'burden' that Mill vaguely described included each and every problem the criminal law would encounter under the harm principle. Peter Cane; in his essay *The Starting Points of the Wolfenden debate*, makes it clear that if one was to live in Mill's society we would have to 'rationalize in terms of the harm principle any and every aspect of the criminal law that appears inconsistent with it.'¹⁰ The major issue with applying the harm principle is when an act may not be harmful, however may be wrong. Gardner and Shute adapt the harm principle when faced with the problem of 'pure' rape. Many suggested that rape in its 'purest form' could be technically 'harmless' providing the

⁸ Mill on Liberty in Morals – Ernst Freund Lecture on The Enforcement of Morals 1964 p. 1-2

⁹ Patrick Devlin - *The Enforcement of Morals* 1965

¹⁰ Peter Cane – Taking Law Seriously: Starting Points of the Hart Devlin Debate 2004 p. 30-33

victim was totally unaware, drunk, for example and the rapist himself had no further involvement. Another situation with similar circumstances would be this;

Suppose that, as you are reading this in your office or in the library, I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic pajamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent. By any ordinary understanding of harm, I do you no harm.¹¹

A solution?

Understandably, this is concerning to the reader as no one in their right mind would allow a complete stranger to trespass and sleep in their property. However, under the harm principle, no direct harm is being done here, despite it being 'wrong' in our eyes. Gardner and Shute claim that there are grounds for criminalization under both of these acts. They state that the 'harm' itself would be the acceptance of these acts in a normal society. They imagine that if 'pure' rape was repeated on a grand scale, fear of harm would take over the apparent lack of harm caused. Therefore in these scenarios, Mill's doctrine must be adapted to suit the best interests of the society as a whole. As Cane says, 'raping a person is wrong, even if it causes the person no harm, and a society where rape was not criminalized would be a worse society to love in than those where it is.' So Mills doctrine can be applied to 'harmless' wrongs to prevent the creation of a society, which feels threatened.

Devlin's common morality

We have now noted that Mill's doctrine, despite having been written a century ago, can be used, to some extent, to draw the line between State controlled and public morality. Problems such as 'harmless' wrongdoings, e.g. 'pure rape' have been dealt with and we have recognized that Mill prioritized true freedom over Devlin's desire for a society united under one 'moral roof'. Devlin's argument needs to be fully addressed, not simply because he is the opponent but also to illuminate some of his constructive ideas. He puts forward his rejection of the Wolfenden report and Hart and Mill's liberalist views in his essay *The Enforcement of Morals*:

For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.¹²

His view totally opposed Mill's view of 'true freedom' and Hart's conception of 'morality as a uniquely true or correct set of principles—not man-made, but either awaiting man's discovery by the use of his reason or (in a theological setting) awaiting its disclosure by revelation'¹³. For Devlin, therefore, morality was a shared set of principles, essential to preventing the collapse of society. His standpoint was named

¹¹ Gardner and Shute - *The Wrongness of Rape*, Oxford Essays in Jurisprudence, 4th series, 2000

¹² Patrick Devlin - *The Enforcement of Morals*, 1965, p. 10

¹³ Hart, H. L. A - *Law, Liberty and Morality*, 1963

Legal Moralism, however I shall refer to it as ‘Devlin’s view’ for the rest of the discussion. His controversial argument following the debate stated that those who did not share in the ‘common morality’ were to be coerced by the State. In the context of Wolfenden, he claimed that homosexuality should be criminalized due to the attitudes of the British population at the time. ‘Indignation and disgust are the forces behind the moral law,’¹⁴ he stated, making clear that freedom of choice may be controlled under these circumstances.

Devlin’s controversial thesis

Devlin’s thesis has been severely criticized over the past fifty years, mainly because his idea of a moral society requires segregation from those who do not share in ‘common thought.’ Let’s imagine that the apartheid in South Africa had a stronger force, with the majority agreeing with its principles. Under Devlin’s thesis, this society would have the right to enforce its morality so to prevent its disintegration. So, in theory, the price for a united common morality, in this case, would be racial discrimination¹⁵. ‘What is important is not the quality of the creed but the strength of the belief in it.’¹⁶ further implies that it doesn’t matter whether a society is immoral or corrupt, only whether it can operate as a united moral body under the enforcement of the State. At this point, Mill’s idea of freedom under the harm principle seems to solve this issue and appears a less radical solution.

The Liberal’s mistake

What we haven’t considered, however, is the fact that both Mill and Hart regarded ‘freedom as a basic human value’ without considering the importance of ‘sociability’. Peter Cane argues that whilst individuality is vital for a society to flourish, it is not the only factor. As human beings we require companionship, either from family or friends, to develop. Imagine a world where, although we were free to follow our best interests independent of the State, we would also be totally alone¹⁷. The idea of ‘community’ that Devlin suggests, perhaps too strongly, is ‘a precondition to human flourishing.’ Moreover, Mill’s world with no moral restraints would give us no comparison to a world with moral restraints, giving freedom itself very little value. The way we value freedom, other than using it, is by comparison to not having it. Therefore, one must assume that freedom and membership within a society should be combined to avoid either losing its intrinsic value. Arguably this is the only real good that has come out of Devlin’s argument, which many feel lacked ‘genuine moral content’. Dworkin argued that, as Devlin’s argument of moral enforcement is fuelled by ‘disgust’ it is not a *real* moral argument. He claims that basing an argument on emotion allows it to be ‘easily susceptible to distortion’ and encourages ‘prejudgement’ and ‘parroting’ instead of moral argument¹⁸. Nevertheless, Devlin’s emphasis on the membership of a community does leave its mark.

¹⁴ *ibid* – see 11

¹⁵ *The Limits of Law, The Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.)

¹⁶ Devlin - *The Enforcement of Morals*, 1965, p. 114

¹⁷ Peter Cane – Taking Law Seriously: Starting Points of the Hart Devlin Debate 2004 p. 37

¹⁸ Dworkin, Gerald (1999) ‘Devlin was right: Law and the Enforcement of Morality,’ *William and Mary Law Review* 40, 927.

The famous issue of Paternalism

Mill's liberal argument was also far from perfect. 'Harmless wrongdoings' were narrowly taken into account and only justified by scholars such as Gardner and Shute. His rejection of paternalism was another problem, which attempted to majorly alter the jurisdiction of the State, perhaps too far. Although this argument was made long before the debate, it is vital to consider when assessing the liberal view. *The Oxford Companion to Philosophy* describes paternalism as 'the power or authority one person or institution exercises over another to confer benefits or prevent harm, regardless of the latter's consent.' Here we see an obstacle in Mill's way. Paternalism, active in our laws today, went totally against his idea of true freedom. Mill saw it as an attack on our individual autonomy and therefore offered several absolute arguments against it. His first argument was relatively weak, stating that each individual knows what's best for themselves, therefore external intervention was not needed. He failed to consider children and those who are not physically able to recognise their best interests. A child needs guidance from its parents to make the right decision, and in most cases parents will make the decision for them. The same applies to those with an infirmity, it would simply be wrong to ignore them and pursue what Mill would call *true* freedom if it meant they were to suffer as a result. Furthermore, as an adult one would consult a variety of people to look after one's best interests such as solicitors and doctors. Taking this into account, however, there are many controversial issues surrounding paternalistic intervention. The first might be voluntary euthanasia, as it does not go against the harm principle, Mill would allow it providing it bettered quality of life and consequential happiness. Paternalistic intervention from the British government has made euthanasia illegal, even in these circumstances. Surely one must have control of their life and have the choice whether to end it for their best interests? Dworkin, in *Morality and the Law*, states two conditions in which paternalism should be enforced. The first condition is in a scenario where a person holds 'deficiencies of cognitive and emotional capacity for ignorance.' Therefore any irrational 'miscalculations' such as believing in a false assumption should call for paternalistic action¹⁹. For example, if Jane believed that the costs of not wearing a helmet when riding a bicycle because it was uncomfortable had more benefits than wearing one, she would be acting irrationally and paternalism would be enforced. His second justification was aimed at circumstances where an action can be 'potentially dangerous' with 'irreversible consequences.'²⁰ Drink – driving, for example should be avoided under this rule. Assisted suicide, provided it is fully regulated, may therefore be allowed under Dworkin's theses. If the person has the 'emotional capacity' to think clearly, it may well be allowed. It would not be a 'dangerous' action per se so long as the quality of life is in no way diminished; therefore Dworkin makes a good compromise.

This evaluation of Paternalism shows another slightly extreme side of Mill's doctrine that requires compromise and considerable re-thinking. Again he fails to recognise that, although individual autonomy is important, reliance on others, including the State is vital for humanity to thrive – as put forward by Devlin. We should not forget, however, that many actions by the State were indeed invasive, and, in the context of

¹⁹ Ronald Dworkin *Morality and the Law* 1969

²⁰ *ibid*

Wolfenden, the ban of 'private' homosexuality was an example of this, which Hart rightly opposed.

A complex and out of date doctrine?

Since the debate, Mill's 'revived' argument became more and more prominent in legal philosophy as it was applied to modern issues and concerns. The harm principle itself was even used in the making of the Model Penal Code by the American Law Institute, finished in 1962, which heavily influenced the introduction of criminal codes in 34 states of the U.S.²¹. However, Bernard E. Harcourt and Joel Feinberg both agreed that the harm principle was slightly out dated, not quite fitting in a world where there are so many new 'trivial' harms and circumstances to consider. Feinberg stated this:

"It is impossible to prepare a detailed manual with the exact 'weights' of all human interests, the degree to which they are advanced or thwarted by all possible actions and activities, duly discounted by objective improbabilities mathematically designated.'²²

In other words, to balance each of our interests equally and to compare the relevant 'importance' of harms against each other is simply too difficult. Moreover, not only is it difficult to apply, but Harcourt writes that harm is no longer a 'limiting principal' or 'necessary condition for legal intervention. He states that the use of the harm principle over the past 50 years has led to the 'definition' of *harm* becoming blurred. We therefore find ourselves with countless *trivial* harms that we cannot prioritise or single out. Mill was writing for the 'progressive being,' keen on encouraging human flourishing, however, Harcourt adds that he was slightly naïve when it came to predicting the doctrine's application in the future. In his essay he even proposed laws forbidding the poor to marry so to 'limit the number of children poor couples could have.' Perhaps, then, Mill had a slightly different view of a more ordered society than our present one today, and, as a result the harm principle doesn't quite fit. Of course, dismissing it would be a huge mistake, as it has become the basis of so many moral and legal principles in our day and age.

The Wolfenden Committee therefore resurrected the debate over where exactly we should draw the line between private and public morality. The revival of Mill's doctrine not only established a liberal view against that of Devlin but it also revaluated the concept of *true* freedom. What Devlin believed to be a catastrophic doctrine was actually an insight into what it means to be free. He encouraged us to think without the influence of others, and, as a result the committee stated that the law must 'never enforce any particular pattern of behaviour.' The laws against homosexuality in private were repealed and, as a result, many reassessed their ideas of freedom, with countless human rights movements created under this new impression. I believe that we should recognise Devlin's efforts in the debate as he established the

²¹ Harcourt, Bernard E. "The Collapse of the Harm Principle." *The Journal of Criminal Law and Criminology* (1999) p.29

²² Feinberg, Joel - *Harm to Others*. Oxford: Oxford University Press, 1984

importance of 'community' that Mill seemed to overlook. A sense of membership in a society and a reliance on the State through a reasonable form of paternalism is vital for what Mill wanted. Unfortunately, he could not predict the huge growth of humanity in the next 100 years, letting the harm principle lose its edge. Nevertheless, Mill created a doctrine that enabled us to understand and judge our best interests in relation to harm, and, with the additional works of Devlin and other scholars we are now able to follow our own paths as individuals, confident that the State's interference will be considerably limited. This combination of work gave us an idea as to where the limit of the law should remain. Therefore we can conclude that sufficient freedom should remain intrinsic, allowing each person to follow his or her desired paths so long no harm is caused. At the same time, one should value one's community and their decisions, whilst also allowing the State to look after our best interests.

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