

Conservatism and the Devlin-Hart Debate

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Abstract

The Devlin-Hart debate, following the Wolfenden Report's recommendations to decriminalize homosexuality in the UK, has sparked ongoing debate over the last 50 years on the issue of moral legislation. The debate centered on the degree to which states should regulate the lives of citizens in order to sustain the integrity of the society while preserving individual liberty. Conservative thought has in no way been in agreement on this topic. Looking at two prominent conservative thinkers of the last half of 20th century, Michael Oakeshott and Russell Kirk, demonstrates the divergence among conservatives in Anglo-American political thought with respect to moral legislation. French liberal-conservative, Chantal Delsol's analysis of modern liberal democracy provides useful insights related to their diverging positions. In light of the concerns of the various views on the debate, a solution can be achieved by means of consistently devolving more authority to legislate morality to local levels of government.¹

Reviewing the Debate

There has been an extensive amount of academic work in response to, or otherwise relevant to, the issues addressed by the Devlin-Hart debate in the more than 50 years since Devlin first responded to the Wolfenden Report in his 1959 British Academy Maccabaeon lecture entitled, "The Enforcement of Morals." The Wolfenden Report (1957) stated the findings of the Committee on Homosexual Offenses and Prostitution, which had met for three years to determine whether homosexual behavior should be decriminalized in Great Britain. The report concluded that the private sexual behavior of consenting adults was "not the law's business" (Wolfenden, par. 62).

Lord Patrick Devlin responded to the report's findings in his 1959 lecture and in subsequent published writings. Devlin's response focuses on two main points. First, he argues

that the State has the power to legislate morality in order to protect itself against behaviors that may disintegrate society and its institutions.²

It is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. Society is entitled by means of its laws to protect itself from dangers, whether from within or without (Devlin, *Morals* 36).

Devlin's compares the need for legislation against immoral behavior with the necessity to punish treasonous activities. In other words, immoral behavior threatens the long-term integrity of society.

An established morality is as necessary as good government to the welfare of the society. Societies disintegrate from within more frequently than they are broken up by external pressures...History shows that the loosening of moral bonds is often the first stage of disintegration (Devlin, *Morals* 36).

Thus, a society's morality is a crucial, if not *the* crucial, element that holds it together.

Second, Devlin argues that the content of moral legislation should be determined by what he calls "public morality". Devlin's public morality is not merely the majority position that could be determined, for example, by a random public opinion poll. Public morality is the view held by what he alternatively calls the "reasonable man" or the "right-minded man". Devlin is not particularly clear in his description of such reasonable persons. On the one hand, he gives the impression that the content of their moral judgments should be the result of collective deliberation—some social dialog or reasoning process.

For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous (Devlin, *Morals* 38).

Elsewhere his comments suggest that the content of public morality can be identified by some kind of moral intuition.

It is the power of a common sense and not the power of reason that is behind the judgments of society...There is, for example, a general abhorrence of homosexuality. We

should ask ourselves in the first instance 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 (Devlin, *Morals* 40).

In the midst of his support for an expansive power of the state to legislate morality, Devlin recognizes that individual rights and interests should not be completely ignored. There ought to be a balance between private and public interests. But, as he points out, this balance must be accomplished in a case by case manner in light of the general principle of valuing and reconciling as much as possible the interests of the society with the interests of the individual.

Morality is a sphere in which there is a public and a private interest, often in conflict, and the problem is to reconcile the two...While every decision which a court of law makes when it balances the public against the private interest is an *ad hoc* decision, the cases contain statements of principle to which the court should have regard when it reaches its decision (Devlin, *Morals* 39).

Thus, Devlin's statement that there should not be "theoretical limits to the power of the State to legislate against immorality" comes into clearer focus and into question. There *should be* limits and those limits should apparently be defined by the current views concerning individual rights and private interests, on the one hand, and public interests, on the other.

In reaction to Devlin, H.L.A. Hart's critique centers around two points of Devlin's mentioned above. The first of Devlin's points Hart calls, alternatively, the "moderate" or "disintegration" thesis. Hart argues that decriminalizing behavior, which has previously been viewed as immoral behavior, is not necessarily a threat to the society's long-term cohesion or existence. Society's moral commitments at a point in time do not constitute the essence of the society in the sense that changes in the moral opinions or behaviors of people leads to a destruction of society.

[Devlin] appears to move from the acceptable proposition that *some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. (Hart 51-52. Italics in original.)

Devlin, who responded to Hart on this point in a later writing, defends himself by clarifying that he does not think all of what society views as immoral should be punished by law in order to protect society. Thus, he agrees with Hart, that some behavior generally considered immoral should be allowed and that certain changes in terms of how law permits such immoral behavior will not jeopardize the stability of the society.

I do not assert that *any* deviation from a society's shared morality threatens its existence any more than I assert that *any* subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law (Devlin, *Morals* 37).

He provides a useful illustration to clarify his position—the concept that a game is defined by its rules. The implication is, of course, that a society is in some fundamental way defined by the rules it chooses in order to regulate citizens' common life together.

I would venture to assert, for example, that you cannot have a game without rules and that if there were no rules there would be no game. If I am asked whether that means that the game is 'identical' with the rules, I would be willing for the question to be answered either way in the belief that the answer would lead to nowhere. If I am asked whether a change in the rules means that one game has disappeared and another has taken its place, I would reply probably not, but that it would depend on the extent of the change (Devlin, *Morals* 37).

The second of Hart's attacks on Devlin appears to be more substantial. Now that Devlin and Hart are both in agreement that some degree of moral legislation should be within the purview of law, what constitutes a basis for the state to criminalize immorality? Devlin suggested that moral legislation consistent with the content of public morality is justifiable—the morality of the "reasonable man", or the morally disgusted "many" (whose reaction is based presumably upon their moral intuitions). Hart's response to Devlin focuses on the latter description of those who embody public morality. For Hart, criminalizing behavior on the basis of the opinions or moral intuitions of the majority will lead to unjust oppression of minorities. Hart argues that such restrictions restrict society from evolving naturally in terms of its citizens' moral beliefs and practices. As Peter Cane has pointed out, Devlin's approach of incorporating

moral values into the law “regardless of content, simply because they were widely held” places “an unjustified brake on changes in social mores” (Cane 23).

While Hart concentrates on the potential for majority tyranny through legislation that enacts the convictions of the morally disgusted majority, Devlin’s alternative description of a “reasonable man” (assuming that this might be somehow distinctive from Devlin’s morally disgusted majority, which it may not) as a basis for moral legislation is no less problematic. Who interprets the content of the reasonable man’s convictions and how would they do so? The obvious and frank answer for Devlin is the State. As referenced above he believes the power of the state to legislate morality should be unlimited (Devlin, *Morals* 36).

In modern liberal democracies this suggests that such decisions can and should be made by legislators and courts. However, how can those who hold the views of the “reasonable man” be assured that politicians and legal professionals will make choices in light of their views? Also, in large states in which populations number in the millions, with the great diversity of opinions present, how might even an honest law maker determine whose view represents that of the “reasonable man”? The diversity of moral beliefs in the citizenry of prominent liberal democracies in the 21st century makes Devlin’s position an impossibility, even if genuine, discerning law makers and judges were in office.

As I conclude my brief summary and analysis of the Devlin-Hart debate, I would like to draw particular attention to one basic conflict or tension in the debate. On the one hand, Devlin is calling attention to a very real aspect of human social life—people make judgments about how they think other people should live in their community and they feel strongly about their judgments.³ On the other hand, Hart emphasizes another basic disposition of citizens in contemporary liberal democracies—individuals desire and demand the freedom to make their own moral choices and resent restrictions to such freedom.

Conservatism and the Devlin-Hart Debate

How does all of this relate to conservatism? An obvious point is that Devlin’s views on the legislation of morality represent one version of a conservative position on the topic of moral legislation.⁴ In order to consider the debate from the perspective of conservatism, several

prominent examples of those who have identified themselves as conservatives and have been viewed as representatives of conservatism during the last 50 years will be discussed: Russell Kirk and Michael Oakeshott.⁵ These two Conservative scholars, however, significantly diverge on the issue of moral legislation. I will briefly consider the issues of the Devlin-Hart debate in light of their views. In doing so, I will primarily draw upon later writings of theirs that provide a kind of summary of their unique conservative perspectives.

Conserving Moral Standards: Russell Kirk

Russell Kirk is regarded as one of the foremost conservative thinkers in the United States in the 20th century. In Kirk's "Ten Conservative Principles" he touches on a variety of issues that are especially relevant to the Devlin-Hart debate. In his 1st principle, Kirk affirms the existence of an "enduring moral order." He says of it "that order is made for man, and man is made for it: human nature is a constant, and moral truth are permanent" (Kirk). In comparison, Devlin seems hesitant to commit to the existence of eternal moral values.

I suppose that moral standards do not shift; so far as they come from divine revelation they do not, and I am willing to assume that the moral judgments made by a society always remain good for that society (Devlin, *Morals* 41).

Kirk is clearly more decisive on the firmness of moral truths. As a result, Kirk's brand of conservatism is suspicious of moral progress in society. In his 3rd principle, Kirk states:

Conservatives argue that we are unlikely, we moderns, to make any brave new discoveries in morals or politics or taste. It is perilous to weigh every passing issue on the basis of private judgment and private rationality. The individual is foolish, but the species is wise, Burke declared. In politics we do well to abide by precedent and precept and even prejudice, for the great mysterious incorporation of the human race has acquired a prescriptive wisdom far greater than any man's petty private rationality (Kirk).

While Kirk stops short of outlining a specific position on moral legislation in this work, he states very bluntly and clearly that he believes societies have a natural disposition to wander from or violate the eternal moral truths. This creates the need to be diligent to order society according to the time-tested, eternal moral truths.

Devlin, in a manner similar to Kirk, expresses his concern that societies might quite naturally become increasingly tolerant of immorality over time and that this is what leads to their eventual dissolution. A close reading of their views reveals that Devlin and Kirk converge on at least the follow positions: (a) the existence of firm, if not eternal moral standards, sustains healthy societies, (b) legislators have the responsibility to incorporate such standards into law, and (c) societies tend to become ambivalent about these standards over time. Therefore, this general agreement between Devlin and Kirk leads to support for an active policy for legislating morality (or one might say, a more restrictive approach with respect to individual liberty and its protection against majority tyranny) consistent with the conservative moral standards understood to be necessary for the preservation of society.⁶

Conserving Individual Liberties: Russell Kirk

One of the foremost British representatives of conservative thought from the 20th century, Michael Oakeshott, can be significantly contrasted with both Kirk and Devlin on moral legislation. Oakeshott's conservatism is of a much more liberal mold than Kirk. What he seeks to conserve is a liberal society with its respect for and protection of private, moral life.

[Governing] is not concerned with concrete persons, but with activities; and with activities only in respect of their propensity to collide with one another. It is not concerned with moral right and wrong; it is not designed to make men good or even better; it is not indispensable on account of 'the natural depravity of mankind' but merely because of their current disposition to be extravagant; its business is to keep its subjects at peace with one another in the activities in which they have chosen to seek their happiness (Oakeshott, *Conservative* 95).

Oakeshott, unlike Kirk, does not think that questions of moral right or wrong are relevant for public policy. His is a conservatism that seeks to confine legislation to the purpose of minimizing the conflicts between individuals who should have the maximum degree of freedom to engage in activities they each believe lead to their own happiness. Thus, he proposes government should be a dispassionate umpire that has no dreams of contributing to or constructing conditions for the moral life of the community, with the exception of keeping individuals from hindering each

others personal pursuit of happiness (Oakeshott, Conservative 97-98). Essentially government should stay out of the business of legislating morality.

Furthermore, Oakeshott's position is not grounded in a liberal ideology of human rights. He distinguishes himself from other conservatives, like Kirk, who want to take up a *principled* position on moral issues.

Now people of this disposition commonly defend their belief that the proper attitude of government towards the current condition of human circumstance is one of acceptance by appealing to certain general ideas... But I do not think that this disposition requires these or any similar beliefs in order to make it intelligible. Something much smaller and less pretentious will do: the observation that this condition of human circumstances is, in fact, current, and that we have learned to enjoy it and how to manage it... In short, if the man of this disposition is asked: Why ought governments to accept the current diversity of opinion and activity in preference to imposing upon their subjects a dream of their own? It is enough for him to reply: Why not? (Oakeshott, Conservative 93).

The only intersection between individual behavior and legislation for Oakeshott should be in the enforcing of fair rules of conduct that resolve conflicts that occur as a result of individuals' pursuing their own happiness in their own ways. In comparison with Kirk, who seeks to conserve (among other things) traditional moral behavior, Oakeshott seeks to conserve a non-intrusive, liberal governance.

[Citizen's of a conservative disposition] have no use for a referee who does not govern the game according to the rules, who takes sides, who plays a game of his own, or who is always blowing his whistle; after all, the game's the thing, and in playing the game we neither need to be, nor at present are disposed to be, conservative (Oakeshott, Conservative 97).

Oakeshott's conservatism, therefore, would lead to decriminalizing most if not all previously restricted private (or to use Mill's language, "self-regarding") activities.⁷ Kirk's conservatism, on the other hand, would defend legislation which regulates the immoral behavior of citizens, because a failure to recognize and institutionalize the principles of the enduring moral principles will weaken the society.

Political By Nature?

For it is peculiar to man as compared to the other animals that he alone has a perception of good and bad and just and unjust and other things [of this sort]; and *partnership in these things* is what makes a household and a city (Aristotle 37. Emphasis mine).

If Aristotle was right, we humans are, among other things, naturally judging creatures. We make personal judgments about what careers we want to pursue, but we also make judgments about social life, for example, the justice (or injustice) of prohibiting smoking in pubs. Thus, I will presently return to my previous comment with respect to the social nature of human judgment in contrast with the individually autonomous nature of human judgment. When one of these two aspects of human nature are sacrificed to the other we find the possibility, when taken to extremes, of totalitarianism, on the one hand, or a condition in which citizens are detached and depoliticized, on the other. Loosely speaking, the fear of totalitarianism is the concern of Oakeshott and Hart with regard to the maintenance of political liberties required for people to be free moral persons, whereas depoliticization, and its corresponding social disintegration, is the concern of Kirk and Devlin.

Certainly the problems associated with placing too much emphasis on, and political power behind, one understanding of the proper way to order society has been clearly observed in the totalitarianisms of the 20th century. According to Marx, state power was to eventually fade, leading to the harmonious and free communist society (Marx 597). However, the French liberal-conservative political philosopher, Chantal Delsol has observed that utopian ideologies, like communism, lead not to the fading of political power and a condition of freedom but rather to political oppression.

Totalitarianism of whatever persuasion, emerges when we get caught up in the belief that “everything is possible”... “Everything is possible” is a way of determining who is human: one can then arbitrarily set a boundary here or there between humans and “subhumans” and declare a particular category to be nonhuman, which is what Nazism did. “Everything is possible” is also a way of determining what is to be human: one can then arbitrarily decree that humans can or should live without authority, without personal secrets, without family, or without gods, which is what communism did (Delsol 11-12).

Totalitarianism occurs when the collective body of persons is viewed as having absolute autonomy to regulate itself (of course by means of the judgments of certain individuals or small groups who represent the whole). Therefore, someone like Oakeshott would argue that the state should be as limited as possible from having control over the lives of individuals. However, are there negative implications of moving so far in this opposite direction—to the other extreme of the absolute autonomy of the individual? Delsol provides some interesting insights and warnings concerning this side of the pendulum.

The subject's vocation is to seek out the foundation of his own existence, to accept his responsibility in the present, and to face the idea of his own death. But he can assume his autonomy only if he is steeped in a culture, if he belongs to a world from whose structures he draws his own critical capacities. If the contemporary individual remains incapable of questioning, it is because he has been emptied of his points of reference. Having been liberated from his bearings, he has also been liberated from his judgment. But like any human faculty, judgment is not abstract; it is exercised within a cultural framework (Delsol 95-96).

Delsol's comments recall one of the central questions of the Devlin-Hart debate: to what extent are legal regulations that reflect the moral beliefs of the community necessary to protect against behavior that threatens the integrity of the society? Delsol argues that individuals will only have the capacities to construct or choose their own moral norms, a condition of liberty which Hart and Oakeshott are so concerned with protecting, when they are "steeped" in a particular culture—when they are given concrete cultural reference points. When individuals inherit a society characterized by a cultural/moral vacuum, they lack the "critical capacities" required to be the "autonomous and individually responsible" person sought after by the modern liberal democratic life.

In the wasteland grows a society of individuals without depth, without their own ideas, without habits of questioning, without distance from themselves, yet who all the while assert their sublime liberty (Delsol 95).

For Delsol, only when a person has been socialized to identify with a specific culture and its moral norms or values, is the person able to step back from it and engage in a critical analysis with others of one's own society's values (Delsol 133-34).⁸

However, if societies and the individuals that comprise them are forced to adopt moral commitments of previous generations and/or that of the majority of current fellow citizens, they will experience significant political oppression and the sense of deep injustice that accompanies it. Delsol proposes that in order for individuals to experience individual liberty in the context of a political community that has made moral commitments, these shared values and norms must be understood to be incomplete and subject to analysis and change.

To escape tyranny, the remedy is not to undermine, but to build. It is humbly to propose referents, knowing them to be incomplete. The genuine subject builds without succumbing to the obsession to make things definitive. He knows that he cannot build anything on sea foam. He has to lay foundations. But our ground is sand, and every truth is partial or incomplete (Delsol 96).

Delsol's criticisms of both alternatives—individual oppression in totalitarian societies as well as what we might call atomistic or depoliticized individualism in liberal societies—are helpful for understanding the current dilemma facing contemporary liberal regimes. However, while they highlight the need for a solution that can result in a society with shared, meaningful values as well as individual freedom to pursue their own definition of the good life, they do not provide a highly detailed or practicable solution with respect to the issue of moral legislation. How can a community allow its legislative process to enact and enforce laws embodying shared moral values while at the same time providing space for individuals the freedom to seek out and pursue their own conception of a good life?

Oakeshott's arguments suggest that his response to this question would be that communities of shared moral values can be enjoyed by individuals in their voluntary associations in a liberal society. If you want to go into a pub without breathing second hand smoke because you believe it is your natural obligation not to damage your own body, go to a non-smoking pub. If one does not exist, create one. If you don't want to be around prostitution because you believe it is a sin, avoid the streets on which they sell their services. However, this assumes that people view themselves as strictly autonomous individuals rather than having both a social as well as an individual nature. In other words, what if no degree of liberal doctrines or theories convinces people that they should not judge the "self-regarding" actions of others nor seek to regulate the

behavior of others accordingly? What if human beings want to belong to and develop political communities that establish moral norms by the force of law, not just as a means to minimizing conflicts between individuals pursuing their own concept of a good life, but because they want to belong to a society in which certain norms for behavior are chosen and enforced by the community? Of course, such talk brings to the mind of any liberal-sensitive person the seeds of totalitarianism, whether of the right (e.g., theocracy) or the left (e.g., communism). However, just because totalitarian is possible, it may not mean that the only alternative is the kind of minimal approach to legislating morality that Oakeshott's position would suggest. The fact that such totalitarian regimes have been able to succeed in gaining power, suggests that human beings have a desire to live in societies in which they share a common life together with more extensively shared moral norms than found in liberal societies that cultivate a depoliticized and isolated individualism.

Allow me to offer an example. After the Velvet Revolution, a phenomenon began to occur in Czech towns bordering the West, especially Germany. Prostitution, catering to customers from across the border, quickly sprang up along the main routes through the towns. Mayors from several of these towns began to take action. They asked for legislation by the Czech Parliament to regulate such practices and, in some cases, they enacted local legislation prohibiting or regulating prostitution in their towns. The town of Ústí nad Labem, passed a municipal law prohibiting public, street solicitation by prostitutes. In 2007, after the law was challenged in the constitutional court, the town was granted the right to enforce their law regulating prostitution (Horáková). The Constitutional Court Judge Ivana Janu commented on the ruling, "It is about public order and it is about good morals." (Horáková). In this case, it is clear that the public activity of prostitution is not something the community wanted.

This case demonstrates what Delsol and others argue is the real dynamic we find at work in human communities. Regardless of what various theories say about the way citizens of a liberal society should think and act—people want to live in communities in which they can have some degree of choice regarding the moral norms that are regulated by the society. People want political liberty as well as individual liberty, we might say. They want to partake in the kind of partnership Aristotle discusses in his *Politics*—a partnership in terms of judgments concerning

“good and bad and just and unjust.”

If this is true, how can the possibility of majority tyranny, as is feared by Hart and by Oakeshott, be avoided if we allow the majority’s moral standards to be applied with the force of law upon minorities? What is needed is a solution that is able to significantly provide individual liberty—providing space for people to make judgments regarding their own pursuit of a good life—while providing a form of political liberty that empowers and encourages citizens to build communities with shared values. I would like to propose that the answer to this question lies in consistently devolving power to legislate morality to a significant degree to local communities. I would like to suggest that it provides a solution that is able to provide, perhaps not perfectly but perhaps more sufficiently than other current alternatives, the sought-after individual and political liberty of real people in the real world.

Moral Legislation in Local Communities: Conserving Individual Liberty & Shared Moral Norms

In the United States Constitution, there is no power granted to the federal government to legislate morality, except with regard to providing for the protection of the basic rights such as the rights to life, liberty, religion, speech, and political participation. There are no explicit rights allowing or forbidding such specific practices as smoking in public places, being married to more than one spouse, having an abortion, smoking marijuana, or engaging in prostitution. In theory, it places under the responsibility of the central government the protection of only the most basic of human rights and the corresponding moral norms associated with them. All other powers of moral legislation are left in the hands of the state or local governments.⁹

This approach of devolving power to the local level is supported by Kirk in his 8th principle of conservatism.

In a genuine community, the decisions most directly affecting the lives of citizens are made locally and voluntarily... But when these functions pass by default or usurpation to centralized authority, then community is in serious danger... If, then, in the name of an abstract Democracy, the functions of community are transferred to distant political direction—why, real government by the consent of the governed gives way to a standardizing process hostile to freedom and human dignity.

For a nation is no stronger than the numerous little communities of which it is composed... It is the performance of our duties in community that teaches us prudence and efficiency and charity (Kirk).

A constitutional arrangement that protects citizen's most basic rights by means of the authority of central government, but devolves as much power as possible to the local level of government to legislate morality, provides for the possibility of a workable balance between individual liberty and political liberty. Problems arise when the central governments view take responsibility for becoming involved in making rulings or enacting laws dealing with moral legislation that extends beyond issues related to those most basic human rights. The central government should, of course, regulate and enforce laws which regulate, or require local governments to regulate, behaviors that violate the most fundamental rights—the kind of rights that lead to outright oppression such as slavery (e.g., human trafficking), physical oppression (e.g., assault and battery), or theft. Regional or local government should be authorized, however, to regulate more specific issues, institutionalizing certain moral norms in the form of laws. This general approach to legislating morality has some important characteristics that may be obvious, but which it might profit us to consider briefly:

First, this arrangement provides local communities with the authority to establish laws that reflect and protect the communities' shared moral values in a manner specific to their community. Requiring some sort of supermajority requirement when enacting laws, which regulate what we might call "self-regarding" activities of its citizens, could prove an important feature.¹⁰ Of course, determining what types of activities fall into this category would require further investigation to determine if it is possible to clearly define such a category in practice. Additionally, I would suggest that such regulations should also be enacted in the most democratic process possible. When it comes to the kinds of moral issues relevant to this discussion, many of them are very understandable to the average citizen, as opposed to legislation reforming financial markets or regulating the energy industry, for example. Thus, methods such as referendums or town hall assemblies could be utilized. In the case of prostitution in Czech towns, the people know what the impact of this practice is on their community and are fully competent to decide if they think this is an acceptable or unacceptable

activity. They may not be able to draft a piece of legislation through collective action, but they ought to be competent to accept or reject a proposal for addressing the issues. In fact, if they know they are authorized to vote on such matters directly, the result will most likely be a more political active, informed, and deliberate citizenry. Citizens who are constantly left out of the process or who are subject to a solution from the national legislature or courts, will naturally feel disempowered and ambivalent about political life.

Second, the basic rights guaranteed by the central government provide all citizens with the individual freedom to live in any community within the nation, in addition to the right to emigrate. If local communities are granted the authority to make and reform their own legislation, we can assume that there will be a great deal of diversity present in the various local communities. Urban communities will likely choose different policies compared to rural communities. As well, the various urban communities will likely approach moral legislation differently. Thus, individuals will have the freedom to live in a community in which they share the moral values most important to them. Of course, an individual may not find a community with which he or she completely agrees. However, it can be argued that having a significant degree of agreement on how the community should be ordered is more fulfilling to people than living in a community which is unwilling to make commitments on moral issues its citizens care about.

Third, since the basic right to free speech will be protected by the central government, individuals in any community will be free to persuade their neighbors of the need for reform with regard to moral legislation. They can engage in a free sharing of ideas through publication, public campaigns, advertisements, etc. Thus, rather than feeling helpless to change the situation or compelled to move from a community in which the person has family or other roots, he or she can become involved in influencing the community's political process.¹¹

Fourth, the most basic rights, those that provide security against the worst abuses against individuals or minority groups, are protected by the national government and courts. While central governments should regularly defer to the local governments on specific issues of moral legislation, they should focus their attention on protecting basic rights and work alongside local community's law enforcement officials to do so. Serious violations of basic rights, for example,

organized human trafficking, should be aggressively prosecuted by the central authorities.

There are certainly difficulties for working this out perfectly in practice. For example, how do you deal with urban communities?¹² Another potential source of difficulty is how religion might affect the process when local communities are given more authority to legislate morality more extensively.¹³ Admittedly, one of the most difficult issues to this general proposal for dealing with moral legislation is the limited resources and power of local authorities. While it is not hard to imagine local police forces being able to arrest and prosecute people violating a local law against public consumption of alcohol, for example, it could be very difficult for them to enforce a prohibition against the sale of any alcohol.¹⁴ Local governments would have to become adept at discerning when certain kinds of laws attempting to regulate moral behavior would be enforceable and other kinds of laws are not. Coming up with laws of the former kind that achieve the desired result may require some creative lawmaking and enforcement approaches.

It is clear that to a large extent this type of arrangement does operate in many federal, liberal democracies. I would propose that many social problems, much of the ambivalence of citizenry to political life, and most of the cultural wars that are waged in liberal democracies can be largely mitigated by a more consistent application of the approach proposed here. To use the United States as an example, if the Supreme Court had consistently delegated to the states and/or local communities the right to decide its own policies with respect to such issues as abortion and prayer in public schools, much of the frustration of predominantly conservative communities would have been defused. Individuals who felt strongly enough about their right to have an abortion would simply go to a community that allows such practices. Parents who want their children to be able to pray publicly in school, would move to neighborhoods that allow it. In addition, members of the communities would be able to participate more actively in the alternative solutions proposed and the choices made.

It is true, the degree of public debate would perhaps intensify, but the dynamics would be one of people exercising both individual and political liberty rather than the disempowering sense that the choices they care about—choices affecting the shared, authoritative rules of their community—are being made for them by officials of the central government or courts. They

would feel empowered to participate in political life and experience individual liberty as well. Liberal democracies would not necessarily preserve the same moral norms of their ancestors, but rather, a political way of life necessary to provide citizens with both individual and political liberty.

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Notes

¹ The purpose of this paper is to investigate the Devlin-Hart debate on the topic of the legislation of morality from the perspective of conservatism. Of course, an obvious concern is to identify what is meant by conservatism with respect to this topic. Different forms of conservatism are legion. Some theorists attempt to distill some common core ideas from among the myriad of conservatism. In Andrew Heywood's *Political Ideologies*, he claims that conservatism is an ideology.

Conservatism is neither simple pragmatism nor mere opportunism. It is founded upon a particular set of political beliefs about human beings, the societies they live in and the importance of a distinctive set of political values. As such, like liberalism and socialism, it should rightfully be described as an ideology (72).

He identifies the core beliefs of conservative ideology as follows: tradition, human imperfection, organic society, hierarchy and authority, and property (Heywood 72-83). However, others would take issue with Heywood's basic conclusion that conservatism should be understood as an ideology. If an ideology is understood as providing not only a comprehensive interpretation of current conditions but also a future plan for human development and progress, conservatism can be understood as an anti-ideology. "Conservatism is the negation of ideology" (Kirk). This anti-ideology perspective on conservatism in combination with some of the core features Heywood mentions provide us at the outset of our discussion with a sufficient degree of definition of this ambiguous idea of conservatism with which to begin our discussion of the relationship between moral legislation and conservatism.

Heywood's identification of conservatism with an understanding of human beings as being imperfect and as members of organic societies are examples of crucial features of conservatism that lead to a deep distrust by conservatives of ideologies. This apparent contradiction, of course, might lead us to question Heywood's commitment to conservatism being an ideology, but that would lead us away from our main concerns.

² For the sake of this paper, moral legislation will be understood to mean the regulation of certain kinds of behavior which does not violate the basic rights of others. In terms of the Devlin-Hart debate, moral legislation involves those actions that are considered to be vice or immoral, but do not have any direct, negative consequence in the lives of others. The author recognizes that this understanding of moral legislation is, it can be argued, untenable. There are perhaps no actions of an individual that do not have consequences in the lives of others—family members, friends, co-workers, etc.

³ Even many decades of living in a liberal democracy has not eradicated this disposition in its citizens. One has only to think about the many cultural wars that go on in liberal democracies regarding issues such as homosexuality, abortion (for or against), drug use, language of hate, etc. The judging nature in humans is seemingly not satisfied with making personal moral judgments. People judge others and, more importantly for this discussion, they judge their own communities with respect to the rules and regulations adopted in laws.

⁴ However, it is a position that has, by and large, been beaten into a corner in scholarly circles. As Cane has bluntly pointed out, "Commentators have accepted Hart's criticisms as effectively demolishing Devlin's position" (Cane 23).

⁵ There are certainly other conservatives since the 1960's have been explicitly involved in the Devlin-Hart debate. One such recent supporter of Devlin, for example is John Kekes (Kekes 97-101).

⁶ The American conservative, Kekes, in his book *A Case for Conservatism*, defends Devlin's disintegration thesis by arguing that even his critics admit that the state has the authority to legislate morality to preserve a basic degree of order. Conservatives legislate morality for the purpose of sustaining what they consider to be necessary conditions for its citizens to live good lives. Liberals likewise support legislation that provides conditions that they claim provide for conditions for citizens to engage in good lives. Their understanding of the necessary conditions for citizens to live good lives differs, but both claim that without support by law for what they conceive to be the necessary conditions the society will disintegrate.

If there is no disgust felt in a society at the relevant kind of violations, then it is already disintegrating because its members have no strong commitment to protecting the minimum requirements of good lives in their context (Kekes 99).

Thus, Kekes argues that Devlin's thesis holds for both conservatives and liberals in practice. They both find that legislating morality in some respects is necessary.

⁷ Of course, Oakeshott is in final analysis no friend of Mill's. While he appreciates Mill's attempts to provide a way for insulating the individual from state influence or regulation with his "self-regarding" versus "others-regarding" categories, he recognizes that Mill's final positions lead in the direction of a collectivist theory.

A man's individuality, we must suppose is exercised both in his "self regarding" and in his "other-regarding" activities. In respect of his "self-regarding" activities government has absolutely nothing to do; they are wholly insulated from its attentions. It is concerned solely with his "other-regarding" activities—his activities insofar as they affect other people.... Having insulated at best part of the sovereign individual from the attentions of government, he can afford to take a more generous view of the proper office of government in respect of what remains—that is "other-regarding" actions...The proper principle of government is to protect the exercise and enjoyment of individuality, but there is no specification of the conduct to be enforced except the duty to respect individuality in others. Nevertheless the way has been opened for a new line of thought to intrude itself—a line of thought turned away from any kind of genuine individualism. Indeed, each of Mill's departures from Benthamism may be recognized as an often inadvertent step in the direction of a collectivist theory (Oakeshott, *Morality* 81)

⁸ Compare this with Michael Sandel, the popular Harvard professor, who is labeled (though does not make the claim himself) a communitarian, who also finds problems with the prospects of the autonomous individual in contemporary liberal democracies. His Harvard colleague, Professor Rawls had developed a new vision of a just liberal society in which autonomous individuals would be free to construct their own conception of a good life called "justice as fairness". The type of person required by this just, liberal society, he called the "unencumbered self."

⁸ Sandel is unconvinced by the prospects of Rawls conception of such a person in the real world. Professor Sandel characterizes the "unencumbered self" as follows:

To identify any characteristics as *my* aims, ambitions, desires, and so on, is always to imply some subject 'me' standing behind them, at a certain distance, and the shape of this 'me' must be given prior to any of the aims or attributes I bear...Or to put the point another way, it rules out the possibility of what we might call *constitutive* ends. No role or commitment could define me so completely that I could not understand myself without it. No project could be so essential that turning away from it would call into question the person I am.

For the unencumbered self, what matters above all, what is most essential to our personhood, are not the ends we choose but our capacity to choose them...

The unencumbered self and the ethic it inspires, taken together, hold out a liberating vision. Freed from the dictates of nature and the sanction of social roles, the human subject is installed as sovereign, cast as the

author of the only moral meanings there are...As actual, individual selves, we are free to choose our purposes and ends unbound by such an order, or by custom or tradition or inherited status (Sandel 77).

The Rawls' "justice as fairness" conception is only possible if it is made up of autonomous individuals conceiving of themselves as unencumbered selves. Only persons who embrace a conception of themselves as the "self-originating sources of valid claims," as Rawls puts it, can actually experience freedom. For individuals who are seeking, and when they find it are committed to, what Sandel calls "constitutive ends," Rawls' liberal conception of society leads to isolation and detachment. Such people are seeking answers to the question, "what is the good life?", rather than engaging in a consumer mentality preference for one version of the good life versus any of the many other alternatives. They are seeking for a firm basis upon which to live their lives, which provides moral standards that are convincing to them—i.e., that are believed to be real, existing outside of themselves and their own mental constructs. And furthermore, and more importantly for our topic, what if people want to live in a community in which others share those constitutive ends, or at least who share a commitment to certain moral values, which are based on constitutive ends? What if such people want to have a say in what moral norms are incorporated into the rules and regulations of the community—into legislation? Are they unsuited for liberal society—this society which promises to embrace people with a diversity of views and perspectives?

⁹ Cf. US Constitution's 10th Amendment

¹⁰ This would, to some extent, mitigate against the possibility of oppressive measures being placed upon large numbers of people who are members of large minorities (groups who constitute, for example, 35-49% of the population).

¹¹ As Aristotle said, "man is by nature a political animal" (Aristotle 94). For him, we can see that to be truly human is to have the capacity to be political in the sense of "[having] the capacity both to be ruled and to rule" (Aristotle 92). With respect to our discussion regarding moral legislation, a truly political person must be able both abide by the community's laws and be able to engage in political participation regarding the moral choices which will constitute reforming, re-iterating, or overturning the moral norms embedded in the laws.

¹² First, urban communities would need to be partitioned in smaller population groups than they currently are in most cities. If a city district consists of 200,000 people, those people will likely feel disempowered from participating in political decisions. Second, in cities, the boundary between one district and another is typically a road. How do you deal with one district who wants to regulate, for example, pornographic material on billboards, when the district across the street has more lenient policies? Solutions for these kinds of issues would all have to be worked out with some creative problem solving and agreed upon guidelines. Third, how various issues would be addressed by local governments representing the entire city versus those representing districts within the city would have to be resolved. Potential contradictions or conflicts between regulations of one versus the other would have to be worked out.

¹³ The central government's commitment to the basic right to freedom of religion and conscience should provide a necessary check against local communities crossing the line between regulating the moral behavior of citizens and institutionalizing religious obligations. Of course, this can be a very fine line. Solutions to this would have to be sought out on the basis of determining whether legislation placed a religious obligation, either pressuring religious beliefs or religious behavior, upon all residents.

¹⁴ This kind of problem was evident in the United States during the Prohibition era. Local governments were no match for stopping the activities of organized crime that was involved in the production and distribution of alcohol. The same situation can be faced with respect to the drug trade. Local law enforcement officials trying to enforce certain kinds of moral legislation may run up against criminal elements that can overwhelm them and their resources. This may lead to the need for central government law enforcement personnel and resources to be required for such enforcement. But, if different communities have opposing or conflicting policies, the role of central law enforcement officials could become very complicated if not impossible. Such issues would clearly have to be worked out in practice.