

PHL271 Handout 7: The Limits of the Law

§1 Review: Mill's Principle

Our focus today will be a question raised last time:

Legal Scope Question: Under what conditions (and to what extent) can—or should—the law place limits on liberty?

Put differently, the Legal Scope Question asks when a state can use legal coercion to regulate the behavior and choices of its members.

Mill gave the most famous answer to the Legal Scope Question:

Mill's Principle: the state cannot restrict an individual's pursuit of her interests *unless* this pursuit undermines the ability of others to pursue their interests.

Here's Mill: 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like...' (p. 325)

Mill's Principle is often put more simply: the law can only restrict those actions which would harm others. Here is the seminal statement of what also gets called the 'Harm Principle':

'[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 be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.' (p. 313).

As stated, Mill's Principle is schematic: it requires supplementation by a criterion for deciding which interests (or, in the case of the second formulation of the principle, which harms) the principle serves and protects.

It is surprisingly difficult to provide such a criterion. For part of Mill's attempt, see pp. 315-316.

§2 Lord Devlin's Attack on Mill's Principle

Lord Devlin's article jumps off from his (then) dissatisfaction with the Wolfenden Report.

The report investigated whether homosexual behaviour between consenting adult males should continue to be punished by U.K. law. [It also asked a parallel question about prostitution]

In their report, the authors argued against the existing law on the grounds that it violates a constraint on the scope of the law. This constraint descends from Mill's Principle:

'[The law's] function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others... it is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.' (p. 370)

An even more forceful statement of the Wolfenden constraint comes a bit later:

'Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.' (p. 371).

Devlin is suspicious of the proposed Millian separation of crime and immorality (or 'sin', used broadly). He ends up arguing that there exists no principled restriction of the law to a realm of 'public' (as opposed to 'private') morality.

Put in these terms, Devlin looks as though he supports a very extreme answer to the Legal Scope Question. But further examination will show that his view is much less extreme than it appears.

§2.1 Devlin's Questions

Lord Devlin frames his discussion with three questions (cf. pp. 375-376):

1. 'Has society the right to pass judgement at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgement?'
2. 'If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?'
3. 'If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?'

It turns out that Devlin's argument for a 'yes' answer to 1 generates a 'yes' answer to 2. And given his answer to 2, he provides a nuanced answer to 3.

Here is Devlin's *a priori* argument for a 'yes' answer to 1 (cf. pp. 377-378):

1. A society is constituted by a 'community of ideas'
2. These ideas include both 'political ideas' and 'ideas about the way its members should behave and govern their lives' (so-called 'moral ideas').
3. Hence: a society exists only as long as there exists fundamental agreement with respect to political and moral ideas ('the invisible bonds of common thought') [from 1 and 2]

4. But a society has a right to exercise available means to safeguard the conditions of its own existence
5. So society has a right to exercise available means to safeguard the moral ideas that help to constitute it (from 3 and 4).

A 'yes' answer to the first of Devlin's questions follows from 5.

Devlin thinks that his argument also generates a 'yes' answer to the second of his questions, if we grant him the additional assumption that the law provides society its only reliable means to protect the society-constituting 'common morality'. For if we grant this assumption, 5 (from the first argument) entails that society has a right to use the law to safeguard the moral ideas that help to constitute society.

Note: Devlin argues pp. 380-381 that individual violations of the moral code pose a kind of threat to common morality, and thus fall under the scope of the law. There are good questions whether this kind of reasoning goes through.

Like Mill and Berlin, Devlin recognizes the need to balance public and private interests; but unlike Mill, he does not exclude any private interests from the scope of the law. Instead, he says that a court (or legislature) must balance private interests against the public interest in regulating immoral behavior.

Devlin spells out a set of principles meant to guide legislators and judges when determining how to accomplish this balance:

1. Tolerance of the maximum of individual freedom consistent with the integrity of society (p. 382)
 - 'Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation.' (p. 383).
2. The limits of tolerance shift (p. 384)
3. As far as possible privacy should be respected (p. 384)
 - See the related discussion on p. 385 of the nature of the boundary between private and public behaviour with respect to the law. Whether something is private no longer protects it absolutely from the law, but rather counts as a factor (among several) that weigh in favour of the law declining to interfere.
4. The law is concerned with the minimum not the maximum (p. 385)

These four principles together help constitute Devlin's answer to the third of his framing questions.

§2.2 Common Morality

Devlin requires an account of how legislators can discover the 'common morality' that helps constitute society.

Without such an ‘epistemology of morality’, the law cannot reliably proscribe those actions that qualify as immoral (according to ‘common morality’).

Devlin says that common morality can be ascertained by appeal to the judgments of ‘the reasonable man’ (p. 381).

‘Immorality then, for the purposes of the law, is what every right-minded person is presumed to consider to be immoral.’ (p. 382)

Note: it’s important to distinguish Devlin’s ‘reasonable man standard’ from a ‘rational man standard’ (cf. p. 381). Take a look at what Devlin says about the difference between these two standards.

Obvious Worry: Does protection of a morality measured by the ‘reasonable man standard’ really justify circumscribing individual freedom?

§3 Dworkin’s Reply

Our ‘obvious worry’ serves as a jumping-off point for Ronald Dworkin’s brief response to Devlin.

Dworkin argues that we must distinguish between two different notions of ‘moral position’: a ‘discriminatory’ notion and an ‘anthropological’ notion.

He uses the first part of his article to motivate and develop the notion of a discriminatory moral position.

A discriminatory moral position takes as its starting point ordinary moral judgments. But it isn’t identical to a collection of these judgments. Instead, to determine a society’s discriminatory moral position we must subject ordinary judgments to a number of tests. These tests include (cf. pp. 396-398):

1. The judgments must be backed by *reasons*; otherwise the judgment should be ignored as *mere prejudice*.
2. These reasons must have the backing of *general moral principles* or plausibly qualify as axiomatic moral truths; otherwise they might count as mere emotional responses (or some other illegitimate ground for a moral judgment).
3. Subjects who endorse the judgments must *consistently* apply the underlying general moral principles.

Dworkin agrees with Devlin that society has a right to enforce its constitutive common morality. But he insists both (a) that Devlin’s ‘reasonable man standard’ reveals a merely anthropological (as opposed to discriminatory) moral position, and (b) that only a discriminatory moral position can justify limits on individual liberty.

His argues for (b) on the grounds that an anthropological moral position may include judgments based on mere prejudice and emotional bias, and that these kinds of judgments cannot justify limits on individual liberty.

However it's tempting to see the disagreement between Devlin and Dworkin as the reflection of a more basic disagreement over the reach of our 'epistemology of morality'.

Dworkin assumes that applying his 'discriminatory moral position' tests will result in a *superior* set of moral principles.

Yet Devlin isn't as sanguine about the prospects for such a reason-based approach to discovering the common morality that helps constitute society. Here's what he says:

'...matters of this sort are not determined by rational argument. Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting that he was doing wrong. It is the power of common sense and not the power of reason that is behind the judgements of society.' (p. 383)

Question: do you share Dworkin's optimism about the prospects for purifying our moral judgments through the application of reason, or do you think Devlin is right about the nature of moral judgment?