

The Enforcement of Morals Revisited

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Abstract Against Patrick Devlin, H. L. A. Hart rejects the enforcement of morals as such. Hart defends an expanded version of John Stuart Mill’s harm principle, but this expanded version is no more defensible than Mill’s original claim. Hart’s discussion fails to clarify what is really at stake in controversies regarding the moral acceptability of criminal prohibition of such activities as suicide and assisted suicide, recreational drug use, prostitution, and so on. Regarding the enforcement of morals as such, we should acknowledge that the jury is still out.

Keywords The enforcement of morals as such · Paternalism · The harm principle

In sports, excellent teams are reputed sometimes to play down to the quality level of their opponents: against mediocre teams the excellent do not always play their best game. So it appears to have been with the Hart-Devlin controversy. H. L. A. Hart was a truly distinguished legal theorist, but *Law, Liberty, and Morality* does not rank among his best works.¹ Following the lead of the nineteenth-century writer James Fitzjames Stephens, Lord Patrick Devlin defends the use of the criminal law to enforce the morality of society and argues against the contrary views famously espoused by John Stuart Mill in *On Liberty*.² Perhaps distracted by the bad arguments advanced by Devlin and Stephens, Hart scores good points against them but fails to acknowledge the extent to which Mill’s position on the moral limits of the proper uses of social coercion is indefensible. Attempting to improve on Mill’s famous harm principle, Hart defends an expanded harm principle, but as

¹ H. L. A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963).

² James Fitzjames Stephens, *Liberty, Equality, Fraternity* (London, 1873); Lord Patrick Devlin, “Morals and the Criminal Law,” reprinted in Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 1–25; John Stuart Mill, *On Liberty*, Elizabeth Rapaport ed. (Indianapolis: Hackett Publishing, 1978). Originally published 1859. Also available at www.utilitarian.net/jsmill/.