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3RD EDITION

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under the 1861 Offences Against the Person Act law on sodomy and the accompanying 1885 Labouchere Amendment. Devlin vehemently disagreed and wanted a continuation of the anti-sodomy laws, whilst Hart espoused the view that it was not the proper role of criminal law to dissolve the idea of selfhood and the capacity for free choice, by the enforcement of a particular set of morals and morality.

✓ Make your answer stand out

It is important to understand the importance of the Wolfenden Committee's recommendation that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. This is a significant development in the area of law and morality, and you should be familiar with the findings of the report and how these apply to the public v. private debate. You should also be able to discuss how the report applies utilitarian philosopher J.S. Mill's 'harm principle' by claiming that in matters of private morality, the individual has the capacity to make free choices in which the law has no right to interfere: 'The law's function 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 life of citizens, or to seek to enforce any particular pattern of behaviour.'

In his 1958 Maccabean lecture to the British Academy entitled 'The Enforcement of Morals', which articulated **Devlin's concept of moral legalism**, Lord Devlin publicly opposed the recommendations of the Wolfenden Report. He argued that, if they were to be adopted, it would eliminate a number of specific crimes, such as passive and, more controversially, active euthanasia, suicide pacts and incest, as these are all acts that can be done in private by consenting adults without giving offence or corrupting the morals of others. Devlin warned of the disintegrating effect of a lapse in enforcing moral standards and appealed to the idea of society resting upon a shared morality as a 'seamless web' that must be able to defend itself against a subversive act against its moral structure. He feared that any attack on society's constitutive morality would lead to the inevitable disintegration of society; 'the suppression of vice is as much the law's business as the suppression of subversive activities'. As a corollary of this view, he claimed there should be no limit to the reach of law's influence in moral matters, and he championed a 'jury box' morality based on the morals of the ordinary 'right-minded' person who has the ability to discern what constitutes an immoral act.

KEY DEFINITION: Devlin's concept of moral legalism

Devlin rejected the distinction between public and private morality, claiming that the protection of morals in the public interest is more powerful than the protection of the individual freedom of consenting parties in an immoral act. To this end, he proposed three guiding principles that would enable the interests of private individuals to be balanced against the public requirements of society:

- Law should support a maximum standard of individual freedom as far as compatible with social integrity.
- Law should only intervene when society, the 'right-minded' citizenry, refuses to tolerate certain behaviour. As society progresses, tolerance may vary so law should be slow to change its moral stance.
- Privacy should be respected, but those interests must be balanced with the need for law to be enforced in the face of internal or external threats.

Be critical

The judiciary believes it is justified in constructing itself as a moral arbiter (as per Lord Devlin), drawing a line between what is acceptable and unacceptable in civil society. Critically evaluate the grounds on which law has silenced certain minority groups, or pathologised particular issues (such as equating homosexuality with disease, or pregnancy out of wedlock being indicative of mental illness), and to what extent this has either protected society or impeded debate. In the UK, abortion and suicide were (prior to the 1960s) considered to be wicked acts and did not merit wider discussion by the legal community. Compare the grounds on which competing legal theories set up the important law v. morality, private v. public debate.

Hart v *Devlin* II: public v. private morality

Hart was sceptical about Devlin's social cohesion/shared morality arguments (which fail to define what is meant by 'society') and doubted that populist views could be relied upon to be always correct or morally grounded: 'The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted.' He invoked J.S. Mill's 'harm principle' in his argument, which stipulates, in the absence of harm to society, that the government has no right to intrude on the lives of

individuals (with the exception of vulnerable individuals such as those lacking capacity, the young and infirm); adding that not all moral developments indicate a disintegration of society.

More significantly, in his 1963 *Law, Liberty and Morality,* Hart criticised the tradition of 'judicial moralism', offering the Ladies Directory case, *Shaw* v *Director of Public Prosecutions* [1962], as an example of the House of Lords resurrecting the old common law offence of conspiracy to corrupt public morals. Against **Hart's 'separability thesis'** (which demands the separation of legal from moral considerations – see page 72), this offence had not been used since the nineteenth century (and was also applied in *Knuller* v *Director of Public Prosecutions* [1972]) and was understood to signal the judiciary's sympathy with Devlin's attempt to enforce society's 'moral values'. Hart said this was a high price to pay in sacrificing 'the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not'.

Ronald Dworkin recommends abandonment of the Hart–Devlin debate and focus on the distinction between general and basic liberties. General liberties 'are derived from an abstract general right to equality, the right to be treated by the government with equal concern and respect' and protect everyone's general right to achieve particular goals. People have interests beyond general liberties and these basic liberties allow the exercise of 'the right of moral independence', where consenting adults can order their own moral priorities, which may include indulging in sado-masochistic play, as in the so-called 'Operation Spanner case', *R* v *Brown* [1994] 1 AC 212.

Be critical

You could critique the idea that some legal theorists believe that the application of J.S. Mill's harm principle can only be defended where harm is likely to other people or property, but cannot apply to ourselves and our own property. If you live alone in the Sahara Desert and feel like burning down your yurt, clearly only you will suffer loss and harm; if, however, you live in Scunthorpe and decide you don't like your apartment, burning it down will evidently harm other people and their property. We live in an individualistic society and the question as to the rightful legal enforcement of public standards of morality in private contexts remains pertinent and an on-going lively area of debate. Think about some of those modern contexts (for example, extreme body piercing, sado-masochism, prostitution and even the work of controversial public artists such as Damien Hirst) and how legal theory informs how such practices are viewed and the legal boundaries fixed accordingly.

Putting it all together

Answer guidelines

See the sample question at the start of the chapter.

Approaching the question

This rhetorical question arises out of the *Hart* v *Devlin* debate. It relates to the recommendations of the Wolfenden Report against which Devlin argued, rejecting the idea of a sphere of private morality. He insisted that society depends upon a shared public morality and that it, therefore, has a right to make laws that both protect and defend that morality. Your essay will discuss the key debates within jurisprudence that contextualise the arguments for and against a set of moral criteria with which to evaluate the rightful content of legislation and sanctioning of actions carried out in private. By consideration of key cases in the area of private rights and morality (these may encompass such issues as abortion, assisted dying and body piercing), you will explore and critically evaluate any shift between moderate and extreme judicial positions on the enforcement of morality in their deliberations and final decisions.

Important points to include

Make sure you are familiar with and include:

- The reasons why the question of the separation of law and morals is important
- The *Hart* v *Fuller* debate
- Fuller's 'inner morality of law'
- The *Hart* v *Devlin* debate and the significance of the Wolfenden Report
- Devlin's 'right-thinking person'
- J.S. Mill's 'harm principle'
- Case law examples that illustrate the judiciary's stance on the private v. public morality divide – for example, contrast the decisions in *R* v *Brown* [1994] 1 AC 212, *R* v *Wilson* [1996] 2 Cr App Rep 241, *Laskey, Jaggard and Brown* v *UK* [1997] 24 EHRR 3, *R* v *Aitken and Others* [1992] 1 WLR 1066 and *R* v *Jones* [1987] Crim LR 123.

✓ Make your answer stand out

There is a good deal of argument made forcefully for and against the consideration of morality in law, and it is tempting to describe these legal positions with a few case examples, or even by referring to the fictional *Speluncean Explorers,* without contrasting these diverse viewpoints. Be sure, however, to make key comparisons between these competing positions and, where appropriate, refer to the fundamental moral issue or debate that has been a major catalyst in shaping the law. One good example is the Wolfenden Report and the effect its vigorous discussion has had on legal innovations relating to homosexuality. Remember to also mention the limitations of such debate in relation to private v. public morality – for example, the law recognises many same-sex rights but does not extend a liberal attitude to sado-masochistic practices or the right of a post-operative transsexual to have their biological child's birth certificate changed retrospectively to reflect the father's gender reassignment; *JK, R (on the application of)* v *Secretary of State for the Home Department & Another* [2015] EWHC 990 (Admin). This is a large area, on which there are many legal theories and opinions, so pick out what you believe to be the main positions that characterise this important area, and be sure to support these with a couple of contrasting key cases.

READ TO IMPRESS

Beyleveld, D. and Brownsword, R. (1986) *Law as a Moral Judgement.* London: Sweet & Maxwell, 326–356.

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Kramer, M.H. (2008) *Where Law and Morality Meet.* Oxford: Oxford University Press, 76–102.

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