

DEVLIN'S ARGUMENT FOR LEGAL MORALISM

The Argument:

1. Society has a right to preserve itself.
2. The existence of society depends upon the existence of a shared public morality.

Therefore, 3. Society has a right to preserve a shared public morality.

4. Even private consensual acts contrary to the shared public morality are destructive_of it.

Therefore, 5. Society has a right to prohibit even private consensual acts when they are contrary to the shared public morality.

Criticism:

1. Of premise #1:
 - a. The right of a society to preserve itself is not as obvious as it might initially appear. Some deny that societies are the right kind of things to have rights. Societies are not people, after all. It is at least possible for a society to “die” without anyone being any the worse off because of it. Perhaps Devlin really means that we have a right to preserve society because it is beneficial to us.
 - b. Whether the right is attributed to society or to us, it is only a *prima facie* right—it does not necessarily “trump” all other moral considerations. We don’t have the right to do anything necessary to preserve our society. We might not have the right to do very much to preserve our society if consequences of our society’s “demise” are not too bad.
2. Of premise #2:
 - a. Devlin sometimes treats this as an historical point, sometimes as a definitional point. As an historical point the evidence for this premise is inconclusive; Devlin gives us no convincing evidence for it at all. As a definitional point it means this: Part of what defines a society is its shared public morality. Thus, by definition, if one morality replaces another, then one society has “died” and a new one taken its place. But as a definitional point, it is unclear that there is anything bad about a society “dying”, and the right to preserve society becomes the right to keep society from undergoing any change—a very weak right if it is a right at all. Thus, on this interpretation of premise #2, it is not clear that the right to preserve society, asserted in premise #1, allows us to interfere with anyone’s liberty.
3. Of premise #4:
 - a. Devlin provides absolutely no evidence for the truth of this claim. It is at least initially as plausible to assume that the occasional violation of the shared public morality strengthens it by challenging us to rethink our moral views. If the acts in question are more than occasional, then it is doubtful that they are really contrary to the shared public morality.