



P. A. DEVLIN

## Patrick Arthur Devlin 1905–1992

PATRICK ARTHUR DEVLIN was born on 25 November 1905, at Chislehurst, the first son and second of five children of William John Devlin and his wife Frances (Fanny) Crombie. The father was an architect of Ulster descent; the mother a member of a wealthy Aberdeen family of cloth manufacturers, whose support was necessary when William Devlin's practice did not prosper. So the Devlin children were brought up in the 'first circles of Aberdeen society on the edge of the County Families'. One brother, Christopher, became a Jesuit priest,<sup>1</sup> another, William, a distinguished actor.<sup>2</sup> The two sisters became nuns.

After school under the Jesuits at Stoneyhurst, Patrick Devlin had a brief period as a Dominican novice before going up to Christ's College, Cambridge, in 1923. A bachelor uncle, George Crombie, provided an annual allowance of £300: 'many at Cambridge had less and few had more'. In 1925 Devlin was placed in the Lower Second Class of Part I of the History Tripos. This dismal display was counterbalanced, at least in Uncle George's view, by membership of a debating team which represented the Union in the USA. (This visit fostered a lifelong interest in the career of President Wilson.) The following year was taken up with the affairs of the Cambridge University Conservative Association and of the Union. Devlin had paid seven and a half guineas

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<sup>1</sup> There is a biography by his sister-in-law: Madeleine Devlin, *Christopher Devlin* (1971). Patrick Devlin left an unpublished autobiography *Taken at the Flood*. It is complete, but ends in the 1930s. Unattributed quotations are from this source.

<sup>2</sup> The judge had the actor's ability to communicate emotion with the minimum of movement.

for life membership in 1923, had been elected to the Committee at the end of his first year, and to the Presidency in Michaelmas Term 1926. His predecessor in that office, Michael Ramsey (later Archbishop of Canterbury), later wrote: 'Devlin of Christ's outstripped all rivals in the art of the advocate; he was the F. F. Smith of the Union in the 1920s'.<sup>3</sup>

In January 1927 Devlin realised that it had become urgently necessary to attend to the syllabus for Part II of the Law Tripos, to which he had changed in 1925 — devoting the long vacation to reading *Salmond on Jurisprudence*. It is now a forgotten book: even then it was widely regarded as a dry text on a dry subject. But Devlin 'enjoyed it enormously. It gave me the thrill, the taste of life in a lucid and well-ordered world, that I had first enjoyed at the age of eight when I opened a Latin grammar'. The more mundane subjects in the syllabus were tackled with the aid of a coach (a feature of the Cambridge scene in the days before college teaching became highly organised), but some supervisions were given in jurisprudence by A. L. Goodhart (then a young don at Corpus Christi), and in real property by H. A. Hollond (Trinity). It looked as if a First might crown his Cambridge career, and Uncle George came south to share in the expected triumph. Over breakfast at the University Arms Hotel Devlin broke the news: he had again been placed in the Lower Second Class. George Crombie took the blow with Scottish calm, but he was also an Aberdonian, and, not unreasonably, his nephew's allowance was reduced to £200 per annum. Devlin himself, also understandably, felt aggrieved at such a grotesque mis-judgment of his talents. Later he wrote:

But how does one set about preparing for an examination? I have no idea now and I had none then. What I lacked was an object. At the Bar when I knew that I had on the next day or in the following week to make an opening speech or cross-examine a witness, I never had any difficulty in absorbing the necessary material, whether it was fact or law. Likewise on the Bench if I had to deliver an unreserved judgment or a summing up. What makes that sort of work easy and interesting is that every bit of material as it comes in is either given an immediate place in the structure or else asked to take a seat in the waiting room as there may be a short delay until a vacancy is found. If it is not wanted, it goes into a limbo where its existence may or may not be forgotten. I have found this a satisfactory way of working in professional life. But it is no sort of preparation for an examination paper in which you are asked to supply within the next three

<sup>3</sup> P. Cradock, *Recollections of the Cambridge Union* (1953), p. 123.

hours information on a variety of topics of which you have been given no previous notice. That is a demand which is never made in real life except to an expert in a narrow field. It is no fit conclusion to a university education. If it were not for this fantastic way of ending it, university life would be as agreeable as it is profitable. Learning comes by reading books and discussing them. As it seeps in, the level slowly rises in the well to the point at which one can happily dip and drink. But the well is not like the hump on the camel's back. It is not portable and cannot be piped to the human head. For happy drinking the pupil must go to it.

The Tripos has changed little in seventy years: the criticism is not easily answered.

So in 1927 Devlin moved to London and joined Gray's Inn. Life as a Bar student was made possible by Arthur Goodhart, who provided £200 per annum for two years. So an attic in Mayfair was rented and friends were made in the area where Mayfair and Bloomsbury met. (Evelyn Waugh's conversation was judged to be 'a point or two lower than his writing'.) But the Tripos lesson does not seem to have been completely learnt: the Bar paper in constitutional law was failed at the first attempt, and in the final examination in 1929 Devlin was placed in the Third Class.

Then there was a pupillage under St. John Field, then thought to be a rising junior. His chambers did not provide what was expected. 'They were very bad', said Gerald Gardiner (with whom a room was shared) years later. Then came a stroke of luck. The Attorney-General, Sir William Jowitt, needed a junior barrister to help him with his heavy case-load. Devlin was appointed and so became a 'devil' for a man of first-class intellectual power. Jowitt was more than a superb lawyer; he moved in circles where a Labour Attorney-General might not normally have been welcome. He drank champagne with the wits. All this was very agreeable to Devlin. 'I wanted the sort of practice which William Jowitt had and which he was now resuming, one in which there were complicated facts to disentangle and clarify and difficult questions of law to be solved.' By the end of the thirties Devlin had a lucrative commercial practice. The tide had been taken at the flood. The war years were spent partly in the Ministry of Supply and partly back in practice. If the courts were to remain open, litigants were entitled to the services of the best counsel available. He was at the top; he was not poaching the practice of anyone on active service.

In 1945 Devlin took silk, but had hardly had time to make his mark when Jowitt (by now Lord Chancellor) appointed him a judge of the

King's Bench Division one month before his forty-third birthday.<sup>4</sup> The vacancy had been created by the promotion of Mr Justice Denning to the Court of Appeal. (Jowitt took some legitimate pride in having promoted two such young and brilliant barristers, neither of whom was a supporter of the Labour Party.) From 1956 to 1960 Devlin was the first President of the Restrictive Practices Court.

As a commercial judge Devlin was much admired. His reported judgments on contracts and charter-parties have often been cited with approval. He dealt with privity of contract and the application of the Hague Rules;<sup>5</sup> discharge by breach and frustration;<sup>6</sup> mistake and loss apportionment;<sup>7</sup> and the concept of a 'weather working day' in computing laytime in a charter party.<sup>8</sup>

What was not expected was that Devlin should quickly establish a reputation as an outstanding criminal judge — not expected, because under the then English system a barrister who had rarely been in a criminal court (as Devlin admitted was his case) might within a week of his appointment find himself trying serious offences at Durham.<sup>9</sup> But within a decade Devlin had become known as a judge who could not only conduct a heavy criminal trial with complete authority, but also analyse the legal principles and concepts which were applicable.

On the Bench Devlin was an impressive figure. The judicial robes concealed a stoop which became very pronounced in later life. The wig concealed a thick head of hair which in youth had been distinctly red, but it also emphasised the high cheek bones (also a striking feature of his brother Christopher), firm chin and full mouth. 'A judge on the bench is a man of silence. Silence and gravity are as much part of his mien as the wig and robes are of his accoutrement'.<sup>10</sup> His voice and diction were admirable — clear and resonant, if a trifle metallic in tone.

<sup>4</sup> This is the youngest age at which anyone in the 20th century has been made a High Court judge, except for Sir F. L. C. Hodson, who was appointed in 1937 nine months before his 43rd birthday. But in the 19th century J. S. Willes was appointed at the age of 41, and in the 18th F. Buller (an ancestor of Lord Dilhorne) at the age of 32.

<sup>5</sup> *Pyrene v. Scindia Ltd.* [1954] 2 Q.B. 402 (a judgment which has had an international as well as a domestic impact).

<sup>6</sup> *Universal Cargo Carriers Ltd. v. Citati* [1957] 2 Q.B. 401 (on which see Devlin himself in *Cambridge Law Journal* (1966), 192, acknowledging his debt to academic writings).

<sup>7</sup> *Ingram v. Little* [1961] 1 Q.B. 31.

<sup>8</sup> *Reardon Smith Ltd. v. Minister of Agriculture* [1963] A.C. 691.

<sup>9</sup> The efforts of well-meaning reformers to require judges to be trained are the subject of some devastating mockery in Devlin's book, *The Judge* (Oxford, 1979), Chap. 2.

<sup>10</sup> Devlin, *Easing the Passing* (Bodley Head, 1985: revised paperback edition Faber and Faber, 1986), p. 219: (henceforward *ETP*).

Off the Bench he did not actively seek social life outside his family circle. (In 1932 he had married Madeleine, younger daughter of Sir Bernard Oppenheimer, diamond magnate.)<sup>11</sup> But he was a good host in his flat at Gray's Inn,<sup>12</sup> or in his house in Wiltshire, where the family had acquired a substantial farm in 1943. (There was also a villa in Portugal.) There was a fine cellar. When Lord Goddard, an exacting guest, came to dinner he exclaimed '“What is this?” with totally unconcealed astonishment after the first sip of the first wine'.<sup>13</sup> The farm in the vale of Pewsey once caused a little tension. In 1953 Devlin was plaintiff in a Chancery Division action for a declaration that he was entitled to a right of way over a neighbouring farm. The defendant admitted that for over forty years the owners of West Wick Farm had used a bridle way, but contended that Devlin's conduct in using lime-spreaders in wet weather was not permissible. Upjohn J. held that Devlin was entitled to the declaration sought, but added that if he made excessive use of the way 'he knew the risk which he ran'.<sup>14</sup>

What a fellow academic had rightly called 'the miserable history' of English criminal law can be briefly told. 'Nothing worth-while was created'.<sup>15</sup> The Victorian fondness for codification had produced some basic statutes (offences against person and property), and one great Victorian judge (James Stephen) had devoted to the subject an analytical mind as powerful as Devlin's. But in the Court of Criminal Appeal on Monday mornings there prevailed what Devlin called the atmosphere of the orderly room.<sup>16</sup> Junior judges were expected to know their place. All that changed in the decade after Devlin's appointment<sup>17</sup> — in some degree because the Lord Chief Justice developed a deep personal respect, and affection, for Devlin. (Letters began 'My Dear Pat'.) Within a year Goddard (no payer of idle compliments) had given high praise to Devlin's direction to a jury on the subject of provocation as a defence to murder.<sup>18</sup> That direction has been continually cited with approval in the Crown Court, but later some argued that it discriminated unfairly

<sup>11</sup> There were four sons and twin daughters. By 1985 there were 21 grandchildren.

<sup>12</sup> Where brother Christopher celebrated the first Mass said in the Inn since Elizabeth I.

<sup>13</sup> *ETP*, p. 34.

<sup>14</sup> *Devlin v. Dewry*, *The Times*, 9, 10 and 11 July 1953.

<sup>15</sup> S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981), p. 403.

<sup>16</sup> *The Judge*, p. 187.

<sup>17</sup> In [1958] Crim. L. Rev. 714 there is an anonymous defence of the decision of the C.C.A. in *Vickers* [1957] 2 Q.B. 664 (intent in murder). It is widely believed to have been written by Devlin.

<sup>18</sup> *R. v. Duffy* [1949] All E.R. 932.

between men and women. Women, it is said, usually bided their time before killing their tormentor, whereas men tend to kill immediately in response to provocation less severe or long continued. The point is obviously important, but could hardly have been foreseen forty years ago. In two other areas where the mental intent of the accused was significant Devlin's analysis made an impact. First, in *Kemp*<sup>19</sup> he held that the phrase 'disease of mind' in the McNaghten Rules on the defence of insanity referred to the mind, not the brain — i.e. the mental factors of reason and understanding. So unstable conduct caused by those factors (as distinct from, say, concussion), however temporary, may be within the defence. This reasoning has been approved by the highest authorities.<sup>20</sup> The result is that the epileptic and sleepwalker may find themselves labelled 'guilty but insane', and sent to Broadmoor. No wonder they often strive for a verdict of 'not guilty'.

Secondly, his direction to the jury in *Bodkin Adams* (8 April 1957) on the topic of euthanasia, or so-called mercy killing, achieved national renown.<sup>21</sup> Devlin told the jury (which acquitted) that 'no doctor, nor any other man, no more in the case of the dying than of the healthy, had the right deliberately to cut the thread of life'. So the injection of lethal drugs is still murder. It is different if invasive medical treatment is withdrawn from a patient who is in a permanent vegetative state.

The *Bodkin Adams* case may be dealt with here, because Devlin nearly thirty years later published his own account of it.<sup>22</sup> It was truly described as 'the first full-length book written by a judge about a trial over which he presided'. Some scraps of judicial anecdote ('My famous trials') had previously appeared. They are not to be compared with Devlin's extraordinary book, rightly described in *The Times* review as 'a complex, subtle and astringent account of the trial'. But there was also criticism.

As the criticism surfaced in publications not readily available,<sup>23</sup> it may be considered here. Three questions arose. First, should retired judges write such books? Here there was general agreement that an

<sup>19</sup> [1957] 1 Q.B. 399.

<sup>20</sup> Twice in the H.L. (*Bratty* [1963] A.C. 386; *Sullivan* [1984] A.C. 156), and once in the C.A. (*Burgess* [1991] 2 Q.B. 92).

<sup>21</sup> It was approved by the H.L. in *Bland* [1993] 2 W.L.R. 316.

<sup>22</sup> *ETP*.

<sup>23</sup> *The Times Literary Supplement*, 13 December 1985; *The Field*, 31 August, 12 October and 2 November 1985. Devlin replied to his critics in a postscript (dated March 1986) to the paperback edition of *ETP*, and, briefly, in *The Independent*, 30 April 1987.

impartial description and analysis of a public event such as a major criminal trial was justifiable once the event had crossed the border which divides current affairs from history. Here Devlin had a brilliant success. The description is fascinating. It is true that he had been dealt a hand in spades: nobody could have failed to make readable the extraordinary cross-examination of the nurses called as prosecution witnesses. But Devlin's brooding analysis of the legal issues which arose during the trial — for example, the proper scope of judicial questioning, and the accused's right to silence — is at a level which no other judge has achieved before or since.

Secondly, it was said that Devlin had cast doubt on the jury's verdict of not guilty. A distinguished silk and an experienced crime reporter both suggested this,<sup>24</sup> but it was strongly denied by Devlin.<sup>25</sup> Such an assertion is certainly difficult to reconcile with Devlin's continual statements (in other contexts) that a jury's power to acquit cannot be reviewed — and with the fact that his summing-up was clearly favourable to Bodkin Adams.<sup>26</sup> It is, however, difficult to explain away Devlin's statement that 'The mercenary killer fits best the picture that I have in my mind'.<sup>27</sup>

Thirdly, it was said that Devlin's treatment of the manner in which the Attorney-General, Sir Reginald Manningham-Buller, conducted the prosecution went beyond fair criticism (in tone, as distinct from substance), and showed malice and ill-will. It is certainly true that Manningham-Buller, like the Duc de Rohan, was pursued *sans cesse et sans lasse*. He is always referred to as 'Reggie', whereas leading counsel for the defence is always 'Lawrence', or 'Mr Lawrence'. In one passage the Attorney-General and the accused are described as 'two of the most self-righteous men in England'.<sup>28</sup> It is painful to re-read these passages: it is even more painful to re-read the fencing and equivocating language in which Devlin later defended himself. He denied that he had expressed contempt for Manningham-Buller: only

<sup>24</sup> *The Times*, 3 July 1985 (Roger Gray QC); *The Field*, 31 August 1985 (Peter Paterson).

<sup>25</sup> *The Field*, 12 October 1985. See also the 1986 edition of *ETP*, p. 219.

<sup>26</sup> Who was certainly not a sympathetic character: after his acquittal he demanded a free lunch at the Old Bailey before driving back to Eastbourne in the Rolls-Royce which he had claimed from the estate of Mrs Morrell. (The Crown's researches had disclosed that he had been a legatee in the wills of 132 patients.) 'It is bad luck for him that he has the face of a murderer', wrote George Lyttleton to Rupert Hart-Davis — but that was before the Crown's case had fallen apart.

<sup>27</sup> *ETP*, p. 199. A similar statement appears in the interview with Marcel Berlins in *The Times*, 11 June 1985.

<sup>28</sup> *ETP*, p. 183.



'lack of admiration' in 'teasing passages'.<sup>29</sup> This does not meet the point that Manningham-Buller had been held up to public ridicule and contempt when no longer able to defend himself.

Two years after the trial Manningham-Buller had defended the Government in a House of Commons debate on a Commission of Inquiry (of which Devlin was chairman) into security in Nyasaland (as Malawi was then called). One sentence in the Report gave great offence in Whitehall: 'Nyasaland is, no doubt temporarily, a police state'. This was ascribed privately by Macmillan to Devlin being 'bitterly disappointed' at not having been made Lord Chief Justice when Goddard resigned in 1958.<sup>29a</sup> A warmer reaction was that of Dr Davidson Nicol (Under-Secretary-General of the United Nations): 'Patrick Devlin's name and his Report are indelibly associated with all that was best in the annals of European imperial history . . . Those of us who were African Nationalists in that era read it with astonished admiration'.<sup>29b</sup>

Macmillan did, however, promote Devlin to the Court of Appeal in January 1960, and thence to the House of Lords in October 1961. Such a brief stay in the Court of Appeal did not enable his talent for appellate work to be adequately displayed, but the profession was certainly looking forward to many years of fruitful achievement as a Law Lord when Devlin startled everyone by suddenly announcing his retirement on 10 January 1964 — just fifteen years and three months after his appointment to the Bench. It may be surmised that Devlin had given notice of his intended resignation as soon as he had completed 15 years of pensionable service, so as to give the Lord Chancellor time to choose a successor. Over twenty years later Devlin himself looked back. 'I was never happy as an appellate judge. I went to the House of Lords from the Court of Appeal thinking it would be better. It was worse. I got several interesting cases. But for the most part the work was dreary beyond belief. All those revenue cases . . .'<sup>30</sup> The prudent

<sup>29</sup> *ETP*, p. 222. An Indian great-grandmother (on the Crombie side) may have brought into the family 'the streak of cruelty, so noticeable in her son Black Jock, so noticeably conquered in Christopher that it became a virtue'; M. Devlin, *Christopher Devlin* (1971), p. 3.

<sup>29a</sup> A. Horne, *Macmillan* (1989), vol. II, p. 181.

<sup>29b</sup> *Christ's College Magazine* (1993), 66.

<sup>30</sup> *The Times*, 11 June 1985. A revealing passage in his autobiography hints at the true reason. Referring to his decision to be called to the Bar, he wrote: 'Between me and the service of the law there was no pledge. I had no vocation and so had a field of choice. . . . There is no pleasure except in a life of occupation. The essential pleasure in life is to be obtained only from congenial work'. So when his judicial work ceased to be congenial he changed his occupation.

biographer learns to be sceptical about a man's account of his own reasons for his actions in earlier life. So it is difficult to accept the complaint about revenue appeals: for a search of the Appeal Cases for the years 1961–5 reveals that of the thirty-one tax appeals reported,<sup>31</sup> Devlin sat on only two — one in the House of Lords and one in the Privy Council.<sup>32</sup> It could be inferred that the administrators were doing their best to accommodate Devlin's preferences.

The positive assertion that there were 'several interesting cases' is certainly true. Devlin's judgments (perhaps a trifle over-lengthy) developed the law in a number of ways. In criminal law there were judgments on the inferences to be drawn from conduct,<sup>33</sup> and the conditions for permitting cross-examination as to previous convictions.<sup>34</sup> In torts there were two appeals of outstanding importance, in each of which a unanimous House restated the law in a way which had made an impact on all tribunals in the common law world — *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*<sup>35</sup> and *Rookes v. Barnard*<sup>36</sup> In *Hedley Byrne* the question was whether a careless but honest misrepresentation (not in a contract) causing economic loss should be treated in the same way as if it had caused physical loss. Devlin had no hesitation in making new law in his powerful judgment. *Rookes* found him both expansionist and restrictive. He was again willing to treat economic loss in the same way as physical loss, so that he was prepared to redefine the limits of the tort of intimidation so as to include threats to break a contract as well as threats to assault another. But on another aspect to the case he persuaded the other Law Lords to join with him in severe limitations on the scope of exemplary damages. 'He knocked down the common law as it had existed for centuries'.<sup>37</sup>

<sup>31</sup> A few may have been unreported, or reported in other series of reports, but this would not affect the general picture.

<sup>32</sup> *IRC v. Littlewoods Ltd.* [1963] A.C. 135; *IRC v. Appuhamy* [1963] A.C. 127.

<sup>33</sup> *R. v. Sharnpal Singh* [1962] A.C. 188.

<sup>34</sup> *Jones v. DPP* [1962] A.C. 635. See also two judgments which enlighten difficult topics — *Connelly v. DPP* [1964] A.C. 1254 (issue estoppel), and *Glinski v. McIver* [1962] A.C. 726 (malicious prosecution).

<sup>35</sup> [1964] A.C. 465.

<sup>36</sup> [1964] A.C. 1129.

<sup>37</sup> *Broome v. Cassell & Co. Ltd.* [1971] 2 Q.B. 354 at 380, per Lord Denning MR. In this case one Lord Justice agreed with Lord Denning to the extent of saying that Devlin's judgment was 'obviously wrong', and another added that it had been delivered *per incuriam*: [1971] 2 Q.B. 354 at 390 and 399. On appeal seven Law Lords told the Court of Appeal it was its duty to follow decisions of the highest tribunal: [1972] A.C. 1027 at 1054 ('a severe rebuke'). But appellate tribunals in Canada, Australia and New Zealand have refused to adopt Devlin's views.

Devlin's view was that damages in tort should be confined to compensation for the wrong: punishment should be left to the criminal law. So, logically, he held in another appeal that only a modest sum should be awarded when the plaintiff was in a vegetative state unable to comprehend what had happened.<sup>38</sup>

When Devlin's widow was asked why her husband had suddenly abandoned this brilliant career, she replied: 'No, it was not deafness — he was not so very deaf then. It was boredom and boredom of the way in which time was wasted reading judgments. He recommended various changes . . . they have all been adopted but not in time for him to find the work tolerable'.<sup>39</sup>

The boredom which caused Devlin's resignation clearly seems (as Lady Devlin stated) to have been the nature of the House of Lords and its procedure as final appellate tribunal rather than with the substantive rules of law which it applied.<sup>40</sup> First, Devlin objected to the cramped accommodation and the inadequate secretarial facilities. Here little has changed in thirty years. Secondly, there is the point relating to the slowness of the intensely oral procedure, and in particular the reading out of judgments. Some problems are here. For many decades, certainly before Devlin's time, the parties to an appeal lodge Printed Cases (as they are called) with the parliamentary authorities some weeks before the appeal is listed for hearing. These Cases contain not only the judgments of the lower courts, but also a summary of the arguments which will be advanced by each party. (These summaries have become increasingly elaborate.) It is hoped that this pre-reading (as it is called in the Court of Appeal) will cut down the time taken up by oral argument. Devlin seems to have been pessimistic about the value of this. He told one researcher, whose book<sup>41</sup> on the topic has not been superseded, 'I never used to read the Printed Case. I would have done if I hadn't known it was going to be said all over again in oral argument'. Perhaps Devlin would have been satisfied if there had been a firm chairman who assumed that it was unnecessary to read

<sup>38</sup> *West. v. Shepherd* [1964] A.C. 326.

<sup>39</sup> Lady Devlin to the author, 21 June 1993.

<sup>40</sup> Yet there is a strange judgment delivered 21 January 1964 (10 days after his retirement) in which some well-settled rules relating to the interpretation of standard-form contracts are discussed in a mocking way: *McCutcheon v. David MacBrayne Ltd.* [1964] 1 All E.R. 430.

<sup>41</sup> A. Paterson, *The Law Lords* (1982), p. 36. One of the main conclusions of this book is that all concerned with the appellate process placed great weight on the oral interchanges between counsel and Law Lords.

aloud what was in the Case. In a few places Devlin hinted that he would have welcomed the role of such a chairman. But under the English system it is very difficult for a Law Lord to achieve sufficient seniority to preside. (It is different in the Court of Appeal, which sits in a number of divisions each composed of three Lords Justices. So No. 3 may quickly rise to be No. 1.) It may take years for Law Lord No. 5 to rise to be No. 1 — and even then in the 1960s there was a rule that in the absence of the Lord Chancellor an ex-Lord Chancellor would take priority. So Devlin praised Denning's ability as Master of the Rolls 'to seize the latent power of the office', and hinted that as a modern Lord Chancellor seldom had time to preside over appeals the House lacked 'an active monarch'.<sup>42</sup> It is not difficult to conclude that Devlin would have liked to have been the Head of a Division — but each of the offices of Lord Chancellor, Lord Chief Justice, and Master of the Rolls, was closed off to him in those years.

Finally, the reading of judgments at the end of an appeal was ended in Devlin's time — by a decision of Dilhorne LC in November 1963. He calculated that up to three weeks of parliamentary time could be saved if judgments were simply circulated to the parties, and also made available to the public. This had been done in the Privy Council since 1922 without ill effects. Devlin must surely have approved such a reform which had been discussed by the Law Lords for some months before it came into effect.

In any event a new era opened in January 1964. There was a break with the judicial past.<sup>43</sup> The title pages of his books (and authorship was an increasing activity) described him simply as 'Patrick Devlin, Fellow of the British Academy'.<sup>44</sup> There was no sign of the honorific prefixes and suffixes which then marked the public appearances of an English judge. 'In his writing and campaigning he became to the law what in some ways the Jesuits are to Rome: a rigorous conscience'.<sup>45</sup> His central point was that the relationship between law and justice involved a crucial role for public opinion. From the start he concen-

<sup>42</sup> McCauslan and Jowell (eds), *Lord Denning* (1984), pp. vi–vii.

<sup>43</sup> As a public duty he returned to sit on appeals three times in the Lords, and perhaps a little more often in the Privy Council. He sat as Chairman of Wiltshire Quarter Sessions, in succession to Lord Oaksey, until 1971. There were also some lucrative private arbitrations.

<sup>44</sup> Though in the most substantial work of all, a biography of Woodrow Wilson under the title *Too Proud to Fight* (Oxford, 1974) he is described simply as Patrick Devlin. The connection with the University Press of Oxford rather than Cambridge seems to have been due to a friendship going back to the 1920s with Arthur Goodhart.

<sup>45</sup> *The Guardian*, 11 August 1992.

trated on the jury. His Hamlyn lectures, published while he was still a Queen's Bench judge, concluded with the oft-cited dictum that 'Each jury is a little parliament . . . it is the lamp that shows that freedom lives'.<sup>46</sup> For thirty years he emphasised that the jury should be the final judge of disputed questions of fact,<sup>47</sup> and that its verdict of acquittal, even though perverse, was not reviewable on appeal. Sometimes this was put in the form of technical criticism of decisions of the Court of Appeal and the House of Lords.<sup>48</sup> (A few thought this was a task better performed by an active Law Lord than by a retired one.) But sometimes it was put in a more general way, as with the Hart-Devlin debate (see below p. 260), and by the end had mystical overtones. 'Power lies beneath their feet but they tread on it so swiftly that they are not burnt'.<sup>49</sup> This vivid metaphor is adequate for cases of perverse acquittal: it does not begin to explain cases of perverse conviction, where the jury have been bemused by a prosecution case which is over-elaborate (as in some commercial fraud cases<sup>49a</sup>) or simply deceitful (as with the Birmingham and Guildford bombing cases).<sup>50</sup> Nor does Devlin explain why the civil jury should have disappeared without regret — except for defamation, and in that tort the number of perverse verdicts had led the Court of Appeal in 1993 to hold that the grant of an almost limitless discretion to the jury was undesirable.<sup>51</sup> Indeed, Devlin himself in one of his most famous judgments had held that judicial control had to be exercised over a jury's power to award exemplary damages.<sup>52</sup> Why should the criminal jury be exempt from such control?

Devlin's publication which attracted most attention was *The*

<sup>46</sup> *Trial by Jury* (1956), p. 164. Other dicta, e.g. that the jury is predominantly male, middle-aged and middle-class (p. 20) can be cited now only to show how much England has changed in 40 years. See the searching analysis by P. Darbyshire, 'The Lamp that Shows That Freedom Lives — Is it Worth the Candle?' [1991] *Crim. Law Rev.* 740. Another set of lectures from those years, *The Criminal Prosecution in England* (Oxford, 1960), though rightly admired at the time, has also dated ('there is a general sense among policemen that the accused ought to be fairly treated' (p. 22).

<sup>47</sup> See the complex judgment in *Chandler v. DPP* [1964] A.C. 763 at 801.

<sup>48</sup> See *The Judge*, Chap 5, which contains elaborate criticism of the decisions in *Turnbull* [1977] Q.B. 224, and *Stafford* [1974] A.C. 878.

<sup>49</sup> (1991) 107 L.Q.R. 398 at 404.

<sup>49a</sup> Devlin later accepted that in the 18th century the judges sometimes set a verdict aside if satisfied that the jury had failed to comprehend the issues: 'Jury Trial of Complex Cases' (1980) 80 *Col. L. Rev.* 43.

<sup>50</sup> Devlin conceded these were 'the greatest disasters that have shaken British justice in my time'.

<sup>51</sup> *Rantzen v. MGN* [1993] 3 W.L.R. 953.

<sup>52</sup> *Rookes v. Barnard* [1964] A.C. 1129.

*Enforcement of Morals*. Although published in 1965, this collection of seven essays in fact goes back to 1959, when Devlin delivered the Second Maccabean Lecture under the above title, rechristened 'Morals and the Criminal Law' in the book.

Devlin raised three questions:

1 Has society the right to pass judgment at all on matters of morals, or are morals always a matter for private judgment?

2 If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce that judgment?

3 If so, ought it to use that weapon in all cases, or only in some: and if the latter, on what principles should it distinguish?

The first two questions received a definite Yes in reply. If a common morality exists, then that society had the right (but is not obliged) to use the criminal law to enforce it. A comparison is drawn with treason. 'The suppression of vice is as much the law's business as the suppression of subversive activities'.<sup>53</sup> It is important to note that to Devlin a society's legislators are not concerned with the true belief but with the common belief. The quality of the morality is irrelevant: what matters is the strength of the common belief in it. Natural law is therefore not primarily relevant: we have not got rid of the voice of God to replace it by the voice of the superior person who engages in 'advanced thinking'. For 'A free society is as much offended by the dictates of an intellectual oligarchy as by those of an autocrat'.<sup>54</sup> So in answering his third question Devlin adopts an egalitarian position which puts his opponents in the position of being labelled élitist.<sup>55</sup> He gave to his favourite institution, the jury, a positive role as legislator, and not just a negative role in refusing to enforce oppressive laws. The jury should be entitled to punish<sup>56</sup> conduct which arouses indignation and disgust.<sup>57</sup> Devlin conceded that nothing should be punished which did

<sup>53</sup> *The Enforcement of Morals*, pp. 13–14.

<sup>54</sup> *Ibid.* pp. 93, 126.

<sup>55</sup> A certain note of exasperation is detectable in the writings of the various academic liberals who tried to counter Devlin's arguments: they felt they had been wrong-footed, but were not sure how it had been done.

<sup>56</sup> e.g. by convicting of the misdemeanour of conspiracy to corrupt public morals. Devlin (like his critics) seems obsessed with punishment as a mode of enforcing morality. A mature legal system has other techniques — e.g. non-recognition or nullification (as with gaming contracts). Why send the bigamist to prison? Is it not enough to hold the second marriage to be void?

<sup>57</sup> These words aroused 'what was to me a surprising reaction': Devlin in *The Listener*, 18 June 1964.

not clearly lie beyond the limits of tolerance — and that those limits might shift with changing social conditions.

The Maccabean Lecture had just been published when, as Devlin drily observed,<sup>58</sup> it was ‘denounced in rather strong language by the distinguished jurist Professor Hart in a piece which has been given a place among the masterpieces of English legal prose in *The Law as Literature* [ed. LJ Bloom-Cooper, The Bodley Head, 1961]’.<sup>59</sup> The other chapters in the book contain further replies to Hart’s criticisms. As one reviewer wrote, ‘no punches are pulled and a number of resounding thumps are administered’.<sup>60</sup>

The number of topics surveyed is so great that a selection is inevitable. Much effort was devoted to a discussion of the assertion that certain criminal offences — for example, bigamy, incest, and cruelty to animals — cannot be explained except as showing that society is enforcing morality as such, and so going beyond Mill’s famous liberal principle that ‘the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others’. How then can one explain the well-established principle that the victim’s consent is no defence to a charge of assault<sup>61</sup> or murder? Euthanasia, as we have seen, is still a crime, but so is a serious assault or battery<sup>62</sup> to which for some reason, perhaps perverse, consent has been given. So in *R. v. Brown* Lord Templeman stated that society is entitled to protect itself against outrageous conduct degrading to the human spirit, though Lord Mustill, while agreeing that consent to such conduct was invalid, held that repugnance and moral objection are not grounds on which a *new* crime should be created by judge and jury. Hart was in a difficulty about consent, and concluded rather lamely, in a passage which evoked some withering sarcasm from Devlin,<sup>63</sup> that ‘Mill no doubt might have protested against a paternalistic policy of using the law to protect even a consenting victim’. He might indeed,

<sup>58</sup> *The Enforcement of Morals*, p. vii.

<sup>59</sup> Hart’s article first appeared in *The Listener*, 30 July 1959. It is reprinted in R. M. Dworkin (ed.), *The Philosophy of Law* (Oxford, 1977), p. 66.

<sup>60</sup> (1966) 82 L.Q.R. 114.

<sup>61</sup> Re-emphasised by the House of Lords in *R. v. Brown* [1993] 3 W.L.R. 556, in which the sado-masochistic conduct in question, though repulsive to ordinary people, had been fully consented to by the various accused.

<sup>62</sup> Nobody has argued that the law should deal with people jostling at an underground station, or football fans slapping their heroes on the back.

<sup>63</sup> *The Enforcement of Morals*, p. 132.

for such a stance, as Devlin wrote, ‘tears the heart out of his doctrine’.

As Professor Neil MacCormick wrote,<sup>64</sup> ‘Hart’s whole case falls because of a single, central confusion — his assumption that “harm” is a morally neutral concept. But it is not. In deciding what is “harmful” to a person, we necessarily make an evaluation, and that evaluation belongs to morality’.

Besides authorship there was the chairmanship of various bodies. While still a judge he had been chairman of the Council for Bedford College (1953–9), but characteristically resigned when he developed doubts about the value of higher education for women. The chairmanship of the Press Council lasted from 1964 to 1969: in Fleet Street it was thought to have been successful, and Devlin developed a liking for journalists.<sup>65</sup> There were also three reports in 1955–6 on the problems of Britain’s docks. In 1965 he became High Steward of Cambridge University.

In February 1973 the Cambridge University Reporter published a Report by the High Steward into a sit-in at the Old Schools a year earlier with consequent damage, and the subsequent planned disruption of the proceedings of a court of discipline. (An earlier riot at the Garden House Hotel had been dealt with in the criminal courts.) The Report contained a penetrating and sardonic analysis of the then novel phenomenon of student power. ‘The blunt fact is that students have nothing of value to withhold, so that their direct action has to consist of taking what does not belong to them — the rooms, the facilities and the convenience of others — and trying to get them ransomed’. Constructively, Devlin recommended some form of student representation on university bodies. This is now commonplace.

Devlin died at Pewsey on 9 August 1992, three months short of his eighty-seventh birthday. A funeral requiem mass according to the Dominican rite was held at St. James’s, Spanish Place. The net value of his estate was sworn for probate at £4,844.

Fifteen years ago the author of a major book on the House of Lords as a judicial body perceptively wrote that ‘Devlin was a highly

<sup>64</sup> *H. L. A. Hart* (1981), p. 153. A later collection of essays celebrating the achievements of Hart contained an essay on the enforcement of morals which has only two brief references to Devlin: R. Gavison (ed.), *Issues in Legal Philosophy* (Oxford, 1989). A book by R. P. George entitled *Making Men Moral* (Oxford, 1993) proposes a reinterpretation of Devlin’s position that enables it to survive Hart’s criticisms.

<sup>65</sup> Once he compared their abilities favourably with those of judges: *The Judge*, p. 197.



complex man and judge . . . he was a mystical figure'.<sup>66</sup> Time has made this particular verdict safe from review.

R. F. V. HEUSTON  
*Fellow of the Academy*

<sup>66</sup> Robert Stevens, *Law and Politics* (London, 1979), pp. 466–7.