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COMMENTARIES

LEGAL ENFORCEMENT OF MORALITY

KENT GREENAWALT*

In modern Western political and legal thought, the subject of legal enforcement of morality is narrower than the literal coverage of those terms. That is because much legal enforcement of morality is uncontroversial and rarely discussed. Disagreement arises only when the law enforces aspects of morality that do not involve protecting others from fairly direct harms. More precisely, people raise questions about legal requirements (1) to perform acts that benefit others, (2) to refrain from acts that cause indirect harms to others, (3) to refrain from acts that cause harm to themselves, (4) to refrain from acts that offend others, and (5) to refrain from acts that others believe are immoral. Answers to some of these questions *may* be affected by whether the relevant moral judgments are essentially religious. Subsidiary questions concern the appropriateness of taxes adopted to discourage behavior the government should not forbid outright and the appropriateness of prohibitions on others profiting from such behavior (as when someone lives off the earnings of prostitutes).

Since it is rare that one argument for restricting behavior will stand by itself, with no other arguments supporting restriction, a conclusion about a single theoretical issue will not usually yield a decisive answer as to whether any particular behavior should remain free. However, a conclusion that some argument for restraint is unwarranted can significantly affect the overall power of the totality of arguments. For example, if someone concludes that the claimed immorality of homosexual behavior is not a proper basis on which to forbid it, this will substantially affect the overall strength of reasons in favor of prohibition.

A final subtlety concerns two perspectives from which to consider the subject of the legal enforcement of morality. One perspective is

* This essay is a slightly revised version of one prepared for the Blackwell Companion to the Philosophy of Law and Legal Theory.

that of legislative philosophy: "Should the legislature enforce morality by law?" The second perspective is that of a court in a constitutional regime: "Should enforcement of morality count as a legitimate basis for legislation that is challenged as invalid?" One *might* think that legislatures should not rely upon certain reasons, but that courts should accept them as adequate if legislatures do rely upon them. In addition, a reason might be acceptable for most legislation, but not, say, for legislation that infringes on liberty of expression. Finally, a reason might be acceptable as a matter of general philosophy of government, but not in a constitutional regime that mandates the separation of church and state.

This Article explains these major questions in turn, but first addresses the self-evident point that legal enforcement of morality is usually appropriate.

I. LEGAL ENFORCEMENT OF MORAL NORMS AGAINST CAUSING HARM

Any comprehensive morality includes restraints against harming other people. Murder, assault, theft, and fraud are immoral. In any society sufficiently developed to have a law distinguishable from its social morality, this law will forbid murder, assault, theft, and some forms of fraud. As H.L.A. Hart pointed out, law and social morality will constrain much of the same behavior.¹ This does not mean, of course, that the law will enforce every aspect of morality that concerns preventing harm to others. Law is a crude instrument, requiring findings of uncertain facts, with rules backed by a limited arsenal of coercive sanctions. Many immoral acts that hurt others are unregulated by the law. Nevertheless, no one doubts that, in principle, protecting others from harm is an appropriate task for legal rules. Exactly what protection these rules should extend is a matter of prudential judgment or some kind of balancing of morally relevant factors. These plain truths may obscure some complexities that one must consider when asking if legal rules should prohibit acts on *other* grounds.

The idea of harm to someone else must be clarified and developed. If every unpleasant feeling or negative thought qualified as a harm, an act might be prohibited because it made some people envious or disturbed them. With such an expansive notion of harm, prevention of harm to others would justify enforcement of all aspects of morality.² Inquiries into whether legal rules should prevent people from harming themselves (or enforce morality *as such*) would then

¹ H.L.A. HART, *THE CONCEPT OF LAW* 188-95 (1961).

² However, the weight of reasons in favor of a legal rule would still be influenced by a focus on the gravity of such harm.

have far less practical significance. In his nuanced and exhaustive treatment of this subject, Joel Feinberg suggests that, *for a principle of preventing harms to others*, the "harms" that warrant consideration are "setbacks to interests" that are, in some way, wrong.³ Thus, because no wrong has occurred when an actress is fairly chosen for an important role, that choice does not harm an envious rival who loses the opportunity to earn \$1,000,000. Exactly what qualify as harms to others is of central importance when examining the bases for contested legal regulations.

One significant point is that the prevention of harm to others includes prevention of harm that is most directly inflicted on people as a collective. Thus, the "harm principle" generates no difficulty for a law against spying on the government. What harms qualify as collective harms, however, is an issue to which it is necessary to return.

Two related questions regarding harm to others affect much of the rest of this essay. Their explication here will clarify what follows: (1) Is it possible to make decisions about legal regulation without any moral judgment whatsoever? (2) if moral judgment is necessary in deciding what qualifies as relevant harm, does it follow that general enforcement of morality is appropriate?

In answer to the first question, a distinction between wrongful and nonwrongful harms does involve moral judgment, for example, the judgment that suffering envy at the deserved success of others is not a relevant harm. Is this sort of judgment avoidable? It is possible to *imagine* a legal system with regulations based on an assessment of negative consequences that considers only overall individual preferences, happiness, or ability to pay, relying on no (other) moral judgments ("no other," because deciding that only preferences, happiness, or ability to pay should be considered is, itself, a moral judgment). If someone conceives the grounds for legal regulation as restricted in this way, would the grounds for legal regulation seem more limited than the grounds for moral judgments in general? This depends. "Average happiness utilitarians" base all moral judgments on actual and prospective happiness. It would be misleading, however, to describe their position as one in which legal regulation is determined without moral judgment, because they would use the same kinds of assessments to make all correct moral judgments as they use to determine appropriate legal restrictions. Suppose, by contrast, someone thinks that sound morality includes many grounds for judgment, but that almost all of these grounds are irrelevant for legal regulation.

³ JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31-104 (1984).

This position might be phrased as one in which legal regulation can be determined without moral judgment. But it is hard to understand how someone could defend the substance of this position. Why should moral distinctions that govern the nonlegal evaluation of acts become irrelevant for evaluating legal rules? The answer is that they should not. Thus, the principles guiding legal regulation must include moral judgments.

If moral judgment affects determinations of harm, it does not necessarily follow that legal rules appropriately enforce morality in general. It may be that for reasons of moral and political philosophy, harm to others (determined partly by moral judgment) should be an appropriate basis for legal regulation, whereas moral evils that do not involve harm to others should remain free of legal regulation. The next sections examine whether the law should enforce morality in various senses.

II. LEGAL REQUIREMENTS TO PERFORM ACTS THAT BENEFIT OTHERS

Should people have a legal duty to rescue others? In most states of the United States and in many other countries, people do not have such a duty. A person who walks by a shallow pool in which a baby is drowning, fully aware that saving the baby would cause no more harm than wet feet, can keep on walking without criminal or civil consequence. On occasion, people have defended this legal principle on the ground that the law should not enforce morality. This claim is either confused or unpersuasive.

It helps, initially, to narrow the real basis of contention. People often suppose that omissions to act have a different moral status from actions. If *A* breaks *B*'s arm, *A* does something worse, morally, than if *A* fails to prevent *C* from breaking *B*'s arm. Although an extreme utilitarian might deny the moral significance of a distinction between action and omission, I assume it in what follows. Everyone agrees that preventing easily-avoidable, serious harms is *morally preferable* to letting them occur, and most acknowledge that people have a *moral duty* to rescue the drowning baby.

The law draws no universal line between action and omission. People who have a special responsibility to care for others cannot stand by and let those for whom they are responsible suffer avoidable injury. A parent or hired nurse who, with full awareness of what is happening, lets the baby drown is guilty of murder or manslaughter. Indeed, people perform a wide range of roles that include responsibilities to care for others. Further, people have general duties to act for the benefit of the public. They have a legal duty to testify, even if they

would rather not; they must pay taxes; and they must submit to jury service. Few doubt that the law properly requires some people to act to avoid harm and requires nearly all people to contribute to the common welfare.

Since anyone who is not an anarchist is likely to acknowledge that governments rightly impose on people some positive duties to act, any principled controversy appears to be over whether the law should require *strangers* to assist individuals in need. Some of the arguments against such liability are: (1) determining the state of mind of someone who could rescue, but did not, is usually very difficult; (2) people in a position to rescue (say on a beach, or at home with their telephones as a rape happens outside) frequently believe someone else may do it; (3) a duty to help others in need is too vague; and (4) such a duty infringes inappropriately on the autonomy of citizens to pursue their own projects.

From a consequentialist perspective, these problems are matters of degree. A legal duty requiring people to prevent death or severe injury to another when they are fortuitously in the position to do so at no risk and at slight cost to themselves is a minimal infringement on individuals' pursuit of their own projects.⁴ Limiting the duty to persons who find themselves in situations in which others are not equally able to help, avoids the complexity concerning many available potential rescuers. If determining the state of mind of someone who fails to assist is deemed too difficult, a failure to rescue can be treated as criminal or civil negligence. Circumscribing the legal duty to assist in this manner largely surmounts the vagueness problem. One might reasonably conclude that such a legal duty would cover so few circumstances that it would not be worth imposing—and that it might even detract from nobler motivations to help. However, there can be no principled consequentialist objection to the propriety of such a duty.

Does an examination from a deontological perspective (based on moral rights and justice) yield a different conclusion? I assume that a moral duty to rescue exists (if one assumes that rescue is only a question of moral desirability, not of moral duty, one still might believe that a *legal* duty is appropriate, since, in some domains, the law requires more than is required by independent moral duty). Given that the law properly imposes legal duties to rescue on those with special responsibilities and also imposes legal duties on the general public to satisfy public responsibilities, no basis exists for an absolute principle against requiring stranger rescue. People imagining that they might

⁴ The idea of one being *fortuitously* in the position to help is needed so that those with special skills, mainly doctors, are not on constant call to assist strangers in need.

be in the position of needing rescue or might be able to make a rescue certainly would choose to have such a legal duty (since the adverse consequence of not being rescued is far greater than the inconvenience of rescuing).⁵ A duty to rescue is a reasonable responsibility of citizens. People may believe that, on balance, imposing the duty is unwise, but the duty involves no breach of any defensible deontological principle that law should not enforce morality.

III. REQUIREMENTS TO REFRAIN FROM ACTS THAT CAUSE INDIRECT HARM TO OTHERS

Before examining claims that self-protection, offense, and perceptions of immorality are themselves inappropriate bases for regulation, it is necessary to look at indirect harms to others. Many acts that do not cause direct harm may hurt people indirectly. In *On Liberty*, the most famous work on the legal enforcement of morality (and on enforcement of morality by public opinion), John Stuart Mill wrote, "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."⁶ Mill acknowledged that when people harm themselves it affects others through their sympathy and interests, but he concluded that only when "a person is led to violate a distinct and assignable obligation to any other person or persons [is] the case taken out of the self-regarding class."⁷ As an example, Mill asserted that "no person ought to be punished simply for being drunk; but a soldier or policeman should be punished for being drunk on duty."⁸

May indirect harms to others, contrary to Mill, properly be a basis for legal restriction? Consider three instances of indirect harm: (1) when an action will certainly cause harm to others; (2) when a likely future consequence of action is harm to others; (3) when an action is likely to make someone a burden on society.

If parents with young children commit suicide, they are unable to provide further material and emotional support for their children. That is certain. Criminalizing suicide may be pointless, but the harm to young children is a proper basis for preventing parents from committing suicide, when such prevention would be effective. Whatever conceptual division between direct and indirect effects makes sense, a consequence that is certain to follow from an action is one on which society may base regulation.

⁵ People might not choose to have a legal duty *if* they believed the moral sense of others would assure rescue.

⁶ JOHN STUART MILL, *ON LIBERTY* 15 (Oxford University Press ed. 1975).

⁷ *Id.* at 99-100.

⁸ *Id.* at 100.

Future consequences that are likely, but not certain, pose a more complex problem. Suppose evidence strongly suggests that if the use of a particular psychedelic drug became legal, most people who began to use it would eventually become addicted and would, at that point (because of cost and physical effects of the drug), be unable to perform family obligations. Further, once people used this drug extensively, their desire to consume it would be more intense than if they had never or seldom used it. Would this harm "down the road" be a proper basis for forbidding *all* use of the drug or all use of the drug by parents of young children? If a high percentage of parent-users would eventually neglect their children and no one could determine, in advance, which parents would be the "neglectors," forbidding all use, at least by parents of young children, would make practical sense. Certainly a consequentialist perspective warrants such a restriction. If one were to mount a plausible consequentialist argument in favor of an *absolute* principle against prohibitions based on such indirect effects, one would have to contend that governments cannot be trusted to limit legal restraint to extreme situations in which expected future harm is serious and pervasive and restraint at the initial stage is much more effective.

Focusing on a nonconsequential right to liberty *might* lead someone to believe that people who are capable of controlling themselves should not be restricted because other people, even a high percentage of users, lack such control and will end up doing harm to their children. If the percentage of nonaddicted users was slight, the cost in human misery of recognizing this claimed right would be high; and an absolute right of this sort would be unattractive. Nonetheless, the basic idea of some such claim to liberty suggests a counter to any exclusively consequential analysis of the problem. The appeal of the claim to liberty seems most powerful when the high-risk activity is thought to reflect some commendable striving of the human spirit, as with extremely dangerous mountain climbing.

What about actions that are thought to bear an unacceptable risk that a person will become a burden on society? This is one justification offered for laws that require automobile drivers to wear seat belts and motorcyclists and bicyclists to wear helmets. From a consequentialist point of view, the value of liberty and the pleasure of riding unconstrained might somehow be weighed against the likely cost of injury. The cost appraisal would need to be reasonably comprehensive; if cigarette smoking leads to public medical expenses, does it also save public money because smokers tend to live shorter lives after retirement? Someone who places a great intrinsic value on liberty may claim that no public burden is sufficient to justify restriction. If soci-

ety wants to protect itself, it can demand that people who engage in dangerous activities buy insurance to cover possible expenses of injury. Since that available lesser restriction will protect the public purse, across-the-board-prohibition is not warranted, even if it is easier to administer.

In summary, *some* arguments for restriction based on likely indirect effects run into claims of autonomy that people will assess as more or less powerful according to their overall approach to moral and political philosophy.

IV. REQUIREMENTS TO REFRAIN FROM SELF-HARMING ACTIONS

Is harm to the actor an appropriate reason for legal prohibition?⁹ If morality bears on how people should treat themselves, and if the law should not interfere to prevent self-harms, then this is one respect in which the law should not enforce morality. Mill put the principle in favor of nonrestriction boldly. A person's "own good, either physical or moral, is not a sufficient warrant" for society to exercise power over that person.¹⁰ With regard to conduct "which merely concerns himself, his independence is, of right, absolute."¹¹ If people followed Mill's principle (and did not regard indirect effects on others as an adequate basis on which to regulate), there would probably be no seat belt and helmet laws, no laws restricting voluntary sexual activities among adults, no laws against most presently proscribed drugs, no rules forbidding swimming at unguarded beaches, no legal restraint of suicide, and far fewer regulations on food, medical drugs, and related matters.

Mill speaks of an absolute right, but the grounds underlying the right are consequential. He argues that, given differences among individuals, what is good for most people often is not good for everyone, and that people grow by learning through experience. He argues further that experiments in living are vital for the progress of the human race, and that the majority cannot be trusted to restrict wisely. When one considers most sexual activities, these arguments are powerful. But what of an activity like cigarette smoking? Few mature adults (in the United States at least) are pleased to be smokers; but most smokers find it difficult to quit. The nearly universal desire for decent health makes it possible to say confidently that cigarette smoking is harmful to smokers (or at least unwisely reckless). Thus, unless one's

⁹ For this question, it is widely assumed that adults voluntarily engaging in behavior together, such as sexual acts, are not distinguishable in principle from individuals acting by themselves.

¹⁰ MILL, *supra* note 6, at 15.

¹¹ *Id.*

distrust of the majority is extreme, one cannot, on consequentialist grounds, settle on a principle as absolute as Mill's.

Such an absolute principle is more comfortably defended on the ground that adults should have autonomy to decide how to live their lives, making even foolish choices as long as they do not harm others. The value of autonomy seems most directly opposed to restriction that is designed to protect actors themselves.

In considering the defensibility of a powerful principle against any legal "paternalism" that protects people from themselves, it helps to consider voluntary choice, paternalism that serves the reflective values of the actor, and paternalism that imposes values that the actor rejects. Restriction of people for their own good is easiest to justify when voluntary choice is absent. If voluntary choice is present, restriction on behalf of values the actor accepts amounts to a less severe restriction on autonomy than restriction on behalf of values that the actor rejects.

The use of seat belts provides an apt starting point for the examination of these issues. For most people, using seat belts in automobiles is a minor restriction. In addition, few people are indifferent to loss of life or grave physical injury, and use of seat belts reduces the likelihood of these occurrences. Yet, many people choose not to use seat belts. One *might* analyze these facts in the following way: The chances of having a bad accident on any one occasion of driving are slight. Some people are not fully aware of the value of wearing a seat belt in the event of an accident; others fail to act rationally in the face of a very slight risk of injury, and they are disposed not to imagine that they will actually be in a serious accident. For complex psychological reasons, they do not respond sensibly to the risks involved. People might view a requirement that they wear seat belts as forcing them to do what is prudent and reasonable *given their own values*. One might even argue that a choice made as a result of ignorance or under conditions when rational assessment is difficult is not *really* voluntary. Suffice it to say that the more acts one considers not voluntary, the more one will believe that state restrictions are countering undesirable choices that are insufficiently voluntary.

The most serious breach of someone's autonomy involves coercion that contravenes that person's own rational, reflective judgment. Practicing homosexuals believe that their lifestyle is best for them. If they are told they must refrain from homosexual activity because such activity is psychologically unhealthy, their own deep sense of how to live is rejected.¹² This justification for restriction is more of an insult

¹² This Article does not discuss the complicated subject of coercion that successfully

to their status as autonomous persons than any justification based on harm to others.

Exactly how much paternalism people will countenance depends on how strongly they rate the value of autonomy and to what degree they trust the judgments of the government as to what is in their self-interests. Perhaps no one has given as much careful study to these problems as Joel Feinberg. Writing from a liberal perspective, Feinberg, like Mill, endorses an absolute principle that someone's own physical, psychological, or economic good should not be a basis for criminal prohibitions against voluntary behavior.¹³ This position is substantially more libertarian than the practices of modern societies and what most people in them would endorse.

Some secondary questions regarding legal regulation involve the availability of civil law consequences when criminal prohibitions would be inappropriate, rules against third persons (such as pimps) profiting from consensual acts between others, and taxation designed to discourage behavior. Much could be said on each of these subjects, but this Article will briefly comment only on the third.

Mill concluded that although raising money disproportionately on unhealthy activities is acceptable (the government can tax liquor sales at a higher rate than milk sales), it is unacceptable to set a tax *to discourage* behavior that, in principle, should be free from criminal restriction.¹⁴ Disregard the fact that cigarette smoking harms non-smokers, and assume the following for the volume of sales under various levels of cigarette taxes:

	Tax Rate Per Pack	Sales in Millions	Revenue
(A)	0	20	0
(B)	\$1.00	15	\$15 million
(C)	\$1.50	8	\$12 million

The only reason to prefer tax (C) to tax (B) is to discourage smoking; Mill's proposition bars this resolution. Mill's conclusion, however, is not warranted on consequentialist grounds. People who have a strong desire to smoke will continue to do so if tax (C) is in place, and the "experiment in living" of smoking will not be squelched. A *payable* tax does not foreclose choice in the manner of a successful prohibition.¹⁵ Thus, the consequentialist reasons against outright prohibition apply with much less force to a discouraging tax

alters the subject's judgment about what is worthwhile.

¹³ FEINBERG, *supra* note 3, at 1-49.

¹⁴ MILL, *supra* note 6, at 123-24.

¹⁵ Of course, an enforced tax of \$300 per pack will be a more severe restriction than an unenforced prohibition.

that is not too high.¹⁶ Matters are more complex if one focuses on a smoker's intrinsic right to autonomy. One might think autonomy is breached if the state tries to manipulate behavior for the smoker's own benefit. In this event, tax (C) is not distinguishable in principle from a prohibition. On the other hand, the choice to smoke is still available, and the price of cigarettes is no greater than if natural factors (disastrous storms) or economic factors drove the price of cigarettes up. In its effect on choice, the tax, therefore, still differs from a successful prohibition. Thus, it is impossible to move from the conclusion that the law of crimes should leave self-harming behavior free, to the conclusion that taxation to discourage the behavior would be inapt.

V. REQUIREMENTS TO REFRAIN FROM ACTS THAT OFFEND OTHERS

Some acts that do not cause harm in a more concrete sense offend others who observe them or who know they take place. Often people regard the offending behavior as immoral in some sense. Is offense an appropriate basis for legal restraint or is this an aspect of morality that the law should not enforce?

The analysis is fairly simple for activities that offend unwilling witnesses and that may be carried on in private (*e.g.*, sexual intercourse). In such a case, the act, itself, is not immoral; rather, the immorality is the failure to respect the cultural sense of what may decently be done in public, before involuntary witnesses (a "public" performance before *willing consumers* is a different matter). Of course, the law should not enforce the sensitivities of the most timid, and many things that social conventions treat as offensive (*e.g.*, belching loudly in a restaurant) do not warrant legal regulation; but most people agree that criminal restrictions appropriately protect people against instances of public offensiveness. Of course, in certain instances, countervailing rights qualify this conclusion. Suppose that religious symbols worn openly by a minority or forms of speech (say, flag burning) by dissidents offend the majority. Rights of free exercise of religion and free speech may preclude offense as a basis for legal restriction. In the United States, courts treat such laws as unconstitutional infringements on liberty.

Some acts offend individuals who are not witnesses to them. For example, some people are disturbed to know that homosexual acts occur. Mutilation of the bodies of those who have died and cannibalism are more perplexing examples. Isolating the issue of whether to

¹⁶ If a set amount of tax is unfair to poor smokers, lawmakers can calibrate the amount of tax to a smoker's wealth.

make offense a basis for legal restriction is not easy. It is possible to imagine people being offended by private acts which they do not regard as immoral, but this would be unusual. Typically, people are offended by behavior that they find wrongful. Therefore, in practice, asking whether the opinion that behavior is wrongful is a justification for prohibiting the behavior is not too different from asking whether deep offense is a justification. But belief in wrongfulness and feeling of deep offense are, or can be, distinguishable bases for restricting behavior, and this section focuses on the latter.

With regard to the element of offense, some absolute, or near absolute, principles are plausible. These are presented here without sustained defense. First, if those offended *do not have any moral objection to the behavior*, the law should permit it. The law should not restrict people's liberty to live their own lives as they choose because others are disturbed by what they do. Second, offense at religious practices that cause no secular harm cannot be a basis for restriction. Third, offense at non-religious practices (such as homosexual acts or eating pork) because the practices violate some people's religious beliefs should not be a basis for restriction in a country that values religious freedom and does not maintain a close connection between some religion and the government. *Perhaps* in a country that is overwhelmingly Jewish or Moslem, prohibitions on pork eating would be acceptable.

It does not violate these limits if the law restricts an act because people have a non-religiously based belief in its wrongfulness that causes the act to offend them deeply. If other appropriate bases for restriction are present, deep offense may count in the balance; but it is doubtful that it could ever be the primary basis for restricting liberty. This doubt, however, hinges on a particular view of mutilation of bodies, desecration of graves, etc., which are frequently presented as the strongest candidates for restrictions based on offense. When a loved-one dies, the deepest emotions do not fully separate the body from the person. Abuse of the body would feel like abuse of the person. More broadly, abuse of the bodies of strangers feels like abuse of people. Emotionally, if not reasonably, mutilation is a harm to the person who lived in the body; it is also a harm to those who identify strongly with the person. In addition, it may cause people concern over what will happen to their bodies after they die. It is misleading to characterize as "offense" the deep sense that this behavior causes harm. Protection of human remains is proper, but it should be understood as a special example of accepting (nonrational?) sentiments of what constitutes harm to others.

VI. REQUIREMENTS TO REFRAIN FROM ACTS OTHERS BELIEVE ARE IMMORAL

Is it possible to justify legally restricting an act considered immoral, if that consideration does not stem from any harm (to others or self) and offense the act may cause? Sometimes this seems to be *the* issue about legal enforcement of morality, but conceptual clarity is not easy. Part of the difficulty is that claims that such enforcement of morality is improper dissolve into rather different kinds of arguments. Another part of the difficulty stems from the doubt that any acts really are regarded as immoral in and of themselves, apart from some perception of harm. On the latter point, beliefs about homosexual acts provide a helpful illustration. Almost everyone who thinks homosexual acts are morally wrong also believes they are psychologically unhealthy for those who engage in them. But someone who believes that the Bible reveals that God has condemned cities whose inhabitants practice sodomy might implicitly rate the evil of the acts as much greater than the particular harm (in this life, at least) to practicing individuals. One *could* conceivably think that certain individuals are condemned to completely miserable lives no matter what they do, and still object to their committing immoral acts. Such a complete divorce of morality from harm may be unusual, but since moral perspectives (especially religious ones) have different dimensions, the *magnitude* of a moral wrong may seem greater than any harm it causes. Thus, it does matter whether a sense of moral wrongness may underlie restriction.

A claim that the law should enforce morality *as such* might assert one of the following rationales: (1) objective immorality should be punished; (2) a community properly punishes that which it regards as immoral, without more; (3) a community may preserve its moral structures, without more; (4) people have a legitimate interest in preserving structures of life familiar to them; (5) individual liberty in self-regarding matters may weaken a community and dissolve bonds of other-regarding morality, to the detriment of the people in that community.

The last claim is plainly consequentialist. The notion is that people who perceive the law as accepting acts that they regard as abhorrent will, over time, lose respect for the rights and interests of others. Although various passages may be interpreted differently, this seems to be the drift of Patrick Devlin's argument that legal enforcement of (private) morality is, in principle, appropriate.¹⁷ It may be answered, as H.L.A. Hart responded, that communities could observe other-re-

¹⁷ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

garding morality, while respecting wide variations in private life, just as communities now respect wide variations in religious belief and practice.¹⁸ Neither position is illogical. The real issue is a factual one, and the answer could vary from community to community. Given normal fears of change and the actual capacity of social communities to adapt to change (among religious beliefs, for example), people should regard claims of social disintegration with great skepticism, but one cannot rule them out in principle as conceivable justifications for social restrictions.

Within societies that share views on religious truth, punishment of objective immorality may seem perfectly appropriate. But such an agreement *alone* is probably not a sufficient justification for restriction in a liberal democracy. The position advocated by certain liberal theorists that the state should remain neutral among conceptions of the good life, leads to the belief that the state should not punish objective immorality. Even if one thinks the state need not be neutral in this regard, coercion of adults with respect to their behavior apart from its damaging consequences may not seem appropriate. This tentative conclusion is tested by examples like sex with animals and staged bear fights. Human sex with animals, bestiality, is almost universally criminal, and the main reason is not animal protection. One may, perhaps, find sufficient justification for restricting sex with animals in its unhealthiness for the human participants, and perhaps the morally grounded offense felt by others. However, these justifications probably do not capture all the bases for prohibition; a sense of fundamental immorality independent of harm also contributes. Similarly, with bear fighting, worries that it would make human observers more cruel and aggressive may be only part of the story. These examples show that even in liberal democracies, a sense of objective immorality affects feelings about legislation. Whether acting on these feelings is consistent with liberal principles is debatable.

Those who are skeptical about the existence of objective morality or about government's enforcement of such morality may still believe that a community may enforce its *own* morality, independent of harm and offense. But apart from negative consequences of nonenforcement, why should existing morality be frozen in amber, if members of the community do not assume that the morality is objectively required?¹⁹

¹⁸ H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

¹⁹ This Article does not address the complex intermediate possibility of observers who do not think a particular morality is objectively required, but who are asking themselves if a community is justified in enforcing moral norms that the community thinks are objectively required.

Claims about moral structures and structures of life seek to answer why the community may enforce its own morality. Both claims come down to the idea that members of a community have some interest in preserving forms of life familiar to them. If the argument is not to reduce either to a bald contention that a community can enforce its morality or to an assertion that offense justifies restraint, then it must be based on the value of continuity and psychological security in people's lives. This is a kind of consequentialist basis, although one that would need to be strong if it is to override the liberty of people to choose their own ways of life. As suggested with respect to offense, sustaining a morality that is directly dependent on a religious perspective probably should not count as a justification in a liberal society.

The relationship between political philosophy and constitutional requisites was at issue in *Bowers v. Hardwick*,²⁰ a United States Supreme Court case reviewing the constitutionality of a ban on sodomy as it applied to homosexuals. A majority of five justices found that a public view that homosexual acts were immoral was a constitutionally sufficient basis for a prohibition of such acts. The dissenters did not express disagreement with this conclusion in all applications, but argued that the public's opinion about immorality was an inadequate basis for constitutional restrictions when the fundamental interest of sexual intimacy was involved. Although judges are influenced by their senses of sound political and moral philosophy, any judge might conclude that a legislature is constitutionally permitted to base prohibitions on grounds that would be eschewed under the best understanding of reasons for infringing upon individual liberty.

VII. CONCLUSION

The law uncontroversially enforces much morality that concerns preventing harm to people. Moral judgment is needed to determine what count as relevant harms and to decide what are appropriate bases for legal regulation; but whether law should enforce some aspects of morality is genuinely disputed. Although people sometimes assert that legal rules should not require strangers to assist each other, no simple principle yields that conclusion. Indirect, as well as direct, harm can appropriately underlie regulation. Usually people should remain free to decide what is good for themselves, but restraint for the good of those who are regulated is sometimes defensible, particularly when choices are not rational and restraint is based on values embraced by the subjects of regulation. Contrary to what Mill asserted, taxes to discourage behavior may be justified even if outright

²⁰ 478 U.S. 186 (1986).

prohibition is not. Public offense is a proper basis for restriction; private offense ordinarily is not, unless it is linked to a belief that action is immoral. Various reasons may explain why societies should punish acts that people regard as immoral, even when no identifiable individuals are harassed. The strongest of these arguments rest on undesirable consequences to the social fabric; even these are much easier to assert than to support with persuasive factual hypotheses.

If this essay has a central point, it is the need to avoid reductionist simplicities when addressing whether, and when, the law should enforce morality.