The Enforcement of Morals Revisited

In sports, excellent teams are reputed sometimes to play down to the quality level of their opponents: against mediocre teams the excellent do not always play their best game. So it appears to have been with the Hart-Devlin controversy. H. L. A. Hart was a truly distinguished legal theorist, but *Law, Liberty, and Morality* does not rank among his best works.[1] Following the lead of the nineteenth-century writer James Fitzjames Stephens, Lord Patrick Devlin defends the use of the criminal law to enforce the morality of society and argues against the contrary views famously espoused by John Stuart Mill in *On Liberty*.[2] Perhaps distracted by the bad arguments advanced by Devlin and Stephens, Hart scores good points against them but fails to acknowledge the extent to which Mill's position on the moral limits of the proper uses of social coercion is indefensible. Attempting to improve on Mill's famous harm principle, Hart defends an expanded harm principle, but as I shall argue, this improved version of Mill's position remains indefensible. Hart's discussion is also unsatisfying, insofar as it fails to acknowledge that debate about "the enforcement of morals as such" fails to clarify what is really at stake in controversies regarding the moral acceptability of criminal prohibition of such activities as suicide and assisted suicide, recreational drug use, same-sex sexual activity, brutal sports contests, and prostitution. However, Hart does make some progress toward clarifying the claim that the enforcement of morals as such or legal moralism should be rejected. Moreover, this last claim still has legs—it might well be true.

The origin of this dispute was the publication in 1957 of the Report of the Committee on Homosexual Offenses and Prostitution, also known as the Wolfenden Committee Report. The Committee had been appointed by the British Government to make recommendations as to laws regarding homosexuality and prostitution. The Committee recommended the elimination of laws forbidding homosexual activity between consenting adults and the elimination of laws forbidding prostitution, the latter to be replaced by laws treating public solicitation as a public nuisance. In making its case for these proposed changes in the law the Committee appealed to the idea that the proper function of the criminal law "is to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official, or economic dependence."[3] Hart characterizes this viewpoint as substantially the same as the one that Mill articulated in *On Liberty*. On this basis the Committee recommended relaxation of the law concerning sexual conduct and commented that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

Devlin demurs. He holds that morality by its nature concerns the public and is upheld by the public. Society is held together not merely by shared interests but by shared moral beliefs. If the society's major institutions such as the criminal law adopt a posture of indifference or laissez-faire with respect to people's core moral beliefs, the beliefs will wither and social cooperation will be undermined. Acts that violate the core morality of a society strike at the foundations of social cooperation and hence in a broad

and somewhat amorphous way these immoral acts do threaten to bring about harm to others. Any society has the right to preserve itself, and to use major institutions such as the criminal law for this purpose, and this right encompasses a right to use criminal law sanctions to uphold the core shared moral beliefs of its members.

In Devlin's public lecture attacking the Wolfenden Committee Report to which Hart takes exception, Devlin does not take a stand as to where to draw the line and whether homosexual conduct and prostitution fall on one side or the other of it. Perhaps norms against homosexuality and prostitution are part of the shared moral beliefs that must be upheld to preserve society; perhaps not. Devlin is objecting to the principles that the Committee invokes to justify its recommendations regarding specific legal reforms.

Above I attributed to Devlin the idea that core moral beliefs should be upheld and enforced by the institutions of society including the criminal law. Devlin does not actually speak of core moral beliefs, but he surely believes that there are some immoral practices, such as rudeness and impoliteness, that do not threaten the maintenance of society.

Devlin makes the suggestion that the line between (1) behavior that society generally condemns and that should be the object of criminal penalty and (2) behavior that is also generally condemned but that should be tolerated is set by the degree of revulsion against the practice that is felt by ordinary upstanding adults. Wondering whether repudiated conduct should be made a crime, "We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it."

Devlin articulates the basis of this right in clear terms: ". . .the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together."[4]

Hart and subsequent commentators have had no difficulty in tearing apart this tissue of argument. For starters, Devlin's argument appears to trade on an equivocation in his use of the term "society." Sometimes by "society" Devlin seems to refer to the basic norms, practices, beliefs, and so on that are necessary for developed social cooperation, for the maintenance of society as contrasted with dissolution into disorder and anarchy. If legal toleration of such sexual practices as prostitution and same-sex sexual activity would cause society to fall into anarchy or significantly increase the risk of such fall, that would be an argument for legal prohibition, but it is far-fetched to suppose any such causal link obtains, and Devlin provides not a shred of evidence to support it. Sometimes by "society" Devlin seems to refer to the particular set of norms, beliefs, practices, and values that constitutes a society at a particular time and place—as when we speak of Edwardian Britain or the U.S. in the 1950s. ("Societies" in this sense might be individuated in more or less fine-grained ways for various purposes.) In this sense, if some sexual practice was not tolerated, and then came to be tolerated, the initial society would have disappeared, to be replaced by a new one. In this sense, it would be trivially true that moving from intolerance to tolerance of same-sex sex would be moving from one society to a new one. But the dissolution of society in this sense could take place without anybody being in any way worse off, and the idea that people at a given

time have a right to preserve their "society" unchanged throughout some stretch of future time is wildly implausible. Whichever way we interpret Devlin's talk of society and its vicissitudes, nothing resembling a good argument for legal enforcement of morals as he conceives of it can be found in his discussion.

A second stumble in Devlin's march occurs when he identifies the elements of prevailing social morality that merit protection by criminal law punishment with the bits that condemn certain practices so strongly that they are viewed with revulsion and disgust and popularly regarded as intolerable. What provokes a widespread disgust reaction in ordinary people may be no threat to society (the basic prerequisites of stable social cooperation). Behavior that many people regard as intolerable may simply be behavior about which people have false beliefs or prejudiced responses. What many people at a given time find intolerable may be in fact eminently worthy of toleration.

1. The social enforcement of morality.

Both Devlin and Hart quote the statement in the Wolfenden Committee Report that "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." Devlin takes exception to this statement. Hart does not. Hart's nonchalance on this matter is incompatible with the position he claims to be defending. He claims to be aligning himself with Mill's position in *On Liberty* with one major deviation, namely that Hart embraces more paternalism than Mill accepts. However, Mill is adamant that he opposes not only attaching criminal law penalties to conduct that is not directly and in the first instance harmful to persons (other than those carrying out the conduct) who do not voluntarily consent to bear its spillover costs, he

also opposes social coercion to the same effect brought about by force of social norms and public opinion rather than the criminal law.[5] This means that if same-sex sexual relations are harmless except perhaps to their participants, then not only would making homosexual acts a crime be morally objectionable, so would tolerating "a realm of private morality and immorality" within which homosexual acts are roundly condemned as immoral acts. A strong moral norm forbidding nonheterosexual sexual relations enforced by social norm sanctions of shunning, gossip, exclusion from beneficial cooperative schemes and patterns of interaction, and the like, would constitute a social tyranny according to Mill and would be morally wrong for roughly the same reasons that criminalization would be wrong.

This is not to say that whatever should not be prohibited by law should not be prohibited by moral rules. The criminal law is a blunt instrument, so there may be types of harmful immorality, the legal prohibition of which would do more harm than good. Betrayal of friendship is wrong but surely not an appropriate object of criminal law prohibition. Acts of sexual infidelity committed by persons involved in committed romantic relationships are often morally wrong but should not be made crimes. But according to the doctrine of *On Liberty* there is no line of principle that separates the class of immoral acts that should be legally prohibited from the class of immoral acts that should not be legally prohibited. For each type of conduct the issue comes down to an estimation of the likely consequences of the enactment of a legal prohibition. But if conduct harms no one except maybe the participants and others who consent to involvement in the conduct, there is a line of principle that should not be crossed, the line

established by the liberty (harm) principle. To reiterate the point, this line of principle rules out positive morality condemnation of the conduct as well as legal proscription.

2. The legal enforcement of morality as such.

Hart opposes and Devlin supports the legal enforcement of morals as such. Hart understands the issue in terms of a contrast he draws between *positive* and *critical* morality.[6] The positive morality of a society is the moral code that is actually embraced and upheld by the generality of its members. This is the prevailing morality of a society at a time. Hart distinguishes positive morality from "the general moral principles used in the criticism of actual social institutions including positive morality." The mere fact that a type of conduct is condemned by the current positive morality of a society is not a good ground for its criminal prohibition, because that positive morality might be good, bad, or ugly, and might be unable to withstand critical morality criticism. Devlin holds that there is no principled bar to upholding the positive morality of society by legal coercion; Hart rejects this claim for reasons already canvassed.

We can also distinguish varieties of critical morality. The critical morality prevailing in society, or among social critics of a society, might also be good, bad, or ugly. The positive critical morality of a time is the critical morality actually prevailing. To that we might contrast (1) the best critical morality viewpoint espoused by anyone in society at a given time, or alternatively (2) the best critical morality viewpoint that is epistemically available to a society at a time given its cultural and intellectual resources. A further contrast would be between this best critical morality available in a society at a time and (3) the best critical morality that would emerge from ideally extended and

conducted rational scrutiny of moral matters. According to this taxonomy, the current positive morality might be rejected by the current critical morality in place, accepted by the best critical morality reachable in that culture of that time, variously accepted and rejected by further deliberation, and rejected (or accepted) by the critical morality that would be embraced in ideally extended reflective equilibrium.

Hart makes a further claim, or at least a suggestion, that links the idea of critical morality to the enforcement of morality issue as framed by Mill. The suggestion is that the critical morality we now have best reason to accept would embrace a revised version of Mill's harm principle construed as a proposal for limiting coercive enforcement of morality. Mill had suggested that the only good reason to restrict an individual's liberty of action is to prevent the individual from causing harm to nonconsenting others.

Against the idea that it can be morally acceptable to establish a criminal prohibition on conduct simply on the ground that the conduct in question is immoral, Hart appears to endorse an expanded version of the liberty principle or harm principle that Mill advances in *On Liberty*. This says that the only morally acceptable grounds for establishing a criminal prohibition on a type of conduct are that the conduct causes harm to others or offense to others or harm to self. [7] Call this the *expanded harm principle*. Since Hart allows that harm to self is an acceptable ground for criminal prohibition, he evidently is unwilling to follow Mill, who interprets the harm to others principle restrictively, so that harm to others is a reason for coercion only if what is at stake is harm to nonconsenting others—persons who do not voluntarily consent to beat the risks and costs of the activity the prohibition of which is under review. In another way, Hart might be willing to accept that the expanded harm principle should be further expanded.

The further expanded harm principle allows that criminal prohibition of conduct can be morally acceptable even if the conduct is itself neither harmful nor offensive to others nor harmful to the agent herself provided the prohibition would prevent harm to others.[8]

The first thing to say about Hart's understanding of the issue in play is that he seems to be running together two different issues. One is:

The enforcement of morals as such: The criminal prohibition of a type of conduct can be justified by an appeal to the immorality of conduct of that type independently of whether or not prohibiting it would prevent harm to any individual persons or advance the welfare of any individual persons (or that of any other sentient creatures—this proviso I shall ignore).

Another issue is:

The expanded harm principle: The criminal prohibition of a type of conduct can be justified only by appeal to the fact that it is harmful to others or offensive to others or harmful to the agent whose conduct is in question and not merely by the claim, even if true, that conduct of that type is immoral.

But rejecting the enforcement of morals as such is not the same as accepting the expanded harm principle. One difference is that the expanded harm principle includes offense to others as a proper ground of criminal prohibition, but let us assume that offenses are really a class of small harms, so this difference in formulation is not significant. More significant is that you could hold that the enforcement of morals as such is unacceptable without holding that Mill's harm principle, supplemented by the offense principle and by the acceptance of some paternalism, acceptably marks the boundaries of the morally legitimate use of the criminal law function. For example, you

might object to the harm principle and its close relatives, taken to be stating necessary conditions for justified criminal prohibition of conduct, on the ground that benefit to others might justify such prohibition. Perhaps a type of conduct causes harm to no one, but banning the conduct would generate benefits for people.

Joel Feinberg in his magisterial work on the moral limits of the criminal law takes the benefit to others principle to be just silly.[9] Suppose the state could impose a burden on one person and benefit another. The state could take money from Smith and give the money to Jones. Feinberg suggests that in the absence of some further special consideration such as that the transfer to Jones would reduce her poverty, merely bringing about benefit to other would be arbitrary and plainly unjustifiable. Why favor Jones over Smith or people like Jones over people like Smith in this sort of situation?

Feinberg adds that the liberal opponent of the use of the criminal law sanction for any purpose other than preventing harm to others can readily allow that government policies and laws routinely and unobjectionably aim at goals that benefit some people specially. The government might subsidize the arts, fund public schools, provide old age pension assistance, and so on. Such legislation can be morally legitimate provided it has been enacted by a process that is procedurally fair, such as a democratic vote against a background of free speech and fair elections. In this way the general welfare, and for that matter interests the majority of voters favor, can be a legitimate rationale for legislation, but not for criminal law enactments.

Feinberg's quick dismissal of benefit to others as a rationale for criminal prohibition is misguided. Feinberg urges that the best formulation of the harm to others principle states that the fact that the conduct being prohibited would bring about wrongful

harm to other people who do not consent to being treated in this way is always a good reason for prohibition. But in fairness we should formulate the benefit to others principle in a parallel fashion. The principle would hold that the fact that a person engaging in a type of behavior would be wrongfully refraining from helping others, so that forbidding the wrongfully refraining would be of benefit to the others, is always a good reason for criminal prohibition of that type of conduct.

Consider laws severely restricting exploitative interactions that are beneficial to all participating parties but confer lopsidedly unfair shares of the benefits to exploiters.[10] There is no harm to others rationale for such laws, and often there will be no credible paternalistic rationale either. But a law of this type might yet deliver benefits to people who will be consenting to getting the very short end of the stick in the absence of such legal intervention. Consider people who are in grave peril, and who might be helped by potential rescuers in circumstances in which rescue would not qualify as an easy rescue the delivery of which might acceptably be made a legal requirement. When bargains providing delivery of risky and costly rescue are made, the terms are often grossly unfair to the rescuee. The rescuer is gouging the person who is contracting to be helped. If this scenario is widespread, there might be a plausible case for a legal prohibition of extracting more than moderate profit from provision of rescue in such circumstances. If the upshot of such legislation is that moderate rescues are still provided, but the cost to the rescuer is more reasonable, then such legislation would confer benefit on the class of victims of mutually beneficial exploitation as just described.

The expanded harm principle espoused by Hart would find no proper grounds for the use of the criminal law sanction to prohibit this type of exploitation, but if the facts are as described, why would criminal prohibition be morally unacceptable?

3. More on the legal enforcement of morality as such.

The claim here named "the enforcement of morals as such" is also often called "legal moralism." I shall use the terms interchangeably.

There is a weak and a strong version of the position that rejects legal moralism. The weak version says that reasons that appeal to the immorality of a type of conduct (independently of any claim that prohibiting the conduct will prevent harm or boost welfare) can never by themselves suffice to justify criminal prohibition of the type of conduct. Such legal moralistic reasons must be joined with some reasons that appeal to harms that prohibition will prevent or harms that prohibition will advance. The strong version says that reasons that appeal to the immorality of a type of conduct, the grounds for immorality having nothing to do with the conduct's impact on an individual's welfare, are never good reasons at all for criminal prohibition. On the weak version, sheer appeals to immorality can have weight in determining the appropriateness of criminal prohibition; on the strong version such appeals are weightless. I suppose that Hart would wish to defend the strong version. If legal moralistic reasons have any practical reason weight at all, why couldn't they sometimes combine to yield a sufficient justification for criminal prohibition?)

There is something misleading about this formulation of the legal moralism issue. If conduct of a certain type is conceded to be immoral, aren't we already conceding there

is reason, though perhaps not conclusive reason, for prohibition?[11] Other things equal, immoral conduct should be discouraged, and in many circumstances, criminal prohibition can discourage immoral conduct, lower its incidence. So how can there be a bar of principle against legal moralism? Isn't this like proclaiming there is a bar of principle against using a hammer for a certain type of job, no matter how useful and cost-effective, in given circumstances, using a hammer for that job would be? Gerald Dworkin presses this worry.[12]

The most defensible position for the opponent of legal moralism is to deny that there is any immorality that does not involve human welfare, so that one of two things must always be true: Either immoral conduct is harmful to someone or reducing its incidence, perhaps by prohibition, would boost the welfare of some individual person or persons. So perhaps the opponent of the enforcement of morals should affirm some position along this line: The alleged immorality of a type of conduct, when the claim of immorality is unaccompanied by any sound claims that the conduct diminishes the welfare or impedes a boost in welfare that might accrue to some individual person or persons, is never a good reason that can strengthen a case for legal prohibition of that type of conduct. The opponent of legal moralism is not then necessarily conceding that there might be conduct that is genuinely immoral, but which we have no reason whatsoever, even a presumptive or pro tanto reason, to prohibit.

A special issue looms, one raised by Derek Parfit.[13] Suppose one can engage in action that will bring it about that people are born with lives worth living, but less good lives than would be enjoyed by counterparts of each of these people if one instead refrained from this course of action. Suppose one does the action that produces the

people who are worse off than an equal number of other people who might instead have been brought into existence. No actual person is harmed or made worse off in any way by this type of action. So it looks as though a welfarist restriction on possible prohibitions of conduct of the type articulated in the previous section will not catch and identify as wrongful and an apt target for legal prohibition, any action such as that just characterized.

This is incorrect, as noted by Nils Holtug, who formulates what he calls a wide strong person-affecting principle that shows how a welfarist account of morality can judge to be bad on welfarist grounds possible courses of conduct that have no impact negative or positive on the impact of any actual persons.[14] The principle states: An outcome X cannot be in any respect better (or worse) than another outcome Y if there is no one for whom, were X to obtain, X would be in any respect better (or worse) than Y, and no one for whom, were Y to obtain, Y would be in any respect better or worse than X.

Apply this to a choice of possible pollution policies. The policies have identical effects except that if one is chosen, 10 people born 100 years from now would have welfare level 5, and if the alternative course is chosen, none of the 10 people exist, and instead 10 different people exist, each with welfare level 50. If the first alternative is chosen, no actual person will ever be made worse off by this policy, so no ordinary or narrow welfarist moral principle can condemn the policy as wrong. In the example, there is nothing we could do that would make any actual people who shall ever live better off. Nonetheless, if welfarism is understood according to the strong wide person-affecting principle, this result is overturned. If coming to exist can make you better off, then the

first 10 people would be better off if X not Y is chosen, and the alternative 10 people would be better off if Y not X is chosen. And since each person in Y has a counterpart in X who is worse off, there is reason to support a moral principle of beneficence that says we ought in the envisaged circumstances to follow pollution policy Y not X. So we can arrive at what is the intuitively reasonable judgment about this case without appealing to any claim that pollution policy X would be wrong even though not worse for anyone, so not condemnable except by appeal to legal moralism.

4. Hart and Mill on paternalism and the enforcement of morals.

Hart's tactic in the controversy with Devlin is to concede many points *arguendo* just to show that even assuming that many of Devlin's assertions and assumptions which might well be false are in fact true, a good case for the enforcement of morals is still lacking, and so far as we can see no good case can be constructed. The question then arises whether Hart in this way concedes too much ground to Devlin that has to be contested and won if Hart is to win the battle.

Hart states clearly that he disagrees with Mill's vehement opposition to paternalism—restricting someone's liberty against her will for her own good. Hart's disagreement extends to criminal law issues. For example, he suggests that there might be a case for legal prohibition of the recreational use of some drugs on paternalistic grounds. However, Hart does not explain clearly the extent of his disagreement with Mill on the topic of paternalism. Nor does Hart explore the issue whether his disagreement with Mill on the topic of paternalism has ramifications for his disagreement with Devlin.

Hart asserts that Mill, writing in the Victorian age, has naïve beliefs about human psychology, correcting which should soften our toleration of legal paternalism. In Hart's words, Mill falsely imagines that the normal human adult individual has "the psychology of a middle-aged man whose desires are relatively fixed, not liable to be stimulated by external influences; who knows what he wants and what gives him satisfaction or happiness; and who pursues these things when he can."[15]

Mill himself indicates that when a person's choices affect only himself and his choices fall significantly below the line that marks the fully voluntary, restriction of his liberty to act on these choices for his own good may be warranted. Hart might be saying that failure of voluntary choice might be far more widespread than Mill supposes, in a way that affects what paternalistic criminal law prohibitions and other state policies should be. So understood, Hart would not be opposing Mill on an issue of normative principle, just on questions of empirical fact. But it is worth noting that Hart seems to countenance the possibility that some instances of what we would call hard paternalism might be justified. Suppose I am well informed of the relevant facts that bear on the choice of recreational drug use, and after deliberation I voluntarily choose to experiment with drugs. My knowledge of relevant facts includes the facts that my drug usage may go very badly for me and that in any case my preferences regarding my using drugs are unstable and might well change in the future. My decision in such a case seems to be voluntary enough, so that restriction of my freedom against my will would be hard paternalism not soft paternalism (the former being restriction of a person's liberty against her will for her own good even though the choices subject to interference are fully voluntary or at least voluntary enough). Given that my preferences in this matter are not

stable and might soon be reversed, paternalistic restriction of my liberty to act on choices stemming from these preferences might be acceptable, Hart seems to be saying.

In any event, Hart's tolerance of paternalistic restriction of liberty opens the way for the defender of criminal prohibition of homosexuality and other nonstandard sexual practices to defend such prohibitions by appeal to a principle of paternalism that encompasses hard paternalism and is close in spirit to the legal moralism that Devlin champions. Suppose the argument is made that same-sex sexual acts are inherently bad for people, that engaging in them per se makes one's life go worse, and given that these acts though bad are tempting as well, a paternalistic restriction may do far more good than harm and so be justifiable all things considered. So long as this possibility is not closed off, Hart's strategy in *Law, Liberty, and Morality* amounts to an attempt to build secure fortifications blocking the front entry to a house while leaving the back door swinging wide open.

Moreover, whatever arguments there might be for the claim that homosexuality is bad for those who engage in it and so should be banned will likely mirror the arguments one would try to advance for the claim that homosexuality is inherently immoral and so should be banned. For suppose that same-sex sexual acts are good for the participants and harm no one else. What would be the plausible basis for saying these acts are nonetheless morally wrong? One could appeal to traditional Christian doctrine and assert that God commands that we refrain from same-sex sex, but Devlin and Hart are agreed that sectarian appeals to religious beliefs cannot justify state coercion in modern society, and we should surely agree with them on this point. Natural law advocates might urge that nonheterosexual behavior is action against the fundamental goods of procreation and

marriage, and is wrong on that basis, but I do not see how such a claim could make sense to someone not already in the grip of conservative religious doctrine.[16] Same-sex sex can be engaged in by people who are seeking to strengthen a romantic friendship of a type that everyone acknowledges has great worth. If such acts do not by themselves promote procreation, that is not the same as acting against procreation. Same goes for the claim that one is acting against marriage. If the acts of heterosexual fornicators who do not plan to get married do not count as acting against marriage, neither do the acts of nonheterosexual fornicators. Anyway, same-sex sex can be practiced by a couple that is developing a family bond that might encompass the rearing of children (adopted, or conceived in some nonstandard way). And to state the glaringly obvious, same-sex sex provides the goods of reciprocal friendly sexual pleasure, the same as what friendly reciprocal heterosexual sex might gain, and is valuable for that reason alone. And there is an even simpler good, plain sexual pleasure, to be gained by same-sex sex with willing participants.

I am not asserting that the case that homosexual acts are bad for those who engage in them has any plausibility whatsoever. My point is simply that even if Hart's arguments successfully block the possibility that it is morally acceptable ever to enforce criminal prohibitions on conduct simply on the grounds of its immorality even in the absence of a showing that the act threatens any harm to nonconsenting others, Hart's acceptance of paternalism leaves entirely open the possibility that nonetheless criminal prohibition of the conduct in question might be perfectly acceptable.

One can press this point further. Consider a legal prohibition of the sale and possession of certain addictive recreational drugs on the ground that on the whole and on

the average, the consumption of these drugs is bad for the one who consumes. Suppose that is all correct. It will very likely still be the case that for some people having the option to use these drugs is beneficial, and for some exercising the option is beneficial. Some people are not prone to addiction and will not become addicted if they use; some people will lead better lives as drug addicts (maybe drug use fuels artistic creativity for a few individuals). The legal prohibition might still have good consequences overall even if it works to the disadvantage of some persons. But what then justifies the enforcement of the law against these persons?

Douglas Husak objects to legal prohibition of drug use inter alia by objecting that criminal punishment is morally acceptable only when applied to people who are culpable for serious wrongdoing. But a person who knows it is prudent for him to use the prohibited drug and does so cannot by any stretch of ideas be reasonably deemed to be an apt target for criminal punishment, claims Husak.[17] There might nonetheless be a morally plausible reply to Husak and defense of the legal prohibition. If the drug prohibition helps people on the whole by steering them away from a disastrous life option, and it is administratively unfeasible to have a law that bans drug use only by the group of people for whom it is really bad, then the prudent drug user ought to obey the law and refrain from drug taking in order to cooperate to sustain this all things considered justified law. In effect the law is demanding that the would-be prudent drug user be a good Samaritan and obey the law in order to help those for whom the law is beneficial. Failure to comply is culpable wrongdoing. One could resist this conclusion by arguing that the distribution of benefits from the prohibition is unfair—why is it acceptable to make me worse off to help others? But suppose the correct morally sensitive distributive

justice principle endorses the drug prohibition being envisaged in light of the pattern of its effects overall on gainers and losers. For one thing, those who benefit from drug prohibitions may cluster among the more disadvantaged portion of the population, so a moral principle that tilts in favor of benefits to the worse off will give extra weight to the gains these people would get from prohibition.

In the scenario envisaged, it is plausible to think that the drug prohibition would be morally justified all things considered. A morality that is responsive to human well-being gains and gives priority to gains for the worse off would endorse some such drug prohibitions if the facts we have stipulated actually obtain.[18] But now consider the legal prohibition in its application to the constrained would-be prudent user. His liberty is being restricted because this restriction is good for lots of other people and it would be immoral for him to impede the successful implementation of this law. Apart from the possible effects of his conduct on the smooth operation of the law, his behavior in using drugs would neither be harmful to himself nor harmful to others. This legal stance does not quite amount to the legal enforcement of morals as such, but it is a whisker from that. Again, what Hart rules out as inadmissible leaves the door open for what the ordinary citizen would regard as morals legislation. In its application to the prudent drug user, the rationale of the dug prohibition is benefit to others. In the classification this essay uses, such a legal prohibition would not be legal moralism but also would not necessarily be justifiable according to the expanded harm principle that Hart espouses.

Whether legal restriction or prohibition of such behaviors as nonstandard sexual relations between consenting adults, prostitution, suicide and assisted suicide, and hedonistic drug use is defensible or not is not settled by settling the issues that divide

Hart and Devlin. Nor is it settled by deciding whether legal moralism (the enforcement of morals as such) is morally acceptable. To decide what laws and public morality norms are acceptable in this domain, we have to engage with controversial issues as to what activities are intrinsically good (or are instrumentally efficacious in generating intrinsic goods for people) and should be promoted and what activities are bad and should be discouraged.

5. The utilitarian component of morality and the Hart-Devlin controversy

Hart's somewhat breezy and open-ended acceptance of paternalistic rationales for criminal law prohibitions sets in motion a further complication in his campaign against the enforcement of morals as such. Hart throughout his career seems to be a fellow traveler of utilitarianism. He does not accept it, but often writes against the background understanding that promoting good for people (and other sentient beings) has to be a major component in whatever morality finally proves to be worthy of acceptance. For example, in a famous essay he suggests that a plausible view regarding the justification of criminal punishment is that a justified system of criminal punishment must improve the world by way of deterrence of crime or incapacitation of criminals and must do so under the constraint that it is imposed only on those who have been found to have committed an offense by a fair judicial process.[19] In the context of his dispute with Devlin, Hart aligns himself with J. S. Mill, the author of *On Liberty.* Remember that the author of this work stated that "I forego any advantage which could be derived to my argument from the idea of an abstract right, as a thing independent of utility," and added that "I regard utility as the ultimate appeal on all ethical questions."[20] Rejecting any form of absolute ban on

paternalism, Hart evidently agrees with Mill that one cannot soundly defend such an absolute ban by appeal to a right of personal sovereignty, a right of each person to live as she chooses, regarded as a thing independent of utility. And Hart disagrees with Mill as to the upshot of the utilitarian calculation of harms and benefits that would flow from some acceptance of paternalism.

Mill rejects the idea of duties to self and supposes that duties are one and all grounded in the due consideration we owe to the interests of others when we act. If we distinguish the level of fundamental moral principle and the level of publicly enforced duties and obligations, then even if at the fundamental level each person ought to do whatever would maximize human good, at the level of public morality and legal codes, human happiness is best advanced if no such stringent duty always to act for the best is imposed. Given the crooked timber of humanity, no straight advancement in human well-being would come from trying to hold human individuals to any maximizing standard. On utilitarian grounds, we should impose on one another in law and public morality only limited duties. But accepting all of this, the question remains, why should the duties of law and public morality that utilitarianism prescribes include only duties to refrain from harm to others (and perhaps to help others sometimes) and not also include some duties to care for one's own well-being. And a similar question should arise for someone like Hart who does not go whole-hog for utilitarianism but accepts it only as a component in the fundamental morality we should accept. But then once Hart accepts contrary to Mill that some acceptance of paternalism should be countenanced, given the importance of the utilitarian component of morality, one wonders why the rejection of paternalism should not also license on broadly utilitarian grounds some acceptance of

moral duties to self. In this way the enforcement of morals issue, suppressed at one level, reappears via the acceptance of paternalism in the guise of moral requirements to oneself.

The bearing of this line of thought on traditional enforcement of morals questions is direct and plain. Take the issue of criminal law and public morality prohibitions of suicide and assisted suicide. Let us set to the side the issue that is posed by suicide that might reasonably be regarded as a benefit to the one who dies, as in end-of-life scenarios when one is in the process of dying and wishes to cut short the grim process, or as in tragic cases when due to severe affliction the prospect of continued life, even though it might stretch out for a long time into the future, offers an obviously negative balance of goods and evils. Leaving such cases to the side, one sees that the opportunity for continued normal human life is a great opportunity to do good for self and others, and a secular analogue of the religious doctrine of the sanctity of life naturally comes to mind. On broadly utilitarian grounds we can see a paternalistic case for having the law tilt in favor of continuation of one's life and against suicide even when one wants to cut one's life short. On the same grounds we might regard each person as bound by a strong but loose duty to make something worthwhile out of the opportunity provided by the life one has to do some good for self and others.[21] The duty leaves enormously wide discretion to the individual as to how she conducts her life so as to satisfy the duty, and for any individual, any one of myriad ways of living would suffice to meet the duty, but utterly squandering one's life violates this moral duty, and suicide except when either one's death would heroically save others from peril or one's own future unfortunately offers a negative prospect is one form of squandering one's life and violating the duty.

In some such cases suicide might be a means of evading duties to others, and committing suicide in such cases might qualify as causing harm to nonconsenting others. But in other cases the liberty principle or harm-to-others principle will not provide a basis for finding suicide to be wrong. If we find in common-sense morality a norm against suicide (in standard circumstances), and find that moral norm to be attractive, we might well endorse the legal prohibition of suicide and especially the legal prohibition of assisting suicide, even though the harm-to-others principle cannot support these judgments. The relevant considerations are rather the good to the agent that his suicide would cut short and the benefits to others that the continuation of his life would bring about. Here we see a new wedge between Mill's principles limiting social coercion and the rejection of the enforcement of moral requirements as such.

6. "Directly and in the first instance."

Mill himself interprets the harm principle restrictively in a way this discussion has not so far mentioned. In one version of the harm principle that he advances, the principle requires conduct that affects only the individual agent and others who voluntarily consent to share in its consequences to be left free of interference. Mill adds that when he refers to conduct that affects only the agent himself, he means "directly and in the first instance."[22] Mill here seems to introduce something in the neighborhood of a proximate cause requirement. Consider the relation between the consumption of alcoholic drinks and domestic violence. Suppose it is established that alcohol consumption is a causal factor affecting the incidence of domestic violence: as alcohol consumption rises in a population, incidents of wife-beating and child-beating increase, because drinking relaxes

inhibitions and affects mood in ways that on the whole and on the average increase men's propensity to engage in violent acts. One might suppose that the harm principle then does not rule out restricting or extinguishing people's liberty to consume alcoholic beverages; ex hypothesi this pattern of behavior imposes risks of harm on nonconsenting others. Mill's comments on toleration of drinking indicate he would not accept this as an implication of his views. The harm in question is causally too remote from the behavior we are proposing to prescribe: There are many links in the causal chain running from alcohol consumption to engaging in wrongful violence, and due consideration for individual liberty, expressed in the harm principle, requires that we break the causal chain leading to harm at some point closer to the infliction of harm itself. For example, we might increase the criminal penalties attached to crimes of domestic violence, or provide counseling to families in which some members are especially vulnerable to such physical abuse, or train police to respond in more effective ways to reports of domestic disturbance, and so on. But since the causal relationship between drinking and assaulting is complicated, indirect, and remote, drinking remains protected behavior under the wing of the harm principle.

An alternative way of proceeding would be to deny that the exact character of the causation when a type of behavior causes harm to nonconsenting others sets up any bar of principle to responding to the problem by criminal prohibition of the behavior in question. The situation calls for a careful, morally sensitive cost and benefit analysis: what means are available to alleviate the harm in question, taking into account all the expectable effects of one or another policy choice (and being mindful not just of aggregate benefits and losses but of considerations of fairness in the distribution of these

harms and benefits). The fact that the causation of harm takes place by harming or affecting the individual agent and then by affecting others through him should not in principle be a bar to the legitimacy of social intervention to stop the harm. The mere fact that such conduct causes harm only indirectly and in the second, third, fourth, or nth instance, as opposed to directly and in the first instance, is not per se anything more than a broad indicator that there may be lots of means available for mitigating harm if there is a long, complex chains of events running from the causing conduct to the eventual harm that is produced. After all, releasing greenhouse gas emissions into the atmosphere in a certain way may cause harm only via some incredibly complicated causal process and only in the distant future, yet the fair and reasonable policy response to the problem might be to ban the conduct that generates the emissions.

This is a simple point, which a follower of Mill should accept. Its acceptance renders the harm principle far less of a practically impressive and powerful barrier to proposals to restrict individual liberty than Mill might have hoped, but so much the worse for Mill's hopes.

7. The enforcement of morals as such should be rejected.

Hart actually says very little as to why the enforcement of morals as such should be rejected, once we allow that the moral claims to be enforced would be those ratified by the best critical morality we can identify, and not merely those ratified by the positive morality that happens to be dominant today. He counters claims by Devlin and by Stephen that we are already committed, and rightly so, to the enforcement of morals as such, because features of the legal system that are firmly in place and uncontroversial can

only be defended as instances of the enforcement of morals as such. Hart's counter is that in each case the uncontroversial feature of the legal system to which Devlin and Stephen point can be explained and justified without appeal to the idea of enforcing morals as such.

This essay lodges several criticisms of Hart's treatment of the enforcement of morals issue. Nonetheless I do see Hart pointing the way toward the formulation of a clear and interesting enforcement of morals thesis. It remains a plausible though contestable thesis that we should reject the enforcement of morals as such thesis as stated in section 2 of this essay. The best case for the thesis is simply that a necessary condition for justifiable criminal law prohibition is that the candidate prohibition would promote the welfare or well-being of individual human persons (and of other sentient creatures). Defense of this claim is beyond the scope of this essay, but we should anyway be grateful to Hart for the steps he takes toward identifying and clarifying the issue. I take up one attack on this claim in the remainder of this section. That attack fails, but in section nine of this essay a more troublesome counterexample is developed. The jury is still out on the enforcement of morals issue.

Consider the suggestion that such legal offenses as harmless trespassing and harmless medical experiments carried out on people in ways that are undetected by them are and ought to be legally forbidden, but the harm principle forbids such legal prohibitions, so we ought to reject the harm principle.[23] Another such counterexample to the harm principle would be battery or unconsented-to-touching that is undetected by the victim. An extreme case of this would be sexual assault on an unconscious person that leaves no detectable effects.

These purported counterexamples rely on the judgment that the intrusion on the victim, though wrongful to the point that it ought to be legally prohibited, is not harmful. This raises the question, what is harm, for the purposes of applying the harm principle and determining the limits of acceptable legal prohibition. About this central issue Hart says nothing. In his discussions he relies on the reader's intuitive judgment as to whether this or that effect of a type of action would or would not be harmful.

Take "harmless" trespassing. This is undetected trespassing that does no property damage, interferes in no plan or project of the property owner, and consists simply in unauthorized movement by the trespasser onto the property in question. I shall assume that the trespassing behavior is not plausibly regarded as offensive to others or harmful to self, so if the behavior cannot be shown to cause or risk harm to others, the expanded harm principle will also fail to provide any license for its prohibition.

One possible response would be to assert that property owners reasonably might and typically do prefer that others not intrude on their property without their consent even if no further harm is done. If frustration of one's preferences qualifies as harm, the case is made: "harmless trespassing" is not really harmless. But this gambit is unavailable to one who wants to reject the enforcement of morals as such. Conduct popularly regarded as immoral will also be conduct that some persons prefer that others refrain from perpetrating. If someone does the conduct deemed immoral, that will frustrate the preferences of some or all of the people who sincerely hold the conduct in question to be immoral. The harm principle is eviscerated, has no force in public policy controversy, if harm is interpreted in this broad fashion. Mill for his part is adamant that the harm

principle implies that the likings and dislikings of society shall not be a law to individuals.

Without deviating from Hart's strategy of response, one can rebut the argument under review. In each of the cases advanced as counterexamples, the type of conduct claimed to be prohibitable but not harmful violates an owner's interest in control of his property. The bundle of rights that constitutes ownership of something fundamentally includes the right to exclude others from unauthorized use of the thing. The owner is entitled to use the thing owned and exclude anyone else from using it. In this respect private ownership differs from a free use regime, under which anyone is entitled to use things in specified permitted ways, if necessary, taking turns with others who wish to use the same thing at once. A legal rule that permitted people to use privately owned things without consent of the owner strikes at the heart of the private ownership system.

A property owner needs secure control of what she owns, in order to be able to carry out her plans. In practice, letting others use what one owns when one is not using it oneself and has no plans to use it risks interfering in one's plans, because neither the owner nor would-be trespassers can have perfect knowledge of what uses will and what uses will not have no effects whatsoever on the owner's plans and projects involving the owned thing. What is claimed to be harmless trespassing always imposes a risk on the owner of interference with her plans and projects that involve the use of the thing, and such interference, be it small or large, uncontroversially should count as harm on any plausible understanding of what harm is. Or alternatively, if a type of conduct claimed to be harmless trespassing really is harmless, then there is sound reason for legal toleration

of that type of conduct. (For example, suppose people trespass on estates abandoned by their absentee owners and pick and eat fruit that would otherwise go to waste.)

One might reject the line of thought just adumbrated. Under the description, trespass that has no detectable effect on the property traversed and inflicts no damage at all on the property and interferes not at all with any plans an projects of the property owner (and one can add, imposes no risk whatsoever of any of these effects), the trespass so characterized is harmless.

One counterclaim is that any act of trespass that anyone is ever in a position to make will be such that one of the descriptions that correctly applies to the act is "interferes with the plans or projects of the owner or risks doing that." If the counterclaim is correct, there is no harmless trespassing.

Another line of response appeals to the coarse-grained nature of legal rules. A legal rule must be formulated so that it is reasonably simple to apply and gives those addressed by the rule clear guidance as to what must be done and omitted, to avoid running afoul of the rule. Legal rules exist to coordinate people's behavior, and rules that are excessively vague and hard to interpret and apply cannot fulfill this role. Hence in order to prevent harm, the designer of legal rules may need to construct them so that they apply to a class of generally harmful or often harmful behavior and do not cease to apply in those cases in which the type of conduct proves actually not to be harmful. Failure to craft the rule in this coarse-grained way will sometimes be a cause of harm, so there is a harm-to-others justification for coarse-grained crafting. So there may be a case for a coarse-grained rule banning trespassing that applies to some trespassing acts that are harmless, when making the rule more fine-grained would add to the costs of

administration and would not make the rule more just and fair in the distribution of harms and benefits it produces. In this case the justification of the law that forbids "harmless" trespassing is entirely justified by harm prevention and more broadly promotion of individual well-being fairly distributed.

8. Rejecting the expanded harm principle and defending the rejection of the enforcement of morals as such.

Someone might object that I have not succeeded in finding flaws in Hart's stated position encapsulated in the expanded harm principle. Recall, this is the idea that the sheer fact that a type of conduct is immoral, in the absence of any showing that the act causes harm or risk of harm or offense or risk of offense to nonconsenting others (or, Hart would add, to consenting individuals in circumstances in which paternalistic restriction is justified), is never a good reason for coercive prohibition of that type of conduct. I have nibbled around the edges of that position without disturbing its core.

That objection seems strictly false. I have urged that benefit to others can be an acceptable ground for coercion. This definitely conflicts with Hart's principle as I have characterized it. Hart follows Mill in allowing harm to others but not benefit to others to be a legitimate ground for coercive restriction of liberty. Also, I would claim that my nibbling leaves not much core remaining.

A further nibbling effort follows. Let us consider a commonly raised counterexample to the claim that the enforcement of morals as such is unacceptable. Imagine a society that invokes Hart's expanded harm principle to defend legal toleration of fight-to-the-death gladiatorial contests staged before willing customers by fully

voluntary participants. These participants are hired to engage in fights before paying audiences that are to end only with the killing of one or the other of the contending fighters.[24]

The example is contrived to appear to be a clear instance of a type of transaction that cannot plausibly be regarded as wrongfully offensive to others (those who fear they would be offended by the sight can decline to enter the arena in which the gladiator contest occurs). Horrible harm is inflicted, but only on individuals who consent in a fully voluntary way to bear this risk. As deployed against Hart's position, the example might seem to fall short, because there might plausibly be a sound paternalistic rationale for legal prohibition. The participants to these contests, or many of them, would be acting against their best interests whether they believe that is so or not. However, we can stipulate that the state that legally tolerates these gladiatorial contests also establishes a careful regulatory regime that examines each would-be participant and conducts a detailed assessment of whether there is a good paternalistic case for restriction. Perhaps for some individuals gladiator contests provide a glorious opportunity to display the best skills they have. For some, even though death in the gladiatorial ring is very bad, the lottery consisting of huge payoff plus continued life if one wins and large payoff to a designated beneficiary if one loses is a sensible, prudent choice. So we may assume that the worry about paternalism can be satisfied: in the case we are imagining, there is no good case for blanket prohibition of the gladiator fights.

Still, many of us will still have the strong conviction that it is morally right to prohibit these fight-to-the-death contests, and it seems that only a legal moralist

justification is available to back up this conviction. Here Hart's argument against the enforcement of morals as such meets its death. So the argument goes.

Some try to resist this conclusion by suggesting that our conviction that the contests should be banned really hinges on inchoate suspicions that people who attend these spectacles, and others by contact with them, will become coarsened and inured to horrible human loss in a way that will inevitably lead in very indirect ways to reduced sympathy for those in peril, a disposition to seek settling of disputes by violence, and other effects that clearly involve wrongful infliction of harm on nonconsenting others. The claim then goes that if we flatly stipulate that no such effects are in the offing, then there is no further basis for upholding the judgment that the hypothetical spectacles really ought to be banned. So there is no surrender to legal moralism.

Suppose that the position just described can be successfully defended. Even if that is so, I note that once again we have significant nibbling away at the core of Hart's position. Once we allow that atmospheric cultural effects that arise indirectly from what would otherwise be conduct protected by the harm-to-others principle can be legitimate grounds for suppression, the moral space we are defending in opposing legal moralism is small.

My further suggestion is that part of what prompts the revulsion against the imagined gladiator contests is that they violate the secular sanctity of life idea defended earlier in this essay. If each person has a strong but vague duty to use the opportunity she has been given in having the option of living an ordinary life to do good for self and others, then suicide that cuts short a life that could do significant good is morally wrong, and on the same basis, so would fight to the death gladiator contests (except perhaps if

the participants are limited to the very elderly, who have already fulfilled the duty in question). A closely related point is that the prospect of winning prize money is simply not an acceptable reason for attempting to kill another person even if the person consents to the interaction. Taking money for this reason violates the secular sanctity of life idea.

Moreover, if the participants in this way are acting wrongly, then the pleasure that spectators derive from watching the contest is likely pleasure taken in immorality—people are enjoying a brutal fight waged just to create thrills for spectators, and so waged for no good purpose. Pleasure that has this character should be sharply discounted (if not counted at zero value) in computing in a utilitarian fashion the good that the gladiator contests bring about. Even broadcasting the fights to a large audience would not bring about any significant good. But if this is right, then moral considerations of right enter into the theory of good, and the moral space defended by the opponent of the enforcement of morals as such shrinks yet further.

9. A problematic example.

A weakness in Hart's argument against the enforcement of morals is that he tends to focus on examples such as homosexual conduct and prostitution that are not plausibly regarded as immoral at all, on any grounds. Might it be so that there are plausible examples that challenge the idea that conduct cannot be immoral if it neither reduces anyone's well-being nor fails to benefit others when benefit ought to be conferred? Here is a problematic case.

Suppose Smith willfully becomes addicted to a drug that is only slightly pleasurable but induces extreme craving. Smith arranges his life so he lives in a locked room with steady access to the drug and no possibility of interacting with others. He

renders himself certainly harmless to others. His life in this room will be low in well-being, but no other available life would be better for him, so there is no paternalistic case for restriction of his liberty. However, his will becomes utterly devoted to regular drug taking. He would choose to take the drug even if it were the case that doing that resulted in horrendous harm to other people. Smith comes not to care about being moral and doing the right thing, but since he has foreseen all this and arranged that his depraved will does no harm, there is neither a harm to self nor a harm to others nor a benefit to others case for restriction of his liberty (or criminal prohibition, if there are many identical Smiths). One might hold that deliberately undertaking a course of action for no good reason that causes one's will to be utterly unresponsive to considerations of morality is itself intrinsically morally wrong. One might say this line of conduct violates the dignity of a rational agent.

The opponent of the enforcement of morals as such might be able to resist this counterexample. One might try to argue that by bringing it about that his will is unresponsive to his perception of good reasons for action, he lowers his agency capability and this in itself makes his life go worse, lowers his own lifetime well-being, even though he never faces choices in which this unresponsiveness to reasons has a chance to display itself. But in the example as stated I stipulated that the person's life in the locked room is overall no worse for him than other courses of action he might instead have chosen.

I do not claim that this quick presentation of a single purported counterexample defeats the position that the enforcement of morals as such is unjustifiable. The counterexample puts pressure on Hart's position, but more discussion would be needed to

arrive at a considered view. My point is simpler. Hart focuses on examples that do not provide a good intuitive test of the merits of the position he espouses.

10. Missing the point?

Some readers may object that the discussion of the enforcement of morals controversy advanced so far in this essay perversely misses the main point. The idea that it is appropriate in principle to use criminal law sanctions to enforce the prevailing moral code of society runs afoul of the problem that some members of society may reject parts of the prevailing moral code and may be reasonable to do so. Why is the fact that you find my conduct to be immoral a sufficient ground for enacting a law against it? The question does not lose its force if most members of society agree with your judgment. The main point is that we need to figure out the morally acceptable limits of legal coercion when any lines that one draws between morally permissible and impermissible conduct, and between the part of impermissible conduct that should be legally tolerated and the part that should not, are likely to be controversial. As we have seen, Hart distinguishes the positive morality of society that is actually upheld from critical morality that is deployed to criticize the existing positive code on some principled basis, but people disagree about critical morality as well as about positive morality. In this context, some propose that it is morally legitimate to use state power coercively only to enforce rules that no members of society can reasonably reject. Call this the *liberal legitimacy* norm.[25] (If "reasonably reject" is interpreted generously, so that one who reasons not perfectly but at or above a threshold level of competence can reasonably reject a

proposed rule, this legitimately norm becomes a strong constraint on the coercive use of state power.)

Liberal legitimacy can be deployed to support the harm principle. In order to live together peaceably and cooperatively when there is wide disagreement among us as to what is morally acceptable, we should tolerate one another's immoralities (conduct that some regard as immoral) so long as the person engaging in such conduct is not wrongfully causing harm to others. In this toleration enterprise we count conduct as causing harm only when the notion of harm in play is uncontroversial among all reasonable (reasonable enough) members of society. The enforcement of morality as such—conduct deemed by some to be immoral in the absence of any showing the conduct causes or threatens harm to others—is likely to be morally illegitimate, and hence should not be perpetrated. On this construal the relationship between ruling out criminal prohibitions that violate the liberal legitimacy norm and ruling out the ones that violate the harm principle or expanded harm principle is not watertight, because conceivably some prohibitions might be reasonably rejectable by none even though they clamp down on behavior that neither causes nor threatens to cause harm or offense to others. But one might take up the project of showing that such cases, though conceivable, do not arise, and that the liberal legitimacy norm supplies the background moral principle that justifies the harm principle, so far as it is indeed justifiable.

Hart himself does not advance this line of thought on the enforcement of morals issue. Nor is this line of thought latent in his text so far as I can see. Should he have pressed this argument? I doubt it. In a nutshell, the liberal legitimacy norm is too liberal. Enforcing controversial conceptions of what morally right conduct permits and allows

and what are the genuine goods and bads that the law should respectively promote and discourage is morally acceptable just in case one can identify and put state power behind the conceptions best supported by the best critical morality available in our time. Reasonable people make mistakes. Reasonable people may understandably reject the best views. That the views on morality currently being enforced are such that reasonable people could reject them is compatible with their being the correct views, which ought to be enforced.[26] The possibility that those with the opportunity to use state power to enforce their views might be wrong suggests caution not inaction.

---

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

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

[3]. "Report of the Committee on Homosexual Offenses and Prostitution," section 13, as cited in Hart, *Law Liberty, and Morality*, 14.

[4] . Devlin, "Morals and the Criminal Law." The first quote is from 17, the second from 22.

[5] . Mill, *On Liberty*, 4 and 9 (chapter 1, paragraphs 5 and 9).

[6] . Hart, *Law, Liberty, and Morality*, 17-24.

[7] . Hart discusses the legitimacy of criminal prohibition of offensive conduct such as public indecency in *Law, Liberty, and Morality*, 38-48. He notes that one might accept criminal prohibition of offense while rejecting the enforcement of morals as such. On the need to include offense to others as a separate and distinct ground for criminal prohibition in addition to harm to others, see Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 2, *Offense to Others* (New York and Oxford: Oxford University Press, 1985).

[8] . In *On Liberty* Mill affirms two different ideas: (1) no restriction of liberty except to prevent harm to nonconsenting others and (2) to restriction of liberty unless the conduct being restricted imposes harm or risk of harm on nonconsenting others. These ideas are rivals, with different and opposed implications for the determination of what restrictions of liberty are morally forbidden. Mill does not fully acknowledge the conflict between 1 and 2 and does not clearly opt for one or the other of the rivals.

[9] . Joel Feinberg, *The Moral Limits of the Criminal* Law, vol. 4, *Harmless Wrongdoing* New York and Oxford: Oxford University Press, 1988, 311-316. Feinberg's magisterial work advances our understanding of every topic touched upon in this essay.

[10] . On the concepts of exploitation and mutually beneficial exploitation, see Feinberg, *Harmless Wrongdoing*, chapters 31 and 32.

[11] . One might resist the claim in the text on the ground that sometimes we have a right to do wrong (so long as we don't there by harm others). I disagree, but the issue is open. I thank Massimo Renzo for helpful criticism of my claim here.

[12] . Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality," *William and Mary Law Review* 40 (1999), 927-946. My views on the enforcement of morals as such (legal moralism) owe a lot to Dworkin's insights.

[13] . Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), chapter 16.

[14] . Nils Holtug, *Persons, Interests, and Justice* (Oxford and New York: Oxford University Press, 2010), 184-188.

[15] . Hart, *Law, Liberty, and Morality*, 33.

[16] . For argument along this line, see John Finnis, *Natural Law and Natural* Right (Oxford and New York: Oxford University Press, 1980); also Finnis, "Marriage: A Basic and Exigent Good," *The Monist* 91 (2008), 396-414; also Mark C. Murphy, *Natural Law and Practical Rationality* (Cambridge: Cambridge University Press, 2001).

[17] Douglas Husak, "For Drug Legalization," in Douglas Husak and Peter de Marneffe, *The Legalization of Drugs—For and Against* (Cambridge: Cambridge University Press, 2005), 3-105. In his contribution to this same volume ("Against Drug Legalization," 109-198) de Marneffe mounts a paternalistic case for attaching mild criminal law penalties to use and consumption of certain recreational drugs that are dangerous or otherwise harmful to their users..

[18] . Derek Parfit, "Equality or Priority?", reprinted in Matthew Clayton and Andrew Williams, eds., *The Ideal of Equality* (Basingstoke, Hampshire: Palgrave Macmillan, 2002), 81-125.

[19] H. L. A. Hart, "Prolegomenon to the Principles of Punishment," reprinted in Hart, *Punishment and Respons ibility: Essays in the Philosophy of Law* (Oxford and New York: Oxford University Press, 1968), 1-27.

[20] . Mill, *On Liberty,* 10.

[21] . I argue for a duty to self with this shape, as part of an argument for the moral acceptability of hard paternalism, in my "Joel Feinberg and the Justification of Hard Paternalism," *Legal Theory* 11 (2005), 259-284. See also Arneson, "Paternalism, Utility, and Fairness," reprinted in Gerald Dworkin, ed., *Mill's 'On Liberty': Critical Essays* (Lanham, Maryland: Rowman and Littlefield, 1997).

[22] . Mill, *On Liberty*, 11 (chapter 1, paragraph 12). Mill ends up affirming that the harm principle rules out restricting the individual's liberty to engage in conduct that "neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself" (*On Liberty*, 80, chapter 4, paragraph 11).

[23] . See Arthur Ripstein, "Beyond the Harm Principle," *Philosophy and Public Affairs* 34 (2006), 215-245; also Colin Bird, "Harm versus Sovereignty: A Reply to Ripstein," *Philosophy and Public Affairs* 35 (2007), 179-194; also Ripstein, "Legal Moralism and the Harm Principle: A Rejoinder," *Philosophy and Public Affairs* 35 (2007), 195-201.

[24] . This example receives a thorough treatment in Feinberg, *Harmless Wrongdoing*, 328-331.

[25] . For a thorough treatment of the liberal legitimacy idea and what it implies, see Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011).

[26] . See Richard Arneson, "Neutrality and Political Liberalism," forthcoming; also Arneson, "Liberal Neutrality on the Good: An Autopsy," in George Klosko and Steven Wall, eds., *Perfection and Neutrality: Essays in Liberal Theory* (Lanham, Maryland: Rowman and Littlefield, 2003, 191-218.