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Introduction

Legal systems enforce morality. No one really denies it. "It cannot be seriously disputed," H. L. A. Hart observes, "that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted."[1] From the fact that all legal systems enforce morality, it does not follow that they ought to do so. But no one really denies this either.[2] The legitimacy of legal prohibitions on a host of moral wrongs such as murder, rape and burglary is widely taken for granted and not subject to serious dispute. Since legal systems do and ought to enforce morality, the interesting question is not whether the law should enforce morality. The interesting questions concern what parts of morality the law ought to enforce, the considerations that justify its enforcement, how the law ought to enforce morality, the relationship between the legal and social enforcement of morality and whether there are moral limits that constrain the enforcement of morality – and, if so, the nature and justifications for these limits. These are the central questions explored in this book.

1.1 ENFORCING AND PROMOTING

The legal enforcement of morality is often taken to be an issue about the moral limits of the criminal law. This is understandable. Legal systems characteristically, even if not essentially, rely on the threat of punishment. In the world in which we live, legal efforts to regulate conduct and to guide it in morally desirable directions must impose criminal punishments to be effective. Still, the criminal law is but one

[1] Hart, *The Concept of Law*, 3rd ed., p. 185.

[2] Anarchists – more precisely, political (as opposed to merely philosophical) anarchists – may deny it. To the extent that they reject the legitimacy of legal systems, they will reject the legitimacy of enforcing morality through law. But for those who accept the legitimacy of legal systems, there is no serious dispute about the legitimacy of these systems enforcing morality. For the distinction between political anarchism and merely philosophical anarchism, see Simmons, "Philosophical Anarchism."

instrument for enforcing morality, albeit a particularly salient one. So, we do well to consider other ways by which the law can enforce morality.

The term "enforcement" connotes the use of force. The law enforces morality when it imposes sanctions on its subjects to increase their compliance with its norms. Classical writers in jurisprudence defined sanctions in terms of unpleasant consequences. Sanctions refer to "the evil which will probably be incurred in case a command be disobeyed."[3] Punishments, accordingly, were viewed as the paradigm case of sanctions. Nevertheless, as most writers have allowed, sanctions include more than punishments. For example, it is common to distinguish punishments from mere penalties. The former express the law's condemnation of the targeted conduct, whereas the latter may simply raise the costs of engaging in it.[4] If mere penalties count as sanctions, and if the law enforces morality whenever it imposes sanctions to do so, then the legal enforcement of morality extends beyond the criminal law.

The term "sanctions" can be understood even more broadly to include the withholding of benefits as well as the imposition of costs. Consider a mundane example. Suppose that I have been paying the rent for my friend's apartment while she looks for work. Over time I become concerned about her lack of effort in finding employment and announce that I will discontinue this support if she does not shape up soon. The expression of my intention to cease providing a benefit that I have been providing to my friend may function as a powerful incentive for her to do what I want her to do. Its influence on her conduct may be just as effective as a threat to harm her would be. Modern states provide their members with a wide range of benefits including retirement pensions, education, employment opportunities and health care. Modern states also extend tax credits and tax deductions to favored activities, such as a tax deduction for charitable giving or for making environmentally friendly renovations to one's home. These tax breaks too can be viewed as benefits, which can be extended or withheld. The state might withhold public money for art that was deemed to be offensive, thereby seeking to enforce community standards of decency, for example. By withholding this benefit, it would, in effect, sanction the artists who were producing the offensive art. If the withholding of a previously provided benefit qualifies as a sanction, then the difference between enforcing morality and promoting it is muted. Normatively speaking, it will not matter too much whether state action is classified as enforcement in virtue of the fact that a benefit is withheld or promotion in virtue of the fact that a benefit is extended.[5]

For this reason, in this book we will understand the enforcement of morality to include the use of carrots as well as sticks. It may be objected that when states

[3] Austin, *The Province of Jurisprudence Determined*, Lecture 1.

[4] Feinberg, "The Expressive Function of Punishment."

[5] While the classification of state action does not have normative significance in itself, how it is perceived can make a difference. It often matters whether something is viewed as a gain or a loss. Perceived losses tend to produce greater pain or disutility than the pleasure or utility produced by equivalently sized gains. See Kahneman, *Thinking, Fast and Slow*, pp. 292–297 (discussing "the endowment effect").

promote morality, they always do so coercively, and so even when the state extends or withholds benefits to its members, it is exercising force over them. On this view, when the state is involved, there are no carrots without sticks. In reply, it can be said that coercion is not simply a function of the power of the coercing agent but also of how the use of this power affects the decision making of those subjected to it.[6] Some measures may be noncoercive, even though they are fully backed by the power of the state. These measures include extending recognition to certain institutions or practices (monogamous marriage) while denying it to others (polygamous marriage), providing subsidies for some activities (opera) while denying it to others (amusement parks), and using the law to express official support for some ideals or practices (religious toleration) while expressing official condemnation of others (recreational drug use).[7] Whether these noncoercive legal measures are themselves indirectly coercive need not detain us. We can include them with criminal law prohibitions under the general rubric of legal efforts to enforce morality.

1.2 MAIN ISSUES

Since nearly everyone agrees that harm prevention is an appropriate aim of the law, this idea is a natural place to begin our investigation. We can distinguish cases in which people harm others from cases in which they harm only themselves. A society, it is sometimes said, should concern itself only with preventing harm to others. Famously, John Stuart Mill expressed this view in his essay *On Liberty* by propounding what he described as "one simple principle" for governing the relations between society and the individual:

> [T]he sole end for which mankind are warranted, individually or collectively, for interfering with the liberty of action of any of their number, is self-protection. That 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. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right .... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.[8]

This principle, which has come to be termed the "harm principle," is not as simple as Mill advertised, as nearly every commentator on his essay has

[6] Schauer, *The Force of Law*, p. 129.

[7] Even in countries with a strong commitment to freedom of speech, such as the USA, the courts have generally held that there is no requirement that the government's own speech must be neutral with respect to different viewpoints. For critical assessment of this issue, see Alexander, *Is There a Right of Freedom of Expression?* pp. 82–102.

[8] Mill, *On Liberty*, pp. 223–224.

observed.[9] We will consider some of the complexities and puzzles it presents in Chapter 2. But whether we ultimately accept it or not, we should recognize that the harm principle is a moral principle. When society interferes with the liberty of some of its members so as to prevent them from harming others, it enforces (a part of) morality.

Mill's principle not only provides a justification for the enforcement of morality (prevention of harm to others) but it also identifies the limits to its enforcement. No enforcement of morality is justified beyond that which concerns preventing harm to others. Consider the following legal enactments.

- A legislative body passes a statute that fines anyone within its jurisdiction who is caught riding a motorcycle without wearing a protective helmet.
- A court refuses to uphold a contract between two adults on the grounds that the terms of the contract, while entered into freely, are grossly unfair.
- A judge sentences someone to prison for assisting another in their suicide.

The first of these enactments is an instance of *legal paternalism*. The legislative body interferes with the conduct of some people by imposing and by threatening to impose a fine on them, and it does so for their own good. The aim of the statute is to dissuade people from exposing themselves to the increased risk of serious injury that accompanies riding a motorcycle without protective headgear. The second of these enactments can be viewed as an instance of *legal moralism*. The court refuses to uphold the contract because its terms are grossly unfair. It is, in the language of the law, "an unconscionable contract." Does the upholding of contracts of this kind cause harm to others? Not necessarily, since if the contract is freely and voluntarily entered into by both parties, then any harm that results from it is self-imposed. Friends of the harm principle often register this point by invoking the Latin phrase "volenti non fit injuria" (to a willing person injury is not done). The third enactment can be viewed as a mix of legal paternalism and legal moralism. In criminalizing assisted suicide, the society may seek to protect its members from harming themselves with the assistance of others. Perhaps it worries that those who desire to end their lives typically suffer from forms of depression that impair their capacity to make free and voluntary decisions to do so. Such people need protection against themselves, and from others who would help them to end their lives. But the society may also view suicide as immoral, even when it is the result of a free and voluntary decision and is in the interests of the person who engages in it.

I shall have much more to say about both legal paternalism and legal moralism in subsequent chapters. For now, it need only be noted that Mill's principle excludes them both.[10] No legal enactment that involves either would be legitimate.

[9] Some writers have denied that Mill was, in actuality, committed to the harm principle. See Jacobson, "Mill on Liberty, Speech, and the Free Society." We will not take up this interpretive issue here.

[10] Mill's principle should not be confused with Mill's own views on the legitimate enforcement of morality, since while he accepted the principle, he also appeared to accept enforcements of morality that are in tension with it. Compare his principle with the applications he discusses in chapter 5 of *On Liberty*.

I have been focusing on the law (or the state[11]) as the agent of enforcement. But, at points, we will also consider societal, but nonlegal, instances of the enforcement of morality. This too was a pressing concern for Mill. His principle was intended to apply as much to "the moral coercion of public opinion" as to the physical force of legal sanctions. With this in mind, consider the case of controversial speech on college campuses and the efforts by some students to suppress it or interfere with it, not by legal means but by mobilizing resistance, including violent resistance, to it.[12] This too can be understood as an effort to enforce morality, even though the agent of enforcement in this case is not the state. To be sure, the state remains in the background. And those who wish to defend the rights to speak of those whose speech is targeted may try to enlist the power of the state to uphold these rights, thereby attempting to get the state to enforce that part of morality, as they see it, that concerns the protection of these rights.

The case of controversial speech reveals some of the complexity of our topic. For speech or expression may be wrongful, while being rightfully protected. Those who say false, dangerous or offensive things may not be in the right, even if they have a right to say it. We shall consider in Chapters 8 and 9 how to understand such purported rights to do wrong and how they bear on the enforcement of morality. Here we can simply note that if there are rights of this kind, then efforts to enforce one part of morality will block efforts, by the state and by others, to enforce other parts.

The idea that an important part of morality concerns the rights of individual people will be a familiar one to many readers of this book. Some think that individual rights exhaust the moral domain. This is not a plausible view. As the example of protected speech illustrates, if one has a right to do something, it remains a further question whether it is right for one to do it. But how exactly should the moral domain be characterized? Many have claimed that we need to distinguish a narrow from a broad conception of morality. The distinction has been drawn in various ways. Narrow morality, it has been claimed, refers to "a particular normative domain including primarily such duties to others as duties not to kill, harm, or deceive, and duties to keep one's promises."[13] Of special importance (for our purposes), these duties include requirements of justice and fair treatment. This normative domain, it is often claimed, engages "the sentiments of guilt and resentment and their variants."[14] Broad morality, by contrast, includes narrow morality but much more as well. Most generally, it concerns the question of how to live, "the precepts instructing people on what makes for a successful, meaningful, and

[11] I will use the terms "legal enforcement" and "state enforcement" interchangeably.

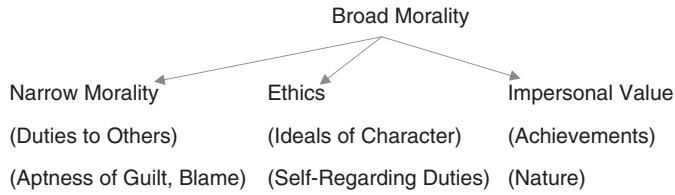
[12] The recent controversy over the alt-right speaker Milo Yiannopoulos at the University of California, Berkeley provides a good example. The controversy, and its background, is described in Marantz, "How Social-Media Trolls turned U.C. Berkeley into a Free Speech Circus," *New Yorker*, July 2, 2018.

[13] Scanlon, *What We Owe to Each Other*, pp. 171–172.

[14] Gibbard, *Wise Choices, Apt Feelings*, p. 6.

worthwhile life."[15] But, in addition, and more specifically, it includes self-regarding duties to develop one's talents and respect one's rational nature, ideals of character and duties to respect impersonal goods, such as perfectionist achievements and natural beauty, even when failure to do so would not contravene any duty to others.[16]

Drawing on the claims expressed in these statements, we can depict the distinction in the following rough-and-ready way.



The divisions depicted here are not meant to be sharp. They are intended to map out characteristic features of different domains or compartments of morality. Consider self-regarding duties, for example. Perhaps we can appropriately blame people for failing to live up to them. If so, then the moral sentiment of blame will not be confined to narrow morality.[17] Or consider justice. A just or fair distribution of goods, I have emphasized, is a matter of narrow morality, but some have thought that justice has impersonal value. It is good for justice to be done, they say, even if it benefits no one.

There are, to be sure, other ways to mark a distinction between broad and narrow morality. Mill famously distinguished the morality of right and wrong from what he called "the art of life." The latter refers to the broader question of how to live. The former is characterized in terms of the appropriateness of punishment: "We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience."[18]

On this proposal, narrow morality – the morality of right and wrong – just is the part of morality that is appropriately enforceable. The part of broad morality that extends beyond the narrow part should not be backed up by sanctions of any kind. In this way, Mill's view makes the claim that we should only enforce narrow morality true by definition (although it does leave open what parts of morality are

[15] Raz, "Right-Based Moralities," p. 198.

[16] Ibid.

[17] Moral blame may have different senses. Blaming someone for failing to live up to a self-regarding duty may express a judgment of responsibility in one sense, while blaming someone for failing to honor their duty to another may express a judgment of responsibility in a different sense. If this were right, then the moral emotions that go with narrow morality could be understood as those that express the latter sense of responsibility. For discussion, see Watson, "Two Faces of Responsibility."

[18] Mill, *Utilitarianism*, p. 14. Mill's position can be softened by replacing punishment with appropriate susceptibility to some non-punitive accountability-seeking reactive attitude. See Darwall, *The Second-Person Standpoint*, pp. 92–93.

appropriately subject to legal enforcement). But while Mill's characterization of narrow and broad morality could conflict with the characterization depicted earlier, it is not incompatible in substance with anything we need to say here. For we can investigate which parts of broad morality, as we have depicted it, are appropriately subject to enforcement and then, after concluding the investigation, characterize them as narrow or broad in Mill's terms.[19]

Nothing of substance, then, turns on the terminology we adopt to describe the different parts or domains of morality. The terminology depicted earlier, however, has the advantage of helping us to formulate clearly the questions that we want to ask. For example, some claim that legal officials should enforce only narrow morality. The part of broad morality that encompasses more than that encompassed by narrow morality should not be legally enforced. And, some hold in addition, that narrow morality is defined by the rights of individual people. Indeed, a proponent of Mill's principle could insist that each individual person has a fundamental right to live their life as they please, so long as they do not cause harm to others; and that the legal enforcement of morality should be confined to protecting this fundamental right for each person. Questions about the rightful exercise of this right could then be assigned to the broad conception of morality, which is not enforceable by law.

We shall be exploring the distinction between narrow and broad morality in more detail in Chapters 5 and 6. We will see that the distinction between these two conceptions or characterizations of morality is harder to sustain than it appears at first pass. If the distinction cannot be sustained, then it will no longer be credible to hold that only narrow morality should be legally enforced.

Whether morality is conceived narrowly or broadly, further questions about its nature invite consideration here. Should we speak of morality, as I have been doing so far, or should we speak instead of moralities? The latter course might seem to be more accurate, for there is, and has been, more than one morality practiced in the world. We speak of the morality of the ancient world or the morality of contemporary Christian culture, for example. At the same time, we often speak of morality as referring not to any moral code that is practiced by any particular society but instead as a set of critical principles or rules. As the opening quotation from Hart illustrated, morality can refer both to the conventional morality of a group and to the purportedly enlightened views of those who object to it (or endorse it). This ambiguity is important. If we are enjoined to enforce morality, then we need to clarify what kind of morality is in question.

Since the issue here is of central importance to our topic, a measure of clarification is in order. Let us stipulate that a social morality is a system of demands and aspirations that apply to and resonate with a particular group of people at a particular time. Let us add that this system of demands and aspirations is generally recognized

[19] Plainly, if we were to do this, then we would need to keep track of the different kinds of sanctions – legal, social, internal reproaches of conscience – that are appropriate for breaches of different parts of morality.

by the members of the group as a source of obligations, in the case of demands, and justifying reasons in the case of aspirations. The general recognition that these demands and aspirations have this kind of authority attests to their perceived importance by those who are subject to them.[20] So understood, social moralities are plural. Different groups have different social moralities. Yet while there exists a plurality of social moralities, each social morality arguably contains within itself the seeds of its own criticism. In virtue of the fact that social moralities are systems of demands and aspirations that purport to be authoritative for their members, it becomes possible to ask, both by their members and by outsiders, whether the purportedly authoritative demands and aspirations are in fact genuinely authoritative. While this question is sometimes raised by those who doubt that any system of social demands and aspirations could be authoritative, it is more often raised by those who wonder whether the social morality to which they are subject could be improved in ways that would make it more authoritative. When this latter group raises the question of the authority of social morality, they are appealing to a critical standard or set of critical standards. These standards are the standards of critical morality.[21]

Unlike social morality, critical morality is not something that must be established by particular groups at particular times. Like the canons of logical reasoning, it can exist solely as abstract standards or principles. Does this mean that critical morality is singular – that one standard, or set of standards, applies to us all? Perhaps, but perhaps not. The issue here is enormously complicated. Much depends on the substance or the content of critical morality. Some utilitarian writers have held that there is one fundamental critical standard of morality, one that enjoins the maximization of utility (or happiness). This critical standard applies to all societies. But a pluralistic account of critical morality can also be advanced, one that maintains that there is a plurality of critical standards. Such a view can allow that these standards can be ranked in different ways by different social groups and that no single ranking is optimal from the standpoint of critical morality. We will consider a pluralistic view of this kind in Chapter 6 when we discuss the value of tradition. However, for present purposes, we do not need to determine whether critical morality is pluralistic or whether there is a single enlightened morality that applies to us all. We can sidestep this issue by distinguishing the social morality of a group from the critical morality that applies to it, thereby leaving open the possibility that different critical standards apply to different groups.

With this distinction in hand, we can return to the enforcement of morality and take proper account of the ambiguity in the injunction to "enforce morality."

[20] This account of social morality draws on both Strawson's "Social Morality and Individual Ideal" and Fuller's "The Two Moralities" in his *The Morality of Law*.

[21] For this term, see Hart, *The Concept of Law*. Hart's distinction between positive and critical morality, which was influenced by Strawson's discussion, tracks the distinction drawn here between social and critical morality.

On one proposal, to enforce morality is to enforce the social morality of the group in question. This has been the view taken by many writers who have been described as communitarians. The British judge Lord Patrick Devlin, whose arguments will be considered in Chapter 3, provides a classic example. For him, the social morality of a society is a necessary ingredient in the glue that holds it together, and if this morality is not adequately enforced, the society will fall apart: "For a society is not something that is held together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage."[22]

Applying this communitarian view of the enforcement of morality to the matter of sexual morality in particular, Devlin argued that whether the law should aim to discourage prostitution or homosexuality turns on whether doing so is necessary for, or conducive to, the preservation of the public morality (i.e. social morality) of the society to which it applies. Devlin was responding to the recommendations advanced by The Report of the Committee on Homosexual Offences and Prostitution, a report commonly referred to as the Wolfenden Report, that was commissioned by the British government and published in 1957. A chief recommendation of this Report was that homosexual sex between consenting adults in private should no longer be subject to criminal sanction.

To the readers of this book, many of whom will have grown up in modern liberal societies, Devlin's focus on homosexuality may seem a little bizarre. Why would anyone want to criminalize conduct, such as homosexual conduct between consenting adults in private, if there is nothing inherently wrong with it? But this is precisely the point. For the society that Devlin was addressing – British society in the middle of the twentieth century – it was widely accepted that homosexuality was, in Devlin's words, "a miserable way of life" – one that could, if unchecked, corrupt the young. That judgment, which reflected the settled and dispassionate assessment of the British people at that time, was an important part of the social morality of this society. And Devlin's point is that it is proper and necessary for a society to support and uphold its social morality.[23]

The proposal that we are now considering, that illustrated by Devlin's response to the Wolfenden Report, is subject to a devastating objection. How could a society have an unqualified right to enforce its social morality? For suppose that the social morality of a given society sustains the institution of chattel slavery. If the proposal we are considering were accepted, then it would follow that this society would have a right to uphold this evil practice. But this cannot be right. The objection brings us back to the interdependence of social morality and critical morality that was noted earlier. The claim that a society has the right to enforce its social morality is not itself

[22] Devlin, *The Enforcement of Morality*, p. 10.

[23] Devlin's own position on the issue of the criminalization of homosexual sex was complex. On the one hand, he personally favored decriminalization. On the other hand, he insisted that his society had the right to criminalize it, if it judged that doing so was necessary to protect its social morality.

a claim of social morality. Devlin makes plain that he thinks that societies, not just his own society, have the right to uphold and enforce their social moralities. This right, then, must be a right of critical morality. But now it can be asked, how could a society have an unqualified critical moral right of this kind?

Devlin was sensitive to the interdependence of social and critical morality, and he struggled to account for it: "There are, have been, and will be bad laws, bad morals, and bad societies. Probably no law-maker believes that the morality he is enacting is false, but that does not make it true."[24] Nonetheless, Devlin insisted that the lawmaker's job is not to enforce the morality that they think is true but rather to enforce the social morality of their society. Their task is to ascertain not "the true belief, but the common belief" of their society. It is a good question why we should think that this is indeed the correct description of the lawmaker's job.

Devlin hints at an answer. His refined view goes beyond the simple thought expressed by the metaphor of the glue holding a society together. The lawmaker must enforce the common moral beliefs of their society not only because doing so helps to hold the society together but also because they have a duty to defer to the views of those they serve. This refined view thus connects the right of a society to enforce its social morality to the value of popular self-rule. We shall examine the arguments for this view more fully in Chapter 3, but here a few preliminary remarks can be made about it.

On Devlin's refined view, the lawmaker in a democratic society has a duty, a moral duty, to uphold the moral judgments of their constituents so long as they are consistent with democracy. This moral duty is a duty of critical morality but it directs the lawmaker to enforce not what they, the lawmaker, believe is right or wrong but rather what their society believes is right or wrong.[25] The duty in question is a democratic duty, since it is grounded in the claim that each citizen in a democracy has an equal claim to define the social morality of the society to which they belong. Admittedly, the democratic duty referenced here is a little obscure. Its content goes beyond the demand to extend formal political rights (to vote, to run for office, to organize in support of political causes, etc.) to the adult citizens in one's society. The duty in question lies on the lawmaker and the judge, and it instructs them to recognize that their judgment of right and wrong has no greater authority than those over whom they govern. By granting that all citizens have an equal claim to discern right from wrong, the office-holder must honor the common morality, the established social morality of their society, rather than seek to replace it with their own understanding of what a more enlightened morality would require.

Several comments about this refined proposal can now be ventured. First, the appeal to democratic values obviously restricts the reach of the argument for the

[24] Devlin, *The Enforcement of Morality*, p. 94.

[25] Similar claims are sometimes made about the role of a constitutional judge in a democratic society. See Bickel, *The Morality of Consent* and Bork, *The Tempting of America*.

enforcement of social morality. A nondemocratic society could not justify the enforcement of its social morality on these grounds. Second, while the refined proposal is a proposal to enforce the social morality of a society, the argument appeals to critical morality, to wit the critical moral democratic duty that it invokes. Third, the democratic duty, if it is indeed a duty of critical morality, is plausibly but one such duty. Other duties of critical morality are likely to conflict with it. Suppose, for example, that a lawmaker believes that it is wrong from the standpoint of critical morality to impose cruel and excessive punishment on an offender for a minor crime, such as public caning for an act of vandalism;[26] but they also know that this punishment for this type of crime is widely viewed as acceptable in their society. If they accept the democratic duty to honor the social morality of their society, then they will need to balance this duty against their perceived duty to avoid supporting unjust punishments. The refined proposal, in this kind of case, must hold that the democratic duty takes precedence over any conflicting duties of critical morality. Accordingly, one could reject the refined proposal either by denying that there is any such democratic duty or by holding that it is frequently overridden by other requirements of critical morality.

Let us turn now to a second proposal concerning the enforcement of morality, one that drops any reference to social morality. On this proposal, the law ought to enforce critical morality. More precisely, the law ought to enforce the critical morality that applies to the society over which the law has jurisdiction. Of course, it is possible that the critical morality that applies to a society will coincide with its social morality. But even in this very fortunate circumstance, it is the fact that the morality is sound by critical standards, and not the fact that it is socially established, that is crucial.

Now, critical morality is one thing; a lawmaker's or judge's beliefs about its contents are another. No legal official is infallible. Legal officials make mistakes all the time. Should we say, then, that on the second proposal the law should enforce critical morality or that the law should enforce the lawmaker's beliefs about critical morality? The question is ill formed in one way. Barring unusual circumstances, a lawmaker can only enforce critical morality by acting on their beliefs about what its contents are. In intending to enforce or promote critical morality, the lawmaker must act on their beliefs about its contents. There is really no other way for them to do so.[27] Notwithstanding this point, if the lawmaker is clearheaded, then they will acknowledge that their judgments are fallible and that their efforts to promote critical morality are justified only if the beliefs on which they act are correct.

[26] Public caning for crimes of vandalism is currently legal practice in Singapore, as well as a few other countries. In 1994 an American, Michael Peter Fay, was convicted of vandalism while visiting Singapore and was given a sentence of caning, which was subsequently carried out. The incident provoked international attention and protest from the US government.

[27] A lawmaker might not act on their own beliefs but instead defer to the beliefs of someone they trust, such as a religious official. But even in this kind of case the lawmaker would be acting on their belief that the religious official had trustworthy judgment on the matter in question.

Their intention is to promote critical morality, not to promote their beliefs about critical morality irrespective of their truth.

The recognition of the fallibility of legislative judgment should not paralyze the lawmaker. For failure to enforce what they consider to be sound critical morality can have bad consequences itself. But it should give them pause. The lawmaker should want to ensure that their judgments are formed under social conditions that allow for their correction when they are mistaken, and that allow them to have warranted confidence in them when they are correct. The social conditions that do well in this regard play an important role in justifying a right to free expression, especially free and open debate on matters of public, political concern. We will explore these issues in some detail in Chapter 9.

For now, I want to highlight two distinct ways by which one might criticize a proposal to enforce critical morality by law or by other means. One could argue that the portion of the critical morality that is being targeted for enforcement is not properly subject to enforcement. Alternatively, one could argue that the proposal rests on mistaken beliefs about the morality or immorality of what is being targeted. To take an example: consider a proposal to criminalize prostitution. A critic of the proposal might contend that it is none of the law's business to interfere with prostitution. Their view might be that prostitution, so long as it is consensual, does not cause harm to others and that the harm principle should regulate the legal enforcement of morality, for example. Alternatively, a critic might grant that it would be permissible for the law to criminalize prostitution, if prostitution were immoral, but then go on to deny that it is immoral. To be sure, a critic could have both of these thoughts at the same time, believing that prostitution is not wrong and also that, if it were wrong, it would still be none of the law's business to enforce it. But while both thoughts are compatible and can sit in the mind of the same person at the same time, they remain distinct thoughts, and it is important to appreciate the difference between them, as they represent different ways of arguing about the legitimacy of various proposals to enforce critical morality.

Bringing together two of the distinctions we have introduced – that between narrow and broad morality and that between social and critical morality – we can now consider a view that resembles Devlin's view in holding that the law ought to enforce broad as well as narrow morality, but departs from his view in giving critical morality rather than social morality pride of place. A view of this kind will be considered in detail in Part II of this book, but a few preliminary points can be made about it here. The view in question assigns the state, and the legal officials who run it, a general duty to promote the welfare of those who are subject to its authority. It then argues that in order to adequately discharge this duty, the law must enforce morality, including broad morality. Thus, like Devlin's view, this view recognizes that the welfare of people is deeply influenced by the social environment in which they live, but unlike Devlin's view, it assesses the quality of that social environment from the standpoint of critical morality. In one respect, then, the language of

enforcing morality, on this view, is a little inapt. It holds that the moral norms of a society should be enforced when they are sound, and when they are not sound, they should not be enforced. Indeed, on the view we are now considering, one function of the law is to improve the social morality of the society in which it holds sway.[28]

No doubt caution is in order here. There are substantial limits that apply to any legal effort to improve the social morality of a group. Morality, whether social or critical, is not subject to deliberate change. As Hart explains, "standards of conduct cannot be endowed with, or deprived of, moral status by human *fiat*, though the daily use of such concepts as enactment and repeal shows that the same is not true of law."[29] When the law undertakes to improve morality, it aims to bring the social morality of those who are subject to it closer to the standards of critical morality. But for this to work, the process of change must be gradual. By changing legal rules and norms, the state can attempt to shape social morality indirectly. The fact that some conduct is made illegal, or the fact that some conduct, such as homosexual sex, is decriminalized, may over time affect societal attitudes about its permissibility.

There are opportunities here for the reformer, but also dangers. A more conservative version of the view we are now considering accentuates the dangers. By attempting to improve social morality, the law might weaken its authority and loosen its bonds. As one writer cautions, "It would be a mistake to make the perfect the enemy of the good-enough, especially when the good-enough actually exists and is an environment that gives structure and meaning to people's lives, while the perfect is just somebody's theory."[30] The conservative version of the view, accordingly, centers on preserving rather than reforming the social morality of a society. According to it, the law ought to enforce morality only if two conditions are jointly met. The morality to be enforced (i) must be part of the actual social morality of those who are subject to the law and (ii) must be judged to be sound or at least acceptable from the standpoint of critical morality.

This view neatly avoids the objection that many have pressed against Devlin's view and that we took brief note of earlier. Even if it were granted that society has a right to use the law to enforce its social morality, this right could not be unqualified. As Delvin himself acknowledged, "Societies in the past have tolerated witch-hunting and burnt heretics: was that done in the name of morality? There are societies today whose moral standards permit them to discriminate against men because of their colour: have we to accept that?"[31] Devlin's posing of these rhetorical questions reveals his ambivalence about his own view. But the conservative view we are now considering harbors no such ambivalence. Society, it holds, has no right to enforce false or misguided morality.

[28] For discussion of this point, with special emphasis on the law's role in improving sexual morality, see Green, "Should the Law Improve Morality?"

[29] Hart, *The Concept of Law*, 3rd ed., pp. 175–178.

[30] Green, "Should the Law Improve Morality?" p. 489.

[31] Devlin, *The Enforcement of Morality*, p. 91.

A new issue arises at this point. I have been proceeding on the assumption that social morality and critical morality are distinct in the sense that the former is a matter of descriptive fact, whereas the latter is a matter of critical prescription (of what moral code ought to be established as opposed to what moral code is actually established). As such, the former is investigated by the methods of the sociologist or the anthropologist, while the latter is investigated by methods of rational argument, such as those employed by the ethicist, the moral philosopher or the theologian.[32] But this assumption backgrounds something important. Social morality, like other artifacts, is subject to interpretation. And methods of interpretation can, and often do, appeal to critical standards. For example, suppose that there are two rival interpretations of a given rule of social morality and that each interpretation fits the facts of established practice well. In choosing between them, one needs to appeal to something other than common beliefs about them, since each does equally well on this score; and here, it may be thought, it is appropriate, perhaps necessary, to appeal to standards of critical morality. The best interpretation of the rule in question, one may think, is the one that puts it in the most attractive light.[33]

The proper interpretation of social morality, like that of law, is contested terrain. We cannot investigate this matter here. The point for present purposes is modest: to the extent that one comes to believe that the interpretation of the content of social morality requires some recourse to the standards of critical morality, it will not be possible to say with Devlin that in attempting to enforce the social morality of one's society one does not need to attend to its goodness or truth. This modest point also complicates the conservative version of the argument for the enforcement of critical morality that we just reviewed, since, if the point is accepted, then the line between conserving existing social morality and reforming it will not be a sharp one.

Reconsider now the general form of the argument for enforcing critical morality that has been sketched here. Whether this argument is understood on either the reformist or conservative version, it appeals to a general duty, purportedly one that applies to the state, and the legal officials who run it, that directs the state to promote the good of those who are subject to its authority. This duty, as we have seen, requires the state to attend to the moral environment, or, as I will later call it, the "ethical environment," that its laws and policies shape and sustain. The claim that state officials have a general duty of this sort can be challenged in a variety of ways.

Legal measures designed to shape the moral environment, whether by means of the criminal law or by means of milder legal measures that are not directly coercive, aim to favor some ways of life over others on the grounds that they are better ways of life. This position, it may be thought, runs afoul of a key desideratum of a modern

[32] Some identify the standards of critical morality with the teachings of revealed religion. For them, the method for identifying its content will center on techniques for accurately interpreting these teachings.

[33] For an imaginative and powerful development of this general thought, see Dworkin, *Law's Empire* (discussing the idea of constructive interpretation).

liberal state; namely, that it should remain neutral between different conceptions of the good life. The neutralist position has a number of influential proponents in contemporary political philosophy,[34] and its spirit informs objections to the legal enforcement of morality that ordinary citizens often voice. A full defense of the kind of legal enforcement of critical morality that we have been discussing, accordingly, must address the concerns that stand behind and motivate this neutralist critique.

An initial response to the critique is tempting. Neutrality is only a desideratum if it is genuinely possible. But, as was noted at the outset of this chapter, no one seriously denies that the law should enforce morality. And, if it enforces morality, then it will perforce favor some ways of life over others. (If a rapist or a thief were to object to laws that criminalize their preferred activity on the grounds that they are non-neutral and discriminatory toward their way of life, no one should be impressed.) But this tempting response is too quick. More sophisticated versions of the neutralist position can be articulated. The idea of neutrality invites two basic questions. Who is supposed to be neutral, and to whom or what is neutrality supposed to be shown? We have been speaking loosely of the state, or the legal order, as the entity that is supposed to be neutral. But to whom or what is this neutrality owed? Not to any and all activities or ways of life that people may take up. This much is clear from the example of the rapist or the thief. How then to circumscribe the scope of neutrality? Here we can help ourselves again to the distinction between narrow and broad morality. Whether or not there is one true broad morality, there are certainly many conceptions or rival understandings of its content. Some of these conceptions will conflict with the requirements of narrow morality, but many will be consistent with them. Working with these distinctions, the neutralist can now present a more promising version of the view. The state, or legal order, should be neutral with respect to all conceptions of broad morality that are consistent with the requirements of narrow morality.[35] The rapist or the thief has a way of life that is flatly incompatible with narrow morality and so their way of life is not owed neutral treatment. But there are many ideals of conduct that are consistent with narrow morality and the neutralist can insist that the state should not take sides between them.

We will take a closer and more critical look at the neutralist position in Chapters 5 and 6. We will be interested in identifying and evaluating the considerations that purport to justify it. Still, even from the sketch provided here, it should be clear how the neutralist position challenges the moral environmentalist view that we have been associating with the legal enforcement of critical morality. For, in attempting to shape the moral environment of the society in which it claims jurisdiction, the law

[34] For a survey of views on state neutrality in contemporary political philosophy, see Wall and Klosko, *Perfectionism and Neutrality: Essays in Liberal Theory*.

[35] Some friends of the neutralist position hold that the state need only be neutral among conceptions of broad morality (more precisely, the part of broad morality over and above that of narrow morality) that are actually held, or adhered to, by those who are subject to its authority. See Larmore, *Patterns of Moral Complexity*, p. 67.

will almost certainly favor some conceptions of broad morality over others, and this favoritism will not be limited to favoring conceptions of broad morality that honor the requirements of narrow morality over conceptions of broad morality that do not.

1.3 PRINCIPLES AND PRACTICE

The foregoing discussion introduced some of the main issues, and alluded to some important lines of argument, that will occupy our attention in this book. Along the way it introduced some key distinctions, in particular those between narrow and broad morality and between social and critical morality. Before proceeding, a few more notions need to be explained, all of which relate to the difference between defending an enforcement proposal as in-principle permissible and defending it as in-practice advisable.

Principles are general directives.[36] They tell us what we ought to do or what we ought to refrain from doing in a range of situations. They inform practical decisions. But principles do not always tell us all we need to know to make practical decisions. Sometimes principles do not apply to a case; sometimes they apply but are overridden; and sometimes they direct us elsewhere to make the decision. Return to the harm principle. This principle, as it is standardly construed, states a necessary condition for justified interference with the actions of another. Its content can be stated negatively. It is always wrong to interfere with the actions of another who is not causing harm to anyone else.[37] From this statement of the principle it does not follow that if X is causing harm to Y, then X ought to be interfered with. This inference does not follow because there are costs to interference, and these costs may render interference ill advised. As Mill explained, "it must by no means be supposed, because damage, or probability of damage, to the interests of others [harm], can alone justify the interference of society, that therefore it always does justify such interference."[38] Mill had an elegant way of expressing this point. Conduct that did not cause harm to others was "self-regarding" and none of society's business, whereas conduct that caused, or risked, harm to others could in principle be interfered with if doing so was in the general interests of society.

This point is especially important to bear in mind when thinking about proposals to enforce morality through criminal law. Using criminal law to enforce morality is expensive, liable to mistake and abuse and certain to impose hard treatment on convicted offenders. Accordingly, the good that it does, and the bad that it deters, may not be enough to justify the costs it imposes. Consider a proposal to criminalize the use and sale of cocaine. This proposal could be rejected on the grounds that it is ruled out by the harm principle. If someone is harmed from consuming this drug,

[36] There are different kinds of principles and reliance on them can serve different purposes. See Nozick, *The Nature of Rationality*, pp. 3–40. The principles I have in mind here are moral or normative principles that purport to apply to legal officials, or others in a position to enforce morality.

[37] This is one formulation of the harm principle. In Chapter 2 we will consider other formulations.

[38] Mill, *On Liberty*, p. 292.

the resulting harm is self-imposed and so not properly considered a "harm" under the harm principle. This proposal could also be rejected on the grounds that the costs of criminalization in this case would exceed its benefits and so, on balance, criminalization would not be in the general interests of the society. Both responses could be sound. But if the first response is sound, then it is unnecessary to consider the merits of the second.

Many of the principles we will consider in this book take this form. If accepted, they foreclose the need for investigation into the costs and benefits of the proposals they rule out. Alternatively, if they do not foreclose the need for such investigation, the principles establish a strong presumption against the proposals they rule out – a presumption that could be overridden only if the cost/benefit calculation weighed greatly on the other side.[39] Eitherway consideration of the principles engages issues in moral and political philosophy, whereas investigation into the costs and benefits of various enforcement proposals must draw on empirical analysis informed by the methods of the social sciences.

However, this way of putting matters, while substantially accurate, threatens to cover up something important. Philosophers who write on the legal enforcement of morality sometimes claim that "all practical reasoning involves the application of principles to facts."[40] No doubt this is an overstatement. One does not have to be an ethical particularist to appreciate that practical reasoning is more complex than this. Nevertheless, this principles-first approach provides support for a tempting picture of the order of inquiry in practical thinking. First, determine which principles are sound and how they should be understood; next, ascertain the relevant facts; and then apply the principles to the relevant facts to reach a judgment about what ought to be done. Whatever its merits, this way of proceeding can blind us to the ways by which the principles themselves can depend on facts. Call a principle that depends on facts a fact-dependent principle and a principle that does not depend on any facts a fact-independent principle.[41]

The principles that we will be considering in this book are fundamental principles. But they are also fact-dependent in various ways. So, in assessing them, we cannot ignore facts. But this need not cause trouble for our order of inquiry. Fact-dependent principles, we can say, have conditions that determine their domain of application. These application conditions refer to various facts, such as general facts about human nature that are presupposed by a principle, or facts about the state of

[39] Philosophers speak of the stringency of a principle. On one end of the spectrum, a principle could be maximally stringent or absolute in that it could not be overridden by any balance of costs and benefits. At the other end, a principle could be minimally stringent, serving as a mere tie-breaker when the cost/benefit assessment of rival options is equally balanced. We shall be considering principles that purport to be very stringent, if not maximally, then substantially so.

[40] Feinberg, *Harm to Others*, p. 16.

[41] For a searching discussion of the relation between facts and principles, see Cohen, *Rescuing Justice and Equality*, chapter 6. Cohen argues that the most basic or fundamental normative principles are fact-independent.

technology that a principle takes for granted. To investigate the plausibility of a given fact-dependent principle, we do not need to know if its application conditions obtain in this or that circumstance, but we do need to attend to them. For if we do not attend to them, we may mistakenly infer that certain examples count against the principle when in fact they fall outside its domain of application.

To give an example: some writers propose the harm principle for some types of societies, but not others. The harm principle, they contend, applies to societies that do not have the means to target for legal sanction certain morally bad, but (non-)harm-causing, options with precision. In these societies "there is no practical way of ensuring that the coercion will restrict the victim's choice of repugnant options but will not interfere with their other choices."[42] This practical limit is thus part of the principle. It restricts its domain of application. It is no counterexample to the principle, accordingly, to point out that it would permit interference with people's (non-)harm-causing choices in circumstances in which the means for such targeted precision were available. Reflection on imagined counterexamples of this kind, while not refuting the principle, may be illuminating in other ways, however. For they may help us to understand better the normative considerations that purportedly justify the principle in question. So long as one is careful to keep in mind the different roles played by the normative considerations that purportedly support a principle and the factual considerations that purportedly determine its range of application, no confusion should result.

It remains the case that principles do not tell us what to do. To reach practical decisions, we still need to apply them to the facts. But now it is fair to ask: apply them to what *sort* of facts? A complete answer to this question will not be provided in this book, although some discussion of it will be ventured in Chapter 10. Here it will be useful to single out two types of facts that are plainly relevant to the principles that we will be discussing and to propose some guidelines for thinking about them.

> ***Society-specific facts.*** Principles that concern the legal enforcement of morality can apply to one society and not others in virtue of certain facts unique to that society.
>
> ***Concessive facts.***[43] Principles that concern the legal enforcement of morality can be indexed to circumstances in which it is anticipated that more fundamental principles would be incorrectly applied, or would lead to bad consequences.

The principles that we are concerned with in this book are neither society-specific nor concessive. The fact that a society has a particular legal constitution that would make an otherwise acceptable principle legally ineligible should not be taken to show that the principle does not apply to it. The principle, after all, might provide a justification for changing the constitution, even if the prospects for such change

[42] Raz, *The Morality of Freedom*, p. 419.

[43] The term "concessive" is taken from Estlund. See his general discussion of concessive principles and requirements in *Utopophobia*, pp. 149–172.

were not high. More generally, in seeking to identify sound fundamental principles that apply to the legal enforcement of morality, we do not want to hold that each society has its own set of fundamental principles. The principles we are interested in are more general than that.[44] Likewise, we should not limit the domain of application of a principle to circumstances in which the principle will be well administered. If we were to do so, then the responsibility of legal officials to apply otherwise sound principles would diminish as they became more inclined to misapply them.[45]

Nevertheless, while society-specific facts and concessive facts should not be taken to limit the domain of application of fundamental principles, they are certainly relevant to the question of what kind of legal measures a society should undertake. Mill claimed that "the strongest of all the arguments against interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place."[46] If Mill was right about this, then legal interference with purely personal conduct should not be undertaken. Indeed, it might be good strategic policy to hold that such interference should never be undertaken. But Mill's claim, if true, does not show that it is in principle wrong for legal officials to interfere with purely personal conduct. It establishes only that it is always inadvisable for them to attempt to do so.

Indirect consequentialists may object to this way of putting matters. Mill's point, they may say, is that in-general inadvisability is what distinguishes a principle from a mere policy. As one commentator on Mill explains, "Mill's argument is that utility itself demands the adoption of a weighty (but not infinitely weighty) side-constraint principle [which is the harm or liberty principle defended in *On Liberty*]."[47] The view adopted in this book is that this way of thinking about fundamental principles exaggerates the obstacles and dangers of promoting the good directly. The propensity of legal officials to make mistakes in their efforts to enforce morality almost certainly varies from place to place. We should not turn policies that are prudent to adopt in some (or even most) circumstances into fundamental principles that limit the enforcement of morality in all circumstances.[48]

Recognition of this point should not lead us to undersell the seriousness of worries about the competence of legal officials to enforce morality. These worries are undoubtedly important and must be confronted by anyone seriously concerned with the issue. The main line of argument in this book does not put the spotlight on these worries, however. The focus is on the general theoretical principles that have

[44] In saying this, I do not mean to deny that societies can have their own sound practice or tradition-dependent principles. See Chapter 6, Section 6.4, but these principles, while no doubt important, are not fundamental in the sense indicated here.

[45] See Tadros, *Wrongs and Crimes*, pp. 94–95.

[46] Mill, *On Liberty*, p. 283.

[47] Gray, *Mill on Liberty: A Defence*, p. 60.

[48] The principles favored by rule consequentialists are often both society-specific and concessive. See, for example, the view christened "wary rule consequentialism" defended by Hooker in *Ideal Code, Real World*, pp. 114–117.

engaged the attention of philosophers who have debated the nature and limits of the enforcement of morality. The concluding chapter corrects this neglect. It turns from principle to practice and argues for a comparative and piecemeal approach to addressing practical worries about the legal enforcement of morality. We will see that this approach – including the limits on the enforcement of morality that it supports for particular societies – is fully consistent with the theoretical case for the legal enforcement of morality that emerges from the discussion that precedes it.