

Legal Moralism

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"In space, no one can hear you think."

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1 Legal Moralism

1.1 Defining Legal Moralism: Core Concepts and Distinctions

Legal systems across history and cultures invariably reflect underlying moral judgments, but legal moralism elevates this relationship into a core philosophical and justificatory principle. At its heart, legal moralism posits a provocative answer to a fundamental question: Is immorality itself, entirely apart from any tangible harm inflicted upon others or significant offense caused to the public, a sufficient reason for the state to impose criminal sanctions? The 1895 trial of Oscar Wilde in London serves as a stark, enduring illustration. Wilde was convicted of “gross indecency” under the Labouchere Amendment for consensual homosexual acts conducted in private. The prosecution’s case rested not on claims of fraud, violence, or public disturbance, but on the assertion that such acts violated the fundamental moral fabric of Victorian society. Wilde’s conviction, resulting in two years of hard labor and contributing to his premature death, epitomizes the core proposition of legal moralism: the law is justified, perhaps even obligated, to enforce a community’s shared morality simply because it *is* the community’s morality, independent of demonstrable harm. This concept, while seemingly intuitive to some, stands in stark tension with foundational liberal principles of individual autonomy and the limits of state power, setting the stage for centuries of profound philosophical and legal debate.

1.1 The Core Proposition: Morality as its Own Justification Legal moralism, therefore, can be defined as the theory that the immorality of an act constitutes a legitimate, and potentially sufficient, reason for its prohibition by the criminal law. Its central claim is radical in its simplicity and scope: preventing or punishing moral wrongdoing, *for its own sake*, is a valid function of the state. This stands apart from instrumental justifications. The moralist argues that society has a compelling interest in upholding its collective conscience, preserving its ethical character, and discouraging vice, even when the acts in question occur privately between consenting adults and cause no direct, measurable injury to non-consenting parties beyond the perceived violation of the moral order itself. Proponents contend that a society’s shared morality is its bedrock, akin to a social covenant; permitting widespread flouting of these core tenets, regardless of privacy or consent, risks eroding the very bonds that hold the community together. The moral wrongness, inherent in the act judged by the community’s standards, provides the warrant for legal intervention. This principle historically underpinned laws against blasphemy, sodomy, adultery, fornication, certain forms of gambling deemed intrinsically corrupting, and even attempted suicide – all conceived primarily as sins against the social or divine order, not necessarily as harms inflicted directly on identifiable victims.

1.2 Contrasting Principles: Defining the Boundaries To fully grasp the distinctiveness and controversial nature of legal moralism, it must be contrasted with the other major principles justifying state coercion through criminal law. The most formidable counterpoint is the **Harm Principle**, articulated most famously by John Stuart Mill in *On Liberty* (1859). Mill asserted 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.” This principle draws a bright line around individual autonomy: an individual’s own welfare or moral character is their own responsibility, not

the state's, so long as their actions do not tangibly harm others. While Mill acknowledged complexities regarding what constitutes “harm,” his principle explicitly rejects legal moralism’s core tenet – that private immorality alone justifies prohibition.

Closely related, yet distinct from both, is **Legal Paternalism**. This principle justifies state intervention to protect individuals *from themselves*, overriding their immediate choices for their own presumed long-term good. Laws mandating seatbelt use, requiring motorcycle helmets, prohibiting certain highly addictive drugs, or establishing minimum ages for alcohol consumption or certain contracts are typically justified paternalistically. The focus is on preventing self-inflicted harm, not on enforcing morality *per se*, although moral judgments about prudence or self-destruction often lurk beneath the surface. Unlike legal moralism, paternalism targets the actor’s own welfare; unlike the Harm Principle, it allows intervention even without direct harm to others.

Finally, the **Offense Principle** occupies a middle ground. It permits the state to prohibit conduct that causes profound offense, disgust, or outrage to unwilling witnesses, even if it causes no tangible harm. Laws against public nudity, indecent exposure, extreme public profanity, or perhaps the display of intensely disturbing images in public spaces often rest on this principle. The distinction from legal moralism hinges on the *public* and *non-consensual* nature of the offense. Legal moralism could justify prohibiting the *same* act committed privately (e.g., certain sexual practices or religious desecration within a closed group), based solely on its perceived inherent immorality, whereas the offense principle generally requires that the act be thrust upon an unwilling public. However, tensions and overlaps exist. Is prohibiting flag desecration based on profound public offense, or is it enforcing a moral value about national symbols? The line blurs, highlighting how moralistic sentiments often underpin offense-based justifications.

1.3 “Morality” in Context: The Perennial Question of Authority The power and peril of legal moralism lie critically in defining the “morality” it seeks to enforce. Whose morality binds the community? This question exposes deep fissures in pluralistic societies. Proponents of enforcement often appeal to **positive morality** – the actual moral beliefs widely held within a given society at a particular time. Lord Patrick Devlin, whose arguments we shall explore later, famously invoked the “man on the Clapham omnibus” (an ordinary, reasonable London commuter) as the arbiter of societal morality. The law, he argued, should reflect the deeply held feelings of disgust and intolerance shared by this hypothetical reasonable person. This view grounds morality in social consensus, however determined (often through legislative majorities or perceived community standards).

Critics vehemently challenge this. Firstly, identifying a single, coherent “public morality” in diverse, multi-cultural, multi-faith societies is often impossible. Whose consensus counts? The majority’s? What about minority views? Enforcing positive morality inevitably privileges the dominant or traditional viewpoint, potentially suppressing dissent and stifling moral evolution. Secondly, philosophers often distinguish positive morality from **critical morality** – the set of moral principles that can be rationally justified and defended through reasoned argument, regardless of popular acceptance. H.L.A. Hart, Devlin’s primary opponent, argued that the law *should* concern itself with critical morality, particularly principles essential for any viable society (like prohibitions on violence or fraud, aligning with the Harm Principle), but that enforcing the often

arbitrary and

1.2 Historical Antecedents: From Natural Law to Social Order

The vexing question of whose morality merits enforcement, whether grounded in societal consensus or reasoned principle, is not merely a modern dilemma. The impulse to legally codify and enforce communal moral standards, distinct from preventing tangible harm or offense, has deep roots reaching back to antiquity. Long before the Hart-Devlin debate crystallized the terms of the modern argument, legal moralism was intricately woven into the very fabric of conceptions of law and society, often justified by appeals to virtue, divine command, or the fundamental requirements of social cohesion. Exploring these historical antecedents reveals that the core proposition – that law exists partly to uphold morality for its own sake – is a persistent thread in the tapestry of Western legal philosophy.

Ancient Foundations: Law, Virtue, and the Divine In ancient Greece, particularly within the philosophies of Plato and Aristotle, law was conceived not merely as a mechanism for maintaining order or settling disputes, but as an essential instrument for cultivating virtue (*aretē*) and guiding citizens towards the “good life” (*eudaimonia*). For Plato, outlined in works like *The Republic* and *The Laws*, the ideal state was intrinsically moral, governed by philosopher-kings whose laws would shape the character of the citizens, suppressing base desires and promoting wisdom, courage, moderation, and justice. Laws against impiety, for instance, weren’t primarily about preventing social unrest (though that was a concern), but about upholding the piety deemed essential to the city’s moral and spiritual well-being. The trial and execution of Socrates in 399 BCE on charges of corrupting the youth and impiety starkly illustrated this principle, punishing perceived moral and religious deviations seen as threats to the Athenian *polis* itself. Aristotle, in his *Nicomachean Ethics* and *Politics*, further developed this idea. While acknowledging the role of law in preventing harm (injustice), he argued emphatically that “the law *commands* us to live according to the virtues and forbids us to live according to the vices.” Law, for Aristotle, was the practical embodiment of reason, essential for habituating citizens into virtuous behavior, especially since most people require the compulsion of law to consistently act morally. The aim was the flourishing of the individual and the community through enforced moral education.

Roman jurisprudence, while famed for its contributions to private law and concepts of justice (*ius*), also embedded moralism within its framework of public order (*bonos mores* – good morals). The concept of *mos maiorum* (the custom of the ancestors) held significant sway, embodying traditional Roman virtues like *pietas* (duty, especially to gods, country, and family), *fides* (good faith), and *gravitas* (dignity). Censors, magistrates unique to Rome, possessed the power (*regimen morum*) to scrutinize public morals, punishing citizens (often by degrading their social status or removing them from the Senate) not for crimes causing direct harm, but for conduct deemed contrary to these ancestral virtues, such as extravagance, cowardice, or sexual impropriety. Laws regulating marriage, adultery, and sumptuary behavior often stemmed from this moralistic impulse to maintain the perceived integrity and disciplined character of Roman citizenry. Furthermore, religious law codes from even earlier civilizations demonstrate the fusion of divine command with legal enforcement. Hammurabi’s Code (c. 1754 BCE), presented as received from the sun god Shamash, explicitly linked divine

will to the establishment of earthly justice and moral order. The Mosaic Law, foundational to ancient Israel, governed not only criminal acts but a vast array of personal, ritual, and moral behaviors deemed essential for maintaining the covenant relationship with Yahweh – violations were sins against God requiring expiation, often through legal penalties. Islamic Sharia law, emerging later but rooted in divine revelation (the Quran) and prophetic tradition (Sunnah), similarly integrates detailed moral precepts (covering worship, family life, dietary laws, finance, and personal conduct) into its comprehensive legal framework, where immorality (*fāḥisha*) itself constitutes grounds for legal prohibition and punishment (*hudud*).

Medieval Synthesis: Natural Law and Divine Will The collapse of the Western Roman Empire and the rise of Christianity ushered in the medieval period, characterized by a profound synthesis of classical philosophy, Roman law concepts, and Christian theology. This era solidified the connection between morality and law through the dominant framework of Natural Law, most systematically articulated by St. Thomas Aquinas in the 13th century. Aquinas constructed a hierarchical theory of law in his *Summa Theologica*. At the apex was Eternal Law – the divine reason governing the universe, known perfectly only to God. Below this was Natural Law, the participation of rational creatures (humans) in the Eternal Law, discernible through human reason. Natural Law revealed fundamental moral precepts inherent in human nature itself, such as the preservation of life, procreation, living in society, and seeking the truth about God. Human Law, the positive law enacted by rulers for specific communities, derived its legitimacy and content from Natural Law. For Aquinas, a human law that contradicted Natural Law was not truly law at all but a “perversion of law.” Crucially, the purpose of Human Law extended beyond mere order; it was to lead citizens to virtue, “to make men good,” by restraining vice and commanding virtuous actions. This provided a powerful, theologically grounded justification for legal moralism: immoral acts (sins) violated Natural Law, and thus the state, guided by the Church’s understanding of divine and natural order, had a legitimate interest in suppressing them to promote the common good, defined partly in moral terms.

The practical enforcement of this moral vision was heavily mediated by the institutional power of the Catholic Church. Canon Law, the legal system of the Church, governed vast areas of life – marriage, inheritance, contracts, oaths, and moral offenses – applying to clergy and laity alike. Crimes like heresy, blasphemy, sorcery, adultery, fornication, and usury were prosecuted not merely as social disruptions but as sins requiring correction and penance, often with severe

1.3 The Modern Formulation: The Hart-Devlin Debate

The medieval synthesis of natural law and divine command, championed by Aquinas and enforced through the intertwined powers of Church and State, provided a formidable intellectual and institutional foundation for legal moralism that persisted for centuries. Yet, as societies became increasingly secularized and pluralistic, particularly in the wake of the Enlightenment and the rise of liberal democracies, the justification for using criminal law to enforce morality solely for its own sake faced mounting challenges. The stage was set for a direct confrontation that would crystallize the modern debate. This clash erupted not in the abstract realms of academic philosophy, but amidst the charged social atmosphere of post-war Britain, triggered by a government report examining the criminal status of homosexuality and prostitution. The resulting exchange

between Lord Patrick Devlin and Professor H.L.A. Hart would define the contours of the legal moralism debate for decades to come, establishing the core arguments that proponents and critics still grapple with today.

3.1 The Wolfenden Report (1957) and its Rationale: Challenging the Moral Consensus The immediate catalyst for the modern formulation of the debate was the publication of the *Report of the Departmental Committee on Homosexual Offences and Prostitution* in 1957, universally known as the Wolfenden Report after its chairman, Sir John Wolfenden. The committee, comprising MPs, lawyers, doctors, and clergy, was tasked with reviewing laws criminalizing homosexual acts between consenting adults in private and the solicitation laws surrounding street prostitution. Its conclusions were radical for the time. The report recommended the decriminalization of consensual homosexual acts conducted in private between men aged 21 or over, arguing that “there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” Similarly, while advocating for measures to suppress public solicitation for prostitution (deeming it an offensive public nuisance), the report maintained that the law should not intervene in the private, consensual sexual conduct of adults, regardless of its moral status. The philosophical underpinning was unmistakably Millian: “Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law’s business.” This stark separation between sin (a matter for conscience, religion, or personal morality) and crime (a matter for the state only where harm or public offense was demonstrable) directly challenged the centuries-old tradition, exemplified by the prosecution of Oscar Wilde decades earlier and still actively enforced, that the law could and should police private morality. The report’s impact was profound, not only for its specific recommendations – which eventually led to the decriminalization of homosexuality in England and Wales via the Sexual Offences Act 1967 – but for reigniting a fundamental philosophical inquiry: *What are the legitimate limits of the criminal law?*

3.2 Lord Devlin’s Defense of Enforcement: The Disintegration Thesis The Wolfenden Report’s liberal stance provoked a powerful and articulate rebuttal from Lord Patrick Devlin, a distinguished Law Lord. In his 1959 Maccabean Lecture in Jurisprudence at the British Academy, titled “The Enforcement of Morals,” and later expanded in a book of the same name, Devlin launched a vigorous defense of legal moralism grounded in the perceived necessities of social survival. His core argument, the “**Disintegration Thesis**,” asserted that a shared public morality is not merely a desirable feature of a society but its essential, foundational glue. “Society,” Devlin argued, “means a community of ideas; without shared ideas on politics, morals, and ethics, no society can exist.” Crucially, he contended that this shared morality was indispensable for maintaining social cohesion and preventing societal collapse. Permitting widespread flouting of society’s fundamental moral principles, even in private, was akin to tolerating treason; it risked eroding the collective conscience and dissolving the bonds that held the community together. “The loosening of moral bonds is often the first stage of disintegration,” he warned, suggesting that the acceptance of homosexuality, for instance, could initiate a chain reaction leading to the breakdown of marriage, family, and ultimately, the stability of society itself. This was not merely an abstract concern; Devlin believed history provided ample evidence of societies crumbling when moral consensus faltered.

Devlin confronted the Wolfenden Committee’s invocation of Mill directly. He rejected the notion that the

law should concern itself only with tangible harm or public offense. For Devlin, the *intrinsic wrongness* of certain acts, as judged by society, justified legal prohibition. But whose morality should the law enforce? Devlin famously proposed the “**man on the Clapham omnibus**” test – the reasonable person, the ordinary member of society. If the conduct in question aroused feelings of “**intolerance, indignation and disgust**” in this hypothetical reasonable person, then it was evidence of a deep-seated moral principle vital to society’s fabric and thus a legitimate subject for legal sanction. He argued that the intensity of the public’s feeling of reprobation was the indicator of the moral principle’s foundational importance. However, Devlin did impose significant limits. He emphasized that only acts constituting a “**grave**” threat to the moral order, judged by the intensity of societal outrage, warranted criminalization. Furthermore, he acknowledged the need for toleration of minority practices where possible, advised caution against hastily enacting new moralistic laws, and stressed that privacy should be respected where enforcement would be overly intrusive. Nevertheless, his core principle remained unyielding: society has a *right* to use the law to protect its shared morality as a matter of self-preservation, independent of any requirement to prove direct harm.

3.3 H.L.A. Hart’s Liberal Critique: Reason, Harm, and the Private Sphere Lord Devlin’s forceful defense of legal moralism demanded a robust response from the liberal perspective. It came from Herbert Lionel Adolphus Hart, the preeminent legal positivist and Professor of Jurisprudence at Oxford.

1.4 Key Proponents and Philosophical Arguments

Hart’s rebuttal, delivered in his 1963 lectures published as *Law, Liberty and Morality*, dismantled Devlin’s thesis point by point with rigorous logic and empirical skepticism. He rejected the disintegration thesis as an unsubstantiated “sociological fairy tale,” arguing there was no historical or sociological evidence that the relaxation of laws against private consensual immorality inevitably led to societal collapse. Ancient Greece and Rome, he noted, tolerated practices Victorian England condemned without crumbling as societies. Hart insisted on a crucial distinction Devlin had blurred: that between **positive morality** (the conventional moral beliefs actually held by a society at a given time, which can be arbitrary, prejudiced, or irrational) and **critical morality** (moral principles capable of rational justification). While the state might legitimately promote critical morality through education and non-coercive means, Hart argued, criminal law – with its severe sanctions – should be reserved for preventing tangible harm to others (aligned with Mill) or occasionally enforcing minimal standards essential for any viable society. He staunchly defended a robust **private sphere** where individuals should be free from state intrusion regarding their personal conduct, provided it caused no direct harm to others. Hart’s critique represented a powerful restatement of liberal legal philosophy: the state should not be in the business of enforcing popular morality simply because it is popular.

1.5 Section 4: Key Proponents and Philosophical Arguments

While Lord Devlin’s articulation of legal moralism in response to Wolfenden provided the most famous modern defense, the philosophical underpinnings and justifications for using law to enforce morality extend far beyond his specific “disintegration thesis.” The debate ignited by Hart and Devlin spurred deeper exploration

of alternative rationales offered by proponents who sought to ground legal moralism in richer philosophical soil than mere societal disgust or the fear of collapse. These arguments often drew upon ancient traditions, communitarian ideals, or moral realism, presenting a more nuanced, albeit still controversial, case for why the state might legitimately prohibit certain acts deemed intrinsically immoral, irrespective of direct harm.

4.1 Perfectionism and the Good Life: Law as Cultivator of Virtue The most venerable alternative justification reaches back to the Aristotelian roots explored earlier. **Perfectionism** argues that the state has a legitimate, even noble, purpose in promoting human flourishing (*eudaimonia*) by cultivating virtue and discouraging vice through law. This view sees law not merely as a neutral framework for coexistence but as an active participant in shaping good character and enabling citizens to realize their highest potential. Modern proponents, often drawing inspiration from Aristotle and Aquinas but engaging contemporary philosophy, contend that a purely neutral state is both impossible and undesirable. Laws inevitably reflect and promote *some* conception of the good life, whether explicitly acknowledged or implicitly assumed. Figures like Robert P. George and, in certain aspects, Michael Sandel, argue that the state should intentionally affirm and support substantive conceptions of human excellence and the common good, rather than retreating into procedural neutrality. This might involve laws that discourage practices seen as intrinsically degrading or incompatible with human dignity (e.g., certain forms of commodification like surrogacy contracts or organ selling, or activities viewed as corrupting character, like extreme forms of pornography or drug abuse). The justification here is not primarily societal survival (Devlin) but *human excellence*. The case of *Jacobson v. Massachusetts* (1905), while often cited for public health, contained perfectionist undertones. Justice Harlan’s majority opinion upholding compulsory vaccination stated the state could compel individuals “for the common good” and to prevent them from becoming “a menace to the health of the community,” reflecting a view that individual choices could undermine the collective conditions necessary for flourishing, extending beyond mere physical contagion to a broader sense of civic health and responsibility. Critics, of course, question who defines “excellence” or “dignity,” fearing perfectionism simply masks imposing one contested vision of the good upon all.

4.2 Social Cohesion and Stability: Beyond Devlin’s Disintegration Devlin’s emphasis on shared morality as societal glue resonated with deeper sociological and functionalist perspectives. While his specific disintegration thesis faced Hart’s empirical critique, proponents argue that law inevitably plays a crucial symbolic and constitutive role in defining and reinforcing the shared norms and values that underpin social solidarity. Émile Durkheim’s classic sociological analysis posited that law, particularly criminal law, functions primarily to express and reinforce the collective conscience (*conscience collective*) – the shared beliefs and sentiments central to a society’s identity. Punishing deviance, even victimless deviance, serves a vital ritualistic function, reaffirming social boundaries and strengthening group cohesion. This perspective suggests that abandoning all enforcement of morality risks not immediate collapse, but a gradual erosion of social trust, shared identity, and the informal norms that facilitate cooperation. Modern communitarian thinkers, such as Alasdair MacIntyre and Charles Taylor (though not necessarily advocating for extensive criminalization), emphasize the importance of shared traditions and moral frameworks for individual identity and social coherence. They argue that radical liberal individualism, which seeks to banish morality entirely from the law, underestimates how deeply individual lives are embedded within, and dependent upon, sustaining

communal bonds nurtured by shared values. Law, in this view, is an expression of community identity. Singapore’s founding Prime Minister Lee Kuan Yew explicitly invoked this rationale, arguing that strict laws upholding “Asian values” (emphasizing social harmony, respect for authority, and family stability) were essential for the nation’s cohesion and prosperity, distinguishing its path from perceived Western moral permissiveness. This version of the social cohesion argument shifts focus from preventing catastrophic disintegration to actively nurturing and preserving the shared cultural and moral fabric seen as essential for a stable, well-functioning society.

4.3 Moral Realism and the Enforcement of Truth: The Claim of Objective Morality Perhaps the most philosophically ambitious justification for legal moralism stems from **moral realism**: the view that objective moral truths exist independently of human opinion or societal convention. If certain actions are *truly* and *objectively* wrong – such as torture, slavery, or, for proponents, acts like bestiality or certain forms of desecration – does this inherent wrongness not provide a *prima facie* reason for the state to prohibit them? This argument distinguishes itself from Devlin’s sociological positivism (law enforcing whatever morality society happens to hold) and perfectionism’s focus on flourishing, grounding justification in the objective moral status of the act itself. Natural law theorists in the Thomistic tradition, such as John Finnis and Germain Grisez, argue that basic human goods (like life, knowledge, friendship, and religion) are self-evidently valuable and provide the foundation for practical reason. Actions

1.6 Major Criticisms and Liberal Objections

While proponents of legal moralism offer arguments rooted in social cohesion, perfectionist ideals, and even claims of objective moral truth, these justifications face formidable and sustained criticism, particularly from liberal and pluralist perspectives. The critiques leveled against using criminal law to enforce morality for its own sake are not merely academic quibbles; they strike at fundamental concerns about individual liberty, societal fairness, and the practical dangers of state overreach in diverse modern polities. These objections form a robust counter-narrative to the vision of law as society’s moral guardian.

5.1 The Tyranny of the Majority: Liberty Crushed by Collective Will The most enduring and potent liberal objection originates with John Stuart Mill and resonates powerfully through modern critiques. Mill’s core fear in *On Liberty* was the stifling conformity imposed not by tyrannical rulers, but by the overwhelming weight of majority opinion – a “tyranny of the prevailing opinion and feeling.” Legal moralism, critics argue, institutionalizes this very tyranny. By empowering the state to criminalize acts deemed immoral by societal consensus (however determined, often through majoritarian political processes), it grants the majority the authority to impose its specific moral vision on dissenting individuals and minority groups, solely because they hold numerical dominance. This directly assaults the principle of individual autonomy in the private sphere, the realm Mill fiercely defended as sacrosanct. The conviction of Oscar Wilde, referenced in the opening section, stands as a stark historical monument to this danger: a brilliant individual crushed under the weight of Victorian moral orthodoxy for private, consensual conduct. Similarly, the pervasive anti-miscegenation laws that existed across numerous US states until struck down by *Loving v. Virginia* (1967) were explicitly justified by prevailing moral views about racial “purity” and the perceived immorality

of interracial relationships, demonstrating how majoritarian morality can enshrine deep-seated prejudice and oppression. Legal moralism, its critics contend, transforms the criminal law from a shield protecting individuals from harm into a weapon wielded by the majority to suppress difference, stifle individuality, and enforce conformity to a single, dominant ethical code, regardless of its justification or the absence of tangible harm to others.

5.2 The Problem of Moral Pluralism: Whose Consensus? Closely intertwined with the tyranny of the majority is the profound challenge posed by **moral pluralism**. Modern societies, especially liberal democracies, are characterized by a diversity of religious, philosophical, cultural, and ethical viewpoints. Critics argue that the very notion of a single, coherent “public morality” – the kind Devlin invoked via the “man on the Clapham omnibus” and which legal moralism requires for its legitimacy – is either an illusion or a dangerous fiction in such contexts. Whose morality counts as the “communal” standard? Is it the historically dominant tradition? The loudest or best-organized religious group? The transient majority view captured in an opinion poll? Enforcing *any* specific morality inevitably means privileging one set of beliefs over others, silencing minority voices, and potentially persecuting dissenting lifestyles. The historical enforcement of blasphemy laws, punishing criticism or rejection of the dominant religion, exemplifies this suppression. Furthermore, legal moralism risks entrenching moral stagnation. If the law codifies and enforces the prevailing positive morality, it actively hinders moral progress and social evolution. Practices once deemed profoundly immoral and legally prohibited – such as interracial marriage, women’s suffrage, or homosexuality – gained acceptance precisely because dissenting voices challenged the conventional wisdom. As H.L.A. Hart emphasized, conflating law with positive morality shackles society to potentially unjust or irrational conventions, hindering the development of a more enlightened critical morality. The long struggle to decriminalize homosexuality globally, culminating in landmark cases like *Lawrence v. Texas* (2003) which explicitly rejected moral condemnation as a sufficient basis for criminalization, underscores how legal moralism can perpetuate deep injustices against minorities long after critical morality has evolved. In a pluralistic society, critics assert, the law must strive for neutrality on contested conceptions of the good life, focusing instead on preventing harm and protecting fundamental rights, allowing diverse moral communities to coexist without state coercion favoring one over another.

5.3 Slippery Slope and Over-Criminalization: Where Does it End? Beyond concerns of oppression and pluralism, critics warn of the inherent vagueness and potential for boundless expansion inherent in legal moralism. If immorality itself becomes a justifiable ground for criminalization, what principled limits exist? Devlin acknowledged the need to restrict enforcement only to acts causing “intense, widespread, and extreme” disgust, representing “graver” threats to the moral fabric. However, critics find this standard hopelessly subjective and unstable. Who defines what constitutes “intense” disgust or a “grave” moral threat? History provides ample evidence of how easily moral outrage can be manufactured or focused on relatively trivial matters once the principle of moral enforcement is accepted. The sweeping reach of Anthony Comstock’s “anti-vice” crusade in late 19th and early 20th century America, leading to federal and state Comstock laws, vividly illustrates the slope’s slipperiness. Originally targeting obscenity, these laws were rapidly expanded to criminalize the distribution of information about contraception and abortion, deemed immoral by Comstock and his allies, severely restricting women’s access to reproductive healthcare for decades under the

banner of upholding public morality. Similarly, historical laws criminalizing adultery, fornication, or even card playing on Sundays reflected specific moral judgments that intruded deeply into private life, demonstrating how moralistic fervor can lead to a vast network of intrusive regulations. This over-criminalization carries significant practical dangers: it burdens the justice system with prosecuting victimless “offenses,” diverts resources from addressing genuine harms like violent crime, increases opportunities for selective or discriminatory enforcement (often targeting marginalized communities), and risks trivializing the criminal law by turning it into a tool for enforcing personal taste or sectarian belief. Without the anchor of the harm principle, critics argue, legal moralism provides no clear stopping point, leaving the scope of criminal law subject to the shifting winds of moral panic and political expediency.

These core criticisms – the peril of majoritarian tyranny, the impossibility of defining a single public morality in pluralistic societies, and the lack of inherent limits leading to over-criminalization – form a powerful indictment of legal moralism. They highlight the profound tensions between using law to enforce

1.7 Legal Moralism in Practice: Case Studies

The potent critiques outlined in the preceding section – warning of majoritarian oppression, the impossibility of defining a singular public morality, and the slippery slope towards over-criminalization – are not merely abstract concerns. They resonate powerfully when examining the concrete historical and contemporary landscapes where legal moralism has been explicitly invoked or undeniably evident in the shaping and enforcement of law. Moving beyond theoretical debate, the practical application of legal moralism reveals its tangible impact on individual lives, societal norms, and the boundaries of state power. Examining specific domains provides crucial insight into how the principle manifests, the justifications offered, and the profound controversies it inevitably sparks.

The Persistent Realm of Victimless Crimes: Morality as Sole Justification Perhaps the clearest manifestation of legal moralism lies in the category often termed “victimless crimes” – acts involving consenting adults where the primary objection stems from perceived intrinsic immorality, absent a direct, non-consensual victim. The long history of laws criminalizing consensual homosexual acts, epitomized by Oscar Wilde’s prosecution under the Labouchere Amendment, stands as a stark example. While proponents often invoked tangential fears about corruption of youth or public order, the core justification, as Devlin later articulated, was the profound societal condemnation of the acts themselves as violations of the moral order. Similarly, the regulation and prohibition of prostitution, despite its complex social dimensions, frequently relies on moralistic arguments about sexual propriety and the inherent degradation of commercial sex, distinct from demonstrable harm between consenting parties. This moral impetus fueled the expansive reach of the Comstock Laws in the late 19th and early 20th centuries United States. Championed by Anthony Comstock, the first federal Comstock Act (1873) criminalized the mailing of any “obscene, lewd, or lascivious” material, but its scope rapidly ballooned under moralistic fervor to include information about contraception and abortion, deemed intrinsically immoral. For decades, these laws severely restricted women’s access to reproductive healthcare based primarily on the moral judgment that such information and devices were obscene and corrupting, regardless of their use by consenting adults seeking to prevent disease or plan families.

Gambling prohibitions, particularly historically, often rested less on concerns about fraud (which could be addressed through regulation) or even the tangible harms of addiction (which overlap with paternalism), and more on the deep-seated moral view of gambling as a sinful vice that degraded character and fostered idleness. The enforcement of drug prohibition, especially concerning substances like cannabis or psychedelics in earlier decades, frequently leaned heavily on moral panic about degeneracy and threats to societal values, sometimes overshadowing nuanced harm reduction approaches. The justification invariably circled back to the inherent wrongness of the conduct itself, demanding suppression by the state.

Regulating Appearance and Behavior: Sumptuary Laws and Public Decency Legal moralism extends beyond private acts into the public sphere, governing appearance, consumption, and behavior deemed contrary to social virtue or decorum. Historical **sumptuary laws** provide vivid illustrations. Enacted across medieval and early modern Europe, these statutes meticulously dictated what different social classes could wear, eat, and own, based explicitly on moral and hierarchical grounds. A 1363 English statute, for instance, prohibited servants from wearing cloth costing more than two marks per yard, while dictating the fur trims permissible for knights and esquires. The rationale wasn't economic protectionism alone; it was deeply moralistic, aimed at preserving social order, preventing extravagance and vanity (seen as sins), and ensuring individuals visibly adhered to their God-ordained station. Violations were punished as moral transgressions against the community's structure. Echoes of this impulse persist in modern **public decency laws**. While often justified under the Offense Principle to prevent unwilling exposure to disturbing sights, the underlying moral judgment is frequently evident. Laws prohibiting public nudity or indecent exposure, while regulating public space, often stem from deep-seated views about the inherent immorality or shamefulness of the uncovered body outside specific contexts. Similarly, laws against flag desecration, upheld in the US case *Texas v. Johnson* (1989) only on narrow free speech grounds after intense debate, were passionately defended by proponents based on the profound moral offense and violation of patriotic sentiment caused by such acts, viewing the flag as a sacred symbol whose desecration was inherently wrong and corrosive to national unity. The enforcement of "blue laws" restricting commercial activities on Sundays in various jurisdictions, though often relaxed, historically reflected a clear intent to enforce religious morality concerning the Sabbath, compelling observance through legal prohibition. The line between preventing public offense and enforcing a specific moral code often blurs significantly in this domain.

Defining the Family Unit: Moral Foundations of Personal Status Law The institution of the family has long been a primary battleground for legal moralism, with the state actively shaping its definition based on prevailing moral norms. **Marriage laws** historically provide potent examples. Anti-miscegenation statutes, prohibiting interracial marriage, were explicitly justified for centuries by moral arguments rooted in racial prejudice and notions of purity, deemed essential for social order and divine will. As Chief Justice Earl Warren noted in striking them down in *Loving v. Virginia* (1967), these laws rested solely on "invidious racial discrimination" and moral disapproval masquerading as social policy. Similarly, prohibitions on polygamy, while invoking practical concerns about fraud or exploitation, have deep roots in the moral condemnation of plural marriage derived from specific religious traditions. The long-standing exclusion of same-sex couples from marriage, only recently overturned in many jurisdictions, was defended primarily on moral grounds concerning the "traditional" and "natural" definition of marriage, despite the absence of demonstrable harm.

to third parties caused by such unions. **Divorce laws**, particularly before widespread no-fault reforms, were steeped in moralism. Stringent requirements often forced couples to prove adultery, cruelty, or desertion – demonstrating a clear “guilty” party whose moral failing justified the dissolution – rather than acknowledging marital breakdown itself as sufficient grounds. **Legitimacy laws** historically imposed significant legal disabilities on children born out of wedlock, reflecting moral condemnation of non-marital sex and aiming to discourage such behavior by penalizing the offspring. While modern reforms have mitigated these disabilities, the historical intent was unequivocally moralistic, seeking to uphold the sanctity

1.8 Cultural and Religious Dimensions

The pervasive influence of legal moralism, particularly evident in the state’s regulation of intimate relationships and family structures explored in the previous section, cannot be fully understood without examining its deep entanglement with cultural context and religious belief systems. While the Hart-Devlin debate framed the issue largely within secular, liberal-democratic terms, the content, justification, and societal acceptance of laws enforcing morality are profoundly shaped by the specific cultural and religious milieu in which they operate. What constitutes “immorality” warranting legal sanction in one society may be entirely permissible or even celebrated in another, reflecting divergent foundational values derived from tradition, faith, and communal identity. This section explores how these dimensions manifest across different societal models, from explicit theocracies to secular states grappling with religious heritage and non-Western philosophical traditions.

7.1 Theocratic States and Religious Law: Divine Command as Sovereign Mandate The most unambiguous fusion of morality and law occurs in **theocratic states**, where religious doctrine forms the explicit and supreme basis of the legal system. Here, legal moralism is not merely a justification but the fundamental *raison d’être* of the state itself, with divine command serving as the ultimate source of legitimacy. Islamic states operating under **Sharia law**, such as Iran and Saudi Arabia, provide stark contemporary examples. Sharia, derived from the Quran, the Sunnah (traditions of Prophet Muhammad), and centuries of juristic interpretation (*fiqh*), encompasses a comprehensive moral and legal code governing all aspects of life – ritual worship, family law, contracts, finance, criminal punishment, and personal conduct. Acts deemed *haram* (forbidden) or *fāḥisha* (immorality, obscenity) are intrinsically wrong because they violate divine will, and their prohibition is thus a religious and legal imperative. Blasphemy against Islam or the Prophet, apostasy (renouncing Islam), adultery (*zina*), homosexual acts, and consuming alcohol are criminalized not primarily due to secular harms like social disorder (though this may be invoked) but because they constitute grave sins against God. Punishments, including flogging, amputation, and execution, are framed as enforcing divine justice and upholding the moral order mandated by God. The 2022 death of Mahsa Amini in Iranian morality police custody, arrested for allegedly violating the mandatory hijab (*hijab*) law, exemplifies the intense state enforcement of religiously defined morality concerning public appearance and female modesty, sparking widespread protests precisely because of the perceived injustice of enforcing religious orthodoxy through state coercion. Historically, Christendom operated similarly under the pervasive influence of **Canon Law**. The medieval Inquisition, tasked with rooting out heresy, prosecuted offenses like denying core Christian

doctrines, witchcraft (seen as pact with the devil), blasphemy, and sexual immorality, with punishments ranging from penance to execution by burning. The justification was the protection of souls and the purity of the faith – offenses against God and the Church required suppression by both ecclesiastical and temporal authorities. The Salem witch trials (1692-1693), while occurring in a colonial context, similarly reflected theocratic impulses, treating perceived consorting with the devil as a capital crime against the divine and moral order of the Puritan community.

7.2 Secular Societies with Strong Religious Influence: Morality in the Public Square In ostensibly **secular democracies**, where formal separation of religion and state exists, religiously informed moral values often continue to exert powerful influence on laws justified under the banner of “public morality.” This creates persistent tensions between secular legal frameworks and the deeply held moral convictions of significant portions of the populace, frequently mobilized through political action. The United States offers a prime example. Despite the Establishment Clause, movements like the “**Moral Majority**” in the late 20th century explicitly sought to legislate conservative Christian morality, influencing debates and laws concerning abortion, homosexuality, pornography, and school prayer. The decades-long battle over abortion access, culminating in the overturning of *Roe v. Wade* by *Dobbs v. Jackson Women’s Health Organization* (2022), centrally involves moral arguments rooted in religious views about the sanctity of life from conception. Proponents often frame restrictions not solely as religious doctrine but as protecting fundamental moral values essential to society, blurring the lines between secular public morality and religious conviction. Similarly, opposition to LGBTQ+ rights, particularly same-sex marriage, was frequently couched in terms of preserving “traditional family values” deeply informed by specific religious interpretations, even when argued in secular legal terms. The 1925 **Scopes Trial**, prosecuting a teacher for teaching evolution, highlighted the clash between emerging scientific consensus and literalist biblical interpretations enforced through state law under moralistic guises. This dynamic is not unique to the US. In India, a constitutionally secular republic, debates over “**love jihad**” laws (restricting interfaith marriage) and the criminalization of adultery until 2018 (Section 497 IPC) drew heavily on conservative Hindu and Muslim moralities concerning religious purity and marital fidelity, defended as upholding Indian cultural values. Ireland’s historically stringent constitutional ban on abortion (removed by referendum in 2018) and its former blasphemy laws (repealed in 2020) were direct legacies of the Catholic Church’s profound influence on the state’s founding and legal culture, demonstrating how religious morality can persist in law long after a society becomes more secular in other aspects. The challenge in these contexts lies in distinguishing genuinely secular public interests from religiously derived moral positions seeking state endorsement, often leading to contentious cultural and legal battles over the legitimate scope of legal moralism.

7.3 Non-Western Traditions and Legal Moralism: Harmony, Duty, and Community Moving beyond Western and Abrahamic frameworks reveals distinct philosophical traditions that inform legal moralism, emphasizing communal harmony, social roles, and duty over individual autonomy. **Confucianism**, profoundly influential in East Asia, views law as secondary to moral cultivation (*li* - ritual propriety) but nevertheless essential for maintaining social order and hierarchy when virtue fails. The law’s function is to uphold the “**Five Constant Relationships**” (ruler-subject, father-son, husband-wife, elder brother-younger brother, friend

1.9 Comparative Legal Systems: Moral Enforcement Globally

The profound influence of cultural and religious frameworks on legal moralism, particularly evident in non-Western traditions emphasizing communal harmony and duty, underscores that the principle's manifestation is deeply context-dependent. The tapestry of global legal systems reveals a spectrum of approaches to enforcing morality through law, ranging from explicit rejection in some liberal democracies to wholehearted embrace in theocratic or authoritarian states, with complex hybrid models in between. Examining how different legal traditions incorporate, balance, or weaponize elements of legal moralism provides crucial insights into the enduring tension between individual liberty and communal values across diverse societal landscapes.

Common Law Traditions: Retreat and Resilience The common law world, deeply shaped by the Hart-Devlin debate, exhibits a complex, often contradictory relationship with legal moralism. In the **United Kingdom**, the birthplace of that pivotal exchange, the trajectory has largely followed Hart's liberal critique, particularly concerning private consensual conduct. The Wolfenden Report's recommendations culminated in the Sexual Offences Act 1967, decriminalizing homosexual acts in private between men over 21, marking a significant retreat from overt moralism. Subsequent reforms, such as the further lowering of the age of consent and legal recognition of same-sex partnerships, solidified this shift towards privacy and individual autonomy. Yet, traces persist. Obscenity laws, governed by statutes like the Obscene Publications Act 1959 (requiring material tending to "deprave and corrupt"), still rely significantly on perceived societal standards of morality, however contested. Public order offenses related to decency or conduct causing "harassment, alarm or distress" often blur the line between preventing harm/offense and enforcing moral norms about acceptable public behavior. The **United States** presents a more fractured picture. The landmark *Lawrence v. Texas* (2003) explicitly rejected moral condemnation as a sufficient basis for law, overturning sodomy statutes and affirming a constitutional right to private sexual intimacy. However, moralistic impulses remain potent forces in legislation and judicial reasoning, particularly concerning issues like abortion access post-*Dobbs*, restrictions on transgender healthcare, and debates over pornography and obscenity. The *Paris Adult Theatre I v. Slaton* (1973) decision, while acknowledging privacy rights, upheld state power to regulate obscene material shown even to consenting adults in theaters, with Chief Justice Burger invoking the state's interest in preserving "a decent society" and "the quality of life and total community environment." **Canada**, influenced by its Charter of Rights and Freedoms, generally leans towards Hartian liberalism, with courts emphasizing individual autonomy and equality rights, as seen in the decriminalization of prostitution-related activities (*Canada v. Bedford*, 2013) based on safety concerns rather than endorsing the activity. However, legal moralism surfaces in arguments defending restrictions on certain forms of expression deemed harmful to societal values or vulnerable groups. **Australia**, similarly, has largely decriminalized victimless crimes like homosexuality and abortion, though state-level debates on issues like assisted dying or drug decriminalization often feature strong moralistic rhetoric. Across these jurisdictions, the legacy of Hart-Devlin endures in an ongoing, often implicit, negotiation: courts and legislatures grapple with whether shared moral feelings alone can justify restricting liberty, typically demanding some nexus to harm or tangible societal detriment beyond mere disapproval.

Civil Law Traditions: Secularism, Dignity, and Lingering Heritage Civil law systems in **Europe** and

Latin America demonstrate a distinct balancing act, often framed within robust constitutional commitments to human dignity and secularism, yet still wrestling with the legacy of deep religious roots. **France** exemplifies militant secularism (*laïcité*), rigorously excluding religious doctrine from public law. Its legal framework is generally hostile to pure legal moralism concerning private conduct. Laws regulating public behavior (like bans on the full-face veil in public spaces) are justified primarily on grounds of security, public order, or gender equality rather than enforcing a shared morality. The French approach leans heavily towards protecting individual *liberté* from state-imposed moral codes, reflecting a strong Enlightenment heritage. Conversely, **Germany** emphasizes *dignity* (*Menschenwürde*) as the foundational constitutional principle. While this protects individual autonomy, it also provides a basis for laws that some critics view as moralistic, such as its longstanding (though recently modified) prohibition of adult consanguineous relationships (incest), justified as protecting the “social order and family structure,” or its strict laws against Holocaust denial, defended as upholding human dignity and historical truth against inherently immoral speech. **Italy** and **Spain**, with strong Catholic histories, show greater persistence of moralistic influence, particularly in family law and bioethics. Italy’s restrictive laws on assisted reproduction and its continued criminalization of assisted suicide (despite growing public debate and European Court of Human Rights challenges) reflect powerful moral arguments about the sanctity of life deeply embedded in its political culture. In **Latin America**, the legacy of Catholicism profoundly shapes legal approaches. While most countries have secularized family law (legalizing divorce and, increasingly, same-sex marriage), moralistic arguments rooted in religious tradition remain potent in debates over abortion access. Countries like El Salvador maintain near-total bans, justified explicitly on moral grounds concerning the protection of life from conception, demonstrating the enduring power of religiously informed morality within ostensibly secular legal systems. The Inter-American human rights system provides a counterweight, emphasizing individual autonomy, but clashes persist, as seen in contentious national debates across the region.

Authoritarian States: Moralism as a Tool of Control Beyond theocratic models explicitly based on divine command (discussed in Section 7), **secular authoritarian states** frequently deploy legal moralism as a powerful instrument for political suppression and social control, extending far beyond any genuine societal consensus. In these contexts, the concept of “public morality” becomes an elastic justification for laws targeting dissent, minority groups, or behavior deemed threatening to the regime’s authority or its vision of social stability. **China** provides a stark example. While officially atheist and embracing rapid modernization, the Chinese Communist Party (CCP) actively promotes “Socialist Core Values,” a state-defined moral code emphasizing patriotism, collectivism, and social harmony. Laws against “picking quarrels and provoking trouble,” “spreading rumors,” or “illegal business operations” are often applied broadly

1.10 Legal Moralism and Individual Rights

The complex interplay between state-enforced morality and individual liberty, vividly demonstrated across diverse legal systems from Singapore’s “Asian values” to China’s “Socialist Core Values,” inevitably collides with the bedrock principles of modern human rights frameworks. Legal moralism, grounded in assertions of communal virtue or societal cohesion, inherently poses a profound challenge to conceptions of fundamental

individual rights, creating persistent battlegrounds centered on autonomy, conscience, and equality. This friction is not merely theoretical; it manifests in landmark legal decisions, contentious legislation, and deeply personal struggles for self-determination against the weight of imposed moral codes.

9.1 Autonomy, Privacy, and the Right to Be Let Alone The most fundamental clash occurs over the scope of individual autonomy – the right to make intimate, personal choices free from unwarranted state intrusion based solely on moral disapproval. This concept found its seminal articulation in the 1890 Harvard Law Review article by Samuel Warren and Louis Brandeis, “The Right to Privacy.” Responding to sensationalist journalism, they argued for a “right to be let alone,” framing it as an essential aspect of individual inviolability and personal dignity. This principle became a powerful counterweight to legal moralism, asserting a protected sphere of private life where individual conscience, not state-imposed morality, should reign supreme. The U.S. Supreme Court’s tortured journey on this issue highlights the tension. Decades after *Griswold v. Connecticut* (1965) recognized a constitutional right to privacy protecting married couples’ access to contraception (striking down a law rooted in moral opposition to birth control), the Court in *Bowers v. Hardwick* (1986) notoriously upheld Georgia’s sodomy law. Justice White’s majority opinion dismissed privacy claims for homosexual conduct, declaring that constitutional protections did not extend to “any kind of private sexual conduct between consenting adults” and explicitly accepting moral disapproval as a legitimate basis for criminalization, echoing Devlin’s arguments. This stark endorsement of legal moralism was decisively overturned seventeen years later in *Lawrence v. Texas* (2003). Justice Kennedy’s majority opinion explicitly rejected *Bowers*, declaring: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Crucially, Kennedy dismissed moral condemnation as insufficient justification: “The issue is whether the majority may use the power of the State to enforce [moral] views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.” *Lawrence* stands as a pivotal recognition that legal moralism, when used to criminalize private, consensual adult intimacy, fundamentally violates the autonomy and dignity protected by the right to privacy. The FBI’s infamous “Sex Deviates” program, which compiled dossiers on thousands of Americans suspected of homosexuality during the Cold War based purely on moralistic panic about “sexual perversion” undermining national security, exemplifies the chilling state overreach that autonomy rights seek to prevent.

9.2 Freedom of Conscience, Religion, and Expression Legal moralism inevitably threatens freedoms of thought, belief, and expression when the morality being enforced stems from, or conflicts with, individual conscience or minority religious views. Blasphemy laws, historically prevalent across Christendom and still enforced in numerous theocratic and some secular states (like Pakistan under Section 295-C of its Penal Code, carrying a mandatory death penalty), represent the most direct conflict. These laws criminalize expressions deemed insulting to sacred religious figures or tenets, prioritizing the protection of religious feelings or communal orthodoxy over the right to dissent, critique, or hold alternative beliefs. The 2015 massacre at the offices of *Charlie Hebdo* in Paris, motivated by extremist religious outrage over satirical cartoons of the Prophet Muhammad, tragically underscored the violent potential of conflating religious morality with state or societal sanction. Even in secular contexts, moralistic laws can suppress expression deemed contrary to prevailing “community standards.” Obscenity prosecutions, like the 1957 trial of publisher Barney Rosset

for distributing Allen Ginsberg’s poem “Howl” in the U.S. (*People v. Ferlinghetti*), often hinge on subjective moral judgments about decency, potentially stifling artistic expression and challenging literary merit. Furthermore, legal moralism can infringe upon the free exercise of religion when minority religious practices clash with majority moral norms or secular moral codes. Conflicts arise over ritual animal sacrifice (*Church of Lukumi Babalu Aye v. City of Hialeah*, 1993, where the US Supreme Court struck down ordinances targeting Santeria practice as religious discrimination masked by moralistic concerns about animal cruelty), the use of controlled substances in religious ceremonies (peyote in Native American Church rituals, cannabis in Rastafarian practice), or religiously mandated attire conflicting with secular dress codes. The *Masterpiece Cakeshop* litigation in the U.S. (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2018) presented the reverse scenario: a business owner claimed enforcing anti-discrimination laws by compelling him to create a custom cake for a same-sex wedding violated his religious conscience and freedom of expression by forcing him to endorse a practice he deemed immoral. This highlights how competing moral claims – one grounded in religious conscience opposing same-sex marriage, the other grounded in secular equality principles – can collide within the legal system, raising complex questions about whether enforcing one form of morality (equality) unconstitutionally burdens another (religious objection). The underlying tension remains: state enforcement of *any* singular morality inevitably risks marginalizing dissenting beliefs and practices.

9.3 Equality and Non-Discrimination Perhaps the most pervasive contemporary battleground involves the use of legal moralism to justify laws and policies that discriminate against specific groups, thereby violating fundamental principles of equality and non-discrimination. Historically, moralistic arguments rooted in prejudice provided the bedrock for deeply discriminatory laws. Anti-miscegenation statutes, prohibiting interracial marriage, were explicitly defended as necessary to preserve “racial purity” and “social order,” reflecting dominant moral views about racial hierarchy. The U.S. Supreme Court decisively rejected this moralistic justification in *Loving v. Virginia* (1967), declaring such laws unconstitutional violations of equal protection and due process, and stating unequivocally that restricting marriage

1.11 Contemporary Debates and Controversies

The collision between legal moralism and fundamental rights, particularly equality, is not confined to historical injustices like anti-miscegenation laws. This friction defines numerous high-stakes contemporary battlegrounds where the question of whether the state can, or should, criminalize conduct based solely on its perceived immorality ignites fierce societal and legal conflict. These ongoing debates reveal the enduring potency of moralistic arguments in shaping law and the equally powerful countervailing demands for individual autonomy, privacy, and equality in increasingly pluralistic societies.

The Crucible of LGBTQ+ Rights remains perhaps the most visible arena for legal moralism in modern discourse. While landmark decisions like *Lawrence v. Texas* and *Obergefell v. Hodges* (2015, establishing same-sex marriage rights in the US) seemingly settled core questions of decriminalization and marital recognition, moralistic opposition has shifted focus and tactics. The passage of so-called “**religious freedom restoration**” laws (RFRAs) in various US states, often framed as protecting conscience, frequently func-

tions as a vehicle for permitting discrimination against LGBTQ+ individuals in employment, housing, and public accommodations based on assertions of moral objection to same-sex relationships or transgender identities. Proponents argue these laws protect individuals and businesses from being compelled to endorse or facilitate conduct they deem deeply immoral, framing it as a matter of religious liberty and preserving traditional values. Critics contend they effectively license discrimination, using moral disapproval as justification for denying equal access to goods and services, thereby relegating LGBTQ+ citizens to second-class status under the guise of protecting morality. Similarly, legislative battles over **transgender rights**, particularly concerning healthcare for minors and access to gender-appropriate facilities (often dubbed “bathroom bills”), are saturated with moralistic rhetoric. Opponents of gender-affirming care frequently characterize it as inherently immoral mutilation or child abuse, while restrictions on facility access are defended as protecting privacy and moral decency. The wave of state laws banning such care for minors, despite contrary medical consensus, exemplifies the direct legislative enforcement of a specific moral viewpoint about gender identity and development, overriding parental autonomy and medical judgment. Furthermore, debates persist over banning **conversion therapy** – discredited practices aiming to change sexual orientation or gender identity. While increasingly prohibited in many jurisdictions due to overwhelming evidence of psychological harm, lingering moralistic arguments defending these practices sometimes surface, suggesting the “immorality” of homosexuality or transgender identity justifies attempts to alter it, even against the individual’s will. The enduring struggle reflects the core question: Can laws rooted in moral disapproval of LGBTQ+ identities and relationships be reconciled with fundamental equality and dignity in a diverse society?

Reproductive rights, particularly concerning abortion, constitute another enduring flashpoint where legal moralism clashes violently with bodily autonomy. The overturning of *Roe v. Wade* by the US Supreme Court in *Dobbs v. Jackson Women’s Health Organization* (2022) dramatically reignited this conflict, unleashing a wave of state abortion bans and restrictions. These laws are frequently justified explicitly on **moral grounds concerning the sanctity of fetal life**, often grounded in specific religious doctrines but presented as protecting a fundamental moral value inherent in human existence. Proponents argue the state has a compelling interest, even a moral duty, to prevent what they view as the wrongful taking of innocent human life, regardless of the stage of pregnancy or the circumstances of conception. This represents a pure form of legal moralism: the immorality of abortion itself, as defined by this viewpoint, is deemed sufficient justification for prohibition, irrespective of the profound impact on the pregnant person’s life, health, and autonomy. The very concept of **fetal personhood**, central to many restrictive laws, is a moral assertion seeking legal codification. Conversely, advocates for abortion access frame the issue through the lens of **bodily autonomy and self-determination**, arguing that compelling an individual to remain pregnant against their will constitutes a severe violation of their fundamental rights, particularly in cases of rape, incest, severe fetal anomaly, or threats to maternal health. They contend that imposing one specific moral view about when life begins and its relative value onto all citizens through criminal law is the epitome of the “tyranny of the majority” warned against by Mill. The resulting legal patchwork across the US, where access hinges on geographic location, starkly illustrates the tangible consequences of legislating deeply contested moral beliefs about life, personhood, and women’s roles. Similar, though often differently configured, moral battles rage globally over access to contraception, sex education, and assisted reproductive technologies, where moral objections

rooted in religious or traditional views frequently seek restrictive legal expression.

End-of-life autonomy presents a third critical frontier, pitting moral arguments about the **sanctity of life** against claims of **personal dignity and freedom from intolerable suffering**. Laws prohibiting assisted suicide and euthanasia remain widespread, often defended on the moral grounds that intentionally ending a human life is intrinsically wrong, regardless of consent or circumstances. Proponents of such prohibitions argue that permitting assisted dying devalues life, potentially endangers vulnerable populations (the disabled, elderly, or depressed), and violates fundamental ethical principles upheld by major religious traditions and many secular philosophies. This moral stance was central to the US Supreme Court’s rejection of a constitutional right to physician-assisted suicide in *Washington v. Glucksberg* (1997), where Chief Justice Rehnquist emphasized the state’s “unqualified interest in the preservation of human life” and the moral distinction between letting die and actively causing death. However, growing movements for “**death with dignity**” challenge this moralistic foundation. Advocates argue that competent, terminally ill individuals enduring unbearable suffering possess a fundamental right to autonomy over their own bodies and deaths, viewing the refusal to allow this as a cruel imposition of external moral values onto profound personal suffering. The expansion of Medical Aid in Dying (MAID) laws in jurisdictions like Canada, several US states (Oregon, Washington, Vermont, etc.), and parts of Europe (Belgium, Netherlands, Luxembourg) demonstrates a shifting landscape. These laws typically include stringent safeguards (terminal diagnosis, competency, repeated requests, self-administration) but represent a significant retreat from pure sanctity-of-life-based legal moralism, acknowledging individual autonomy in the face of terminal suffering. The fierce debates surrounding proposed expansions of MAID eligibility (e.g., to those with severe, incurable mental illness, as recently implemented in Canada after significant controversy) highlight the ongoing struggle to define the acceptable boundaries where personal choice overrides societal moral prohibitions on ending life.

The **digital age** has spawned novel and complex arenas for legal moralism concerning **online expression and pornography**. The vast, often unregulated, expanse of the internet intens

1.12 The Boundaries: Where Does Legal Moralism Fade?

The fierce debates surrounding the regulation of online content, pornography, and emerging digital behaviors underscore a persistent reality: while legal moralism remains a potent force, its application inevitably encounters boundaries defined by competing political philosophies, practical considerations of coexistence, and the very mechanics of democratic governance. Even in areas where moralistic impulses run strong, other principles assert limiting pressures, creating complex, often unstable, zones where the justification of enforcing morality “for its own sake” begins to fade, revealing the inherent tensions within pluralistic societies committed to some form of individual liberty. Section 11 examines these boundaries, exploring the points where legal moralism collides with, or is constrained by, other foundational commitments.

The friction between **legal moralism and political liberalism** constitutes perhaps the most fundamental boundary. Liberal political theory, particularly in its Rawlsian formulation articulated in works like *Political Liberalism* (1993), posits that a just society in conditions of reasonable pluralism must be neutral among

competing “comprehensive doctrines” – the deep-seated religious, philosophical, and moral worldviews citizens hold. The state’s coercive power, according to John Rawls, should only be exercised based on reasons all citizens can reasonably be expected to accept, derived from “public reason” rather than contested metaphysical or moral beliefs. This presents a direct challenge to legal moralism. Can a state committed to liberal neutrality legitimately criminalize conduct *solely* because it violates a specific moral view, even if that view is held by a majority? The enforcement of morality becomes problematic when it relies on reasons grounded in a particular comprehensive doctrine that others reasonably reject. For instance, a law banning assisted suicide based solely on a specific religious belief in the sanctity of life violates this liberal neutrality; it imposes a sectarian moral view through state power. Conversely, a law justified by public health concerns, preventing potential coercion of vulnerable individuals, or ensuring rigorous informed consent might pass the public reason test, even if motivated partly by moral unease. The ongoing litigation surrounding religious exemptions to anti-discrimination laws, such as the *Masterpiece Cakeshop* case, exemplifies this clash. Requiring a baker to serve a same-sex wedding couple can be framed by the state as enforcing a neutral principle of equal access to public accommodations, grounded in public reason (preventing discrimination). The baker, however, perceives it as the state coercing him into endorsing an act he deems deeply immoral based on his comprehensive doctrine. The liberal state struggles to navigate this terrain, attempting to maintain neutrality while preventing the imposition of one group’s morality from unduly burdening others’ liberties or access to equal citizenship. Legal moralism finds its justification significantly weakened when it cannot articulate grounds for coercion that transcend the boundaries of contested private morality.

This leads naturally to the concept of **toleration and the limits of enforcement**. Even societies inclined towards legal moralism often recognize that not every disapproved moral lapse can or should be subject to criminal sanction. Toleration, in this context, means refraining from prohibiting or punishing conduct one finds morally objectionable, without necessarily endorsing or approving of it. The Wolfenden Report’s famous dictum – “There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business” – was an explicit call for such toleration regarding consensual adult sexual conduct. Devlin himself acknowledged the necessity of toleration, arguing that society should only deploy the law against immorality posing a “grave” threat to its fabric, judged by the intensity of societal outrage. Yet, determining the threshold for intolerability remains deeply contentious. Why tolerate private gambling but prosecute private use of certain drugs? Why accept diverse religious practices but criminalize certain forms of sexual expression between consenting adults? The justification often involves pragmatic considerations beyond pure moral wrongness: the difficulty and intrusiveness of enforcement, the potential for disproportionate social harm (like creating black markets or driving behavior further underground), the recognition that some moral failings are best addressed through social persuasion or religious sanction rather than criminal penalties, and a pragmatic acceptance of pluralism to avoid constant social conflict. John Stuart Mill’s “marketplace of ideas” metaphor further supports toleration, suggesting that moral truth is more likely to emerge through open discussion and lived experience than through state suppression of “immoral” viewpoints or practices. The evolution of laws regarding end-of-life choices illustrates this boundary. While active euthanasia remains illegal in most jurisdictions based on moral objections, many countries tolerate, or even legally regulate through strict safeguards, practices like withdrawing life support or administering

palliative sedation that may hasten death, reflecting a pragmatic distinction based on intent, consent, and the perceived limits of effective and just enforcement of a blanket sanctity-of-life principle.

The **role of democracy and public opinion** introduces another crucial, yet ambiguous, boundary for legal moralism. In democratic systems, lawmaking is inherently tied to popular will. Does this mean that a democratically enacted law, grounded in widely shared moral convictions, inherently legitimizes legal moralism? Lord Devlin seemed to suggest as much, relying on the “man on the Clapham omnibus” as the gauge of societal morality. This perspective – sometimes termed **majoritarian moralism** – holds that if a majority of citizens, through their elected representatives, deem certain conduct immoral and worthy of prohibition, that democratic mandate provides sufficient justification. Proponents argue this is simply how democracy functions: collective self-determination includes the right of a community to define and uphold its shared values through law, even if those values are moral rather than purely instrumental. The persistence of blue laws in some US counties, reflecting the historical moral views of local majorities about Sunday observance, exemplifies this. However, this view clashes profoundly with liberal objections to the tyranny of the majority. Alexis de Tocqueville and John Stuart Mill both warned that unchecked majority rule could become oppressive. Democratic processes are not immune to prejudice, misinformation, or transient moral panics. Relying solely on popular sentiment risks enshrining injustice, as seen in the democratic enactment and prolonged maintenance of anti-miscegenation laws or the criminalization of homosexuality. This is why constitutional democracies typically incorporate limits on majority power, such as bills of rights and independent judiciaries. The overturning of California’s Proposition

1.13 Future Trajectories and Unresolved Questions

The persistent tension between legal moralism and the restraining forces of political liberalism, toleration, and constitutional safeguards against majoritarian overreach underscores that the debate is far from settled. As societies evolve and confront novel challenges, the fundamental question of law’s relationship to morality resurfaces with renewed urgency, demanding fresh consideration in contexts unimaginable to Hart, Devlin, or Mill. Section 12 synthesizes the ongoing relevance of legal moralism, exploring its potential trajectories amidst the accelerating forces of technological change, globalization, and enduring philosophical puzzles about the very possibility of a morally neutral state.

Technology’s relentless advance presents unprecedented frontiers for moral deliberation and potential legal enforcement. The burgeoning fields of neuroenhancement, genetic engineering, and artificial intelligence generate profound ethical dilemmas that existing legal frameworks struggle to address, inevitably drawing upon moralistic reasoning. Cognitive enhancement drugs like modafinil or Adderall, used off-label by students and professionals seeking competitive advantage, raise questions about fairness, authenticity, and the potential erosion of effort-based merit. Should access be regulated solely based on safety (paternalism) or could societies deem certain enhancements intrinsically unfair or corrosive to valued human experiences, justifying restrictions rooted in perfectionist ideals? The specter of germline editing, exemplified by the controversial 2018 case of Chinese scientist He Jiankui creating CRISPR-edited babies allegedly resistant to HIV, ignited global outrage centered on profound moral objections: the hubris of altering the human

germline with unknown consequences for future generations, the creation of genetic “haves and have-nots,” and violations of the child’s right to an open future. While safety concerns dominated regulatory responses, the core revulsion mirrored Devlin’s “intense disgust,” suggesting a potential future where legal moralism resurges to govern biotechnology based on perceived violations of human dignity or natural order. Artificial intelligence introduces different quandaries. Deepfakes capable of creating hyper-realistic non-consensual pornography inflict tangible harm through reputational damage and psychological trauma, potentially justifying regulation under the Harm Principle. However, does the creation of AI systems designed to simulate intimate relationships or generate art that evokes profound emotional responses cross into a realm of intrinsic immorality for some, akin to blasphemy or sacrilege? The development of autonomous weapons systems forces societies to confront the moral abhorrence of delegating life-and-death decisions to algorithms, potentially leading to bans based on inherent wrongness rather than solely proven strategic instability. Virtual realities further complicate the landscape. If immersive virtual environments allow users to engage in acts that would be criminal or deeply immoral in the physical world (e.g., virtual murder, assault, or pedophilia), does the absence of tangible harm negate societal interest, or does the mere simulation evoke sufficient moral repugnance and potential desensitization to justify regulation? These nascent technologies challenge the adaptability of legal moralism, demanding nuanced distinctions between genuine harm, offense, and deep-seated moral intuitions about the boundaries of acceptable human experience and manipulation. The rapid pace of innovation ensures legislatures and courts will repeatedly face the dilemma: wait for demonstrable harm or proactively legislate based on moral apprehension of the technology’s potential to corrupt or degrade.

Globalization intensifies the clash of moralities, transforming local debates into international confrontations. As people, ideas, and capital flow more freely across borders, divergent cultural and religious conceptions of morality increasingly collide, challenging notions of universal human rights and national sovereignty. International human rights frameworks, emphasizing individual autonomy, equality, and bodily integrity, often stand in direct tension with claims of cultural sovereignty justified by appeals to distinct communal moralities. The wearing of religious attire, such as the Islamic headscarf (*hijab*) or full-face veil (*niqab*), exemplifies this friction. Bans in countries like France, justified under secular *laïcité* or gender equality principles, are perceived by proponents as enforcing a specific secular moral vision of public life and female liberation. Critics, often within the affected communities and internationally, denounce these bans as violations of religious freedom and cultural expression, imposing a Western-centric morality. The United Nations Human Rights Committee has repeatedly criticized such bans, highlighting the global moral divide. Similarly, practices defended as integral cultural or religious traditions within specific communities – such as polygamous marriage arrangements in some contexts or certain traditional gender roles – face condemnation as violations of universal women’s rights and equality norms. This clash fuels contentious debates within international bodies and complicates diplomatic relations. Furthermore, nations increasingly assert **extraterritorial moral enforcement**, applying their domestic moral standards beyond their borders. The United Kingdom’s Female Genital Mutilation Act 2003 allows prosecution of UK nationals or residents for FGM performed abroad, based on the moral repugnance of the practice and its severe physical and psychological harms, regardless of local legality or cultural acceptance. Similarly, laws criminalizing “sex

tourism” involving minors reflect an extension of domestic moral prohibitions on child exploitation onto foreign soil. Conversely, attempts by liberal democracies to promote LGBTQ+ rights or reproductive freedoms internationally are often decried by other nations as cultural imperialism and an imposition of alien moral values. The global reach of the internet amplifies these conflicts: content deemed blasphemous or immoral in one jurisdiction (e.g., depictions of the Prophet Muhammad, certain sexual content, or advocacy for LGBTQ+ rights) becomes accessible worldwide, triggering demands for cross-border censorship based on local morality, clashing directly with principles of free expression and information flow. The rise of transnational advocacy networks mobilizing around both liberal human rights and conservative moral traditionalism ensures that debates once confined within national borders will increasingly play out on a global stage, testing the limits of legal moralism and international legal order.

These contemporary pressures underscore the enduring, perhaps irresolvable, tension at the heart of legal moralism: Is it inevitable? Can any legal system truly escape enforcing *some* conception of morality? Even the staunchest liberal frameworks rest upon implicit moral foundations – the intrinsic value of individual autonomy, the wrongness of causing unjustified harm, the principle of equality. Laws prohibiting murder, rape, and theft are not merely pragmatic; they encode profound moral judgments about the inviolability of personhood and property. The liberal state’s commitment to neutrality, as Rawls conceded, operates within boundaries defined by its own conception of justice and the basic rights essential for a pluralistic society to function. Germany’s constitutional commitment to human dignity (*Menschenwürde*) leads it to maintain its controversial prohibition on consensual adult incest (§ 173 StGB), upheld by the Federal Constitutional Court (