Legal Moralism and the U.S. Supreme Court

Richard F. Galvin, Texas Christian University

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Among the topics I will address in this paper are the arguments made in response to four cases that were ultimately decided by the U.S. Supreme Court. The cases are interesting because each the involved a statute whose purpose was claimed, at least in part, to be to enforce some type of moral standard. Both in arguments presented to the Court, as well as in the opinions delivered by the Court itself, the relationship between law and morality played a prominent role. In each case the Court was forced to decide, again, at least in part, whether a statute's justification could rely on a State's interest in promoting morality and upholding moral standards, and on what ground that interest might plausibly lie.

In the first case, Loving v. Virginia (1967), the Court struck down Virginia's antimiscegenation statute.[1] In the second case, Bowers v. Hardwick (1986), the Court upheld Georgia's anti-sodomy statute.[2] In Barnes v. Glen Theatre (1991), the Court upheld an Indiana statute which prohibited (among other activities) nude dancing in bars.[3] And in the fourth and most recent case, Lawrence v. Texas (2003), the Court overturned a Texas statute criminalizing sexual conduct between members of the same sex.[4] Although each case involved other Constitutional issues that the Court saw to be at least equally as important as the law and morality issue in the disposition of the case (privacy and freedom of association in Loving, privacy and equal protection in Bowers, first amendment freedom of expression issues in Barnes, and due process and equal protection in Lawrence), I shall focus on the arguments concerning what the relationship between law and morality ought to be, or more specifically, whether it is legitimate to impose legal sanctions for what are essentially moral purposes.

This issue has troubled many commentators. For instance, one particularly virulent criticism of the Court's decision in Bowers chided the Court for "accepting a version of legal moralism," and criticized the decision as an example of "legal moralism par excellence."[5] This line of attack is typical of critics of Legal Moralism; many fear that the view would result in too wide a net for the coercive power of the law. There would be a significant loss of liberty, and legal sanctions would be applied in a myriad of cases in which sanctions are ultimately unjustifiable. Yet others on the opposite end of the political spectrum applauded Bowers for exactly the same reason: society's moral disapproval of a type of conduct is a good and important reason for society's use of the law against it. They see Legal Moralism as essential for incorporating moral disapproval within the law.[6]

My aim is to take a close and critical look at both the Court's reasoning in these cases and, more importantly, Legal Moralism itself. My thesis is roughly that the decisions in Bowers and Barnes are ultimately indefensible, and the decisions in Loving and

Lawrence are indeed correct. But despite appearances to the contrary, Legal Moralism is not the culprit in Bowers and Barnes because what might appear to be instances of legal moralist arguments in the prevailing opinions in those cases are either variants of other types of argument or applications of untenable versions of Legal Moralism. Further, the arguments employed by the Court in the prevailing opinions in Loving and Lawrence are at least consistent with the most plausible version of Legal Moralism, and would have entailed that Bowers and Barnes be decided differently. Indeed, Justice Stevens' dissent in Bowers contains important parallels with the most plausible versions of Legal Moralism, and Justice Scalia's dissent in Lawrence relies on an implausible version of Legal Moralism.

I--Legal Moralism

I will begin my discussion of Legal Moralism by briefly setting up the context within which arguments about Legal Moralism characteristically occur, i.e., the discussion of "Liberty-Limiting Principles."[7] In general, Liberty-Limiting Principles attempt to answer the following question:

Under what (if any) circumstances would it be justifiable to employ legal sanctions to prevent people from behaving in ways that they otherwise would (or to get them to behave in ways that they otherwise would not), and (perhaps secondarily) to impose legal sanctions on those who do not comply?[8]

Before proceeding further, it should be emphasized that the sense of justification at issue is that of moral justification for legal sanctions and the imposition of legal punishment.

Among the Liberty Limiting Principles that prominent legal philosophers have endorsed as offering defensible answers to questions about the moral justification for legal sanctions, three such principles have arguably received the most attention:

Harm Principle: It is justifiable to employ legal sanctions when a person's behavior harms (or presents a clear and present danger of harm to) another.

Offense Principle: It is justifiable to employ legal sanctions when a person's behavior causes (or presents a clear and present danger of causing) profound offense to another.

Legal Paternalism: It is justifiable to employ legal sanctions when a person's behavior causes (or threatens to cause) harm to the agent him/herself.

These are among the most familiar Liberty-Limiting Principles since some subset of these principles (suitably modified and interpreted) is endorsed by Mill (Harm Principle only), Hart (Harm Principle and limited Legal Paternalism) and Feinberg (Harm and Offense Principles).[9] It is also the case that Mill, Hart and Feinberg (among other notables) argue at length against another Liberty-Limiting Principle, Legal Moralism, which can be minimally characterized as follows:

Legal Moralism: It is (or can be) justifiable to employ legal sanctions to prevent people from behaving in ways that are immoral.

Alternatively, Legal Moralism maintains that the immorality of certain conduct is or can be a good reason for employing legal sanctions against that type of conduct.[10]

As we shall see, Legal Moralism is not so much a single position as it is a category of distinct positions which share the common tenet of linking justifiable employment of legal sanctions to a type of behavior's being deemed immoral. Among the issues on which legal moralist positions diverge are 1) whether immorality is claimed to be necessary, sufficient or just some good ground for employing legal sanctions?, and 2) what is held to determine that a type of conduct is immoral?

Let us look very quickly at these issues, beginning with whether immorality is held to be a necessary, sufficient or (merely) relevant reason for employing legal coercion. Opponents of Legal Moralism often argue against the view that the immorality of some behavior is sufficient for legally prohibiting it. And perhaps insofar as Aquinas and Devlin embrace Legal Moralism it might be inferred that each holds the "sufficiency" view, but this is not so. Aquinas argues that it is both improper and impossible to prohibit every instance of immorality,[11] and Devlin argues that society's interest in opposing immorality must be balanced against the interest each of us has in individual liberty.[12] Since few if any legal moralist positions incorporate the implausible view that immorality is sufficient for justifiable legal prohibition (even a minor transgression? at what cost?), I will consider only those views which argue that immorality provides either a necessary condition or some ground (i.e., a relevant reason) for using sanctions.

On the question of what determines that some type of conduct is immoral, both defenders and critics of Legal Moralism typically assume that there are only two options in delineating the class of immoral behavior: a) Classical Legal Moralist positions, which include not only arguments for the legitimacy of using legal sanctions against immoral behavior, but also a full-blown normative theory which is claimed to provide the one correct criterion of immorality which the law is to enforce. Obvious examples include Aquinas and (I would insist) the current proponents of the New Economic Analysis of the Law, at least Richard Posner and his followers.[13] The alternative is b) Conventionalist Legal Moralism, which is usually associated with moral relativism, or at least some type of anti-realist moral view, whose thesis is that the law should enforce a society's moral consensus. The fact that a type of behavior is condemned by a society's moral consensus provides grounds for legally prohibiting it.

Turning first to Classical Legal Moralism, recall that the Classical version holds that the law should enforce some set of overarching moral standards, which we might refer to loosely as "moral truth." But even the most ardent advocates of cognitivism in ethics must admit that at least at this point, no one has produced the kind of full-blown moral theory demanded by the Classical Thesis that would be (as Michael Bayles put it) acceptable to the reasonable person.[14] To say that we are epistemologically impoverished regarding moral truth is clearly an understatement.[15] The situation is not

much better for Conventional Legal Moralism either. Let me first reiterate a point made by Feinberg and other critics such as Hart and Bayles.[16] The problem is, quite simply, that any conventionally accepted moral view might be hopelessly mistaken. Indeed, doesn't Conventional Legal Moralism run the risk of enforcing an ignorant and misguided set of conventional moral standards? Surely we don't need much of a memory or imagination to see that all sorts of moral outrages would be and indeed have been labeled as legitimate moral requirements according to this view. So any reasonable person should reject Conventional Legal Moralism on those grounds alone.

It is, however, important to note that Conventionalist Legal Moralism differs in a number of crucial respects from two other positions which some (e.g. Feinberg) have included under the general heading of Legal Moralism, viz. a) The Disintegration Thesis, which holds that failure to use legal sanctions to enforce a society's moral consensus will result in the erosion of moral restraint and the eventual collapse of society. This thesis, endorsed by Devlin and Durkheim and criticized at length by Hart,[17] is actually a corollary of the Harm Principle, since it relies on the harmful effects of a widespread loss of moral restraint in justifying the legal enforcement of a moral consensus.[18] Conventional Legal Moralism is also distinct from b) The Conservative Thesis (or "Moral Conservatism"), which holds that a society has a right to protect its way of life and valued institutions against behavior that threatens them. Further, failure to enforce society's moral consensus is claimed to threaten essential or malignant change in its moral consensus, one of its valued institutions,[19] and consequently in its way of life. Therefore, the law should enforce a society's moral consensus. I maintain that the Conservative Thesis should be distinguished (at least in principle) from Conventionalist Legal Moralism for the following reason: if it is possible that failure to enforce conventional morality will not in fact produce drastic, essential or malignant change in society's way of life or valued institutions, then legal sanctions would not be justifiable according to Moral Conservatism, but would be according to Conventionalist Legal Moralism.

Indeed, Feinberg refers to both the Disintegration and Conservative Theses as versions of "Impure Legal Moralism," a term which he uses to refer to views which hold that legal sanctions should be employed against behavior deemed to be immoral, not because of the behavior's immorality per se, but because of the disastrous "secondary effects" that would ensue if the behavior were not outlawed.[20] These secondary effects include harms associated with social disintegration and the erosion of society's valued institutions. He reserves the term "Pure Legal Moralism" for those views that argue for using legal sanctions against immoral behavior solely because such behavior is immoral. Both Classical and Conventional Legal Moralism fit the bill as examples of Pure Legal Moralism, but as we have seen, each version suffers from seemingly insurmountable difficulties.

Feinberg also writes: "I am not aware of a leading writer who has systematically developed" pure strict Legal Moralism.[21] Well, a "leading writer" I may not be, but nonetheless, my aim here is to lay out the basic structure for and to offer a limited defense of a view that is arguably an instance of Pure Legal Moralism (focusing on

immorality itself rather than secondary effects). Actually, I will do this by considering two versions of (Pure) Legal Moralism, one of which I will ultimately reject. I will also consider two variants of what I consider the most plausible version of Legal Moralism. Of course the view that will emerge is hardly a robust, fully-developed legal moralist position; it is at best a sketch of how such a position might be developed. So I will claim only to be outlining a legal moralist framework: detail and argumentative support will be, for the most part, absent. In the process, however, I hope to rescue Legal Moralism from two difficulties that have led many to dismiss it: a) that Legal Moralism would employ legal sanctions in the service of either a mistaken critical morality, or an ignorant conventional morality, and b) Legal Moralism would result in an overly-wide net of legal sanctions that would too severely limit individual liberty (i.e., it would allow employment of legal sanctions unjustifiably). As will become clear, I owe debts to Ronald Dworkin for the general line of thought behind this position, as well as to John Rawls for some important insights on the relationship between moral theory and political philosophy (which I coopt and apply to legal philosophy) and to Carl Cranor for developing what he thought to be the strongest, but ultimately an unsuccessful, argument for Legal Moralism, and which he claimed to enable us to dispense with the view once and for all.[22] If I am right, perhaps Cranor's fitting a casket for Legal Moralism is a bit premature. But if the version that I sketch here must also be rejected, then I am prepared to join Carl as a pallbearer at the funeral.

The general idea is to follow the Classical Thesis' insistence that the use of legal sanctions must be justifiable according to some ultimately correct moral standard (so that something's being really wrong is a necessary condition for justifiably imposing sanctions on legal moralist grounds), but to depart from its claim to have produced an ideal moral code that every reasonable person would accept, and which legal sanctions would enforce. The starting point for my argument is that if moral realism is true, then whether the use of legal sanctions is morally justifiable will depend on what the moral facts are, and if moral realism is not true, then arguments about the moral justifiability of legal sanctions are pretty much beside the point (i.e., no Liberty-Limiting Principle is correct in the sense of providing a moral justification for the use of legal sanctions). Here I need to emphasize that I am using the term "moral realism" in an extended, but I hope useful and plausible, sense. I am not assuming the truth of what Peter Railton has referred to "stark-raving realism,"[23] or some variant of Cornell Realism, or any view which holds that moral facts can be reduced to scientific facts, whose apprehension requires the application of only theoretical reason. Instead I am assuming that some moral judgments can be shown to be correct, or to have the highest level of warrant for us, or to be supported by the best reasons, or to be judged most (or more) reasonable for us. So I will follow Chris Korsgaard in using the term "moral realism" to include both substantive realism and procedural realism.[24] I propose that we frame the question of the justifiability of employing legal sanctions by employing this sense of the term "moral realism," and according to some set of criteria of this sort.

Let me begin by adopting an insight of Cranor's in initially addressing the overextensiveness problem. Cranor's important insight, fully appreciated by neither critics nor proponents of Legal Moralism, is that identifying some type of conduct as

morally wrong would not be sufficient to justify even a permission to employ legal sanctions on legal moralist grounds. Additionally, the wrong in question must be a serious enough wrong for (all things considered) persons to be justified in trying to discourage and prevent others from engaging in the wrongful conduct, since there may be some wrongful conduct that we ought not to try to discourage or prevent. And for legal sanctions to be justified there must be (all things considered) a good reason to employ legal sanctions (as opposed to some alternative means of discouragement) against the conduct. To reiterate, not only must the conduct be immoral, it must be wrongful enough to justify employing sanctions to discourage and prevent it.[25] Clearly this represents a vast improvement over more familiar statements of the Classical Thesis insofar as it addresses the need not only to identify wrongdoing, but also to justify the use of legal sanctions against instances of wrongdoing. It should also go some way toward allaying the worry that Legal Moralism would overextend the net of legal sanctions--clearly there must be an (all things considered) good reason for employing sanctions. If using legal sanctions against some type of conduct really is morally justified, it is difficult to see how that use would overextend the net.

But Cranor believes that even this version of Legal Moralism fails, for reasons related to the problem of enforcing of a mistaken set of moral judgments, to which I now turn. In Cranor's formulation each consideration--whether something is immoral, whether it ought to be discouraged, and whether legal sanctions are justified--is relativized to specific moral codes, so what emerges is the judgment that according to moral code M it either is or isn't justifiable to use legal sanctions against conduct C. And of course it is likely that for at least some types of conduct, the use of legal sanctions will be justified according to some moral codes but not others. This relativism makes it difficult to see how we could ever arrive at the conclusion that the use of legal sanctions against some type of conduct was ever, all things considered, morally justified simpliciter. So I agree with Cranor that even this patched-up version of Legal Moralism should be rejected.

II--Realist Legal Moralism

Rather than simply abandoning Legal Moralism, I shall suggest a further modification, the motivation for which derives from Dworkin's criticism of Devlin's Conservative Thesis.[26] Briefly, Dworkin argues that there are two senses of the term "moral position." One sense, the nondiscriminatory or "anthropologi-cal" sense, refers to any type of judgment about the propriety or impropriety of human conduct. A judgment in the discriminatory sense, on the other hand, is one based on moral principle. A judgment does not count as a moral judgment in the discriminatory sense if any of the following defeasibility conditions is met: a) if there are no reasons given for the judgment. Also, some "reasons" do not count, including those based on purely emotional reactions, blatantly false and implausible empirical claims, or those that are mere "parroting." b) If the reasons given are insincere or inconsistently applied, as evidenced by other judgments which the subject affirms or fails to affirm. c) When reasons cited as ultimate moral standards are arbitrary and logically unrelated to any coherent set of moral standards. These defeasibility conditions prescribe what are arguably the minimum standards that a moral position must satisfy in order to have a hope of qualifying as rationally defensible.

I understand Dworkin's criticism of Devlin's version of the Conservative Thesis as follows: If (as Devlin's Moral Conservatism claims) a society has a right to protect its valued institutions and way of life from malignant and essential changes, then that right claim requires some grounding. Likewise, if it is claimed that society has a right (and perhaps a duty) to oppose certain types of change on moral principle, a minimum requirement for grounding such claims is that the moral judgments that society is invoking must meet the minimum standards for being a rationally defensible moral judgment--only such judgments can a society plausibly claim a right to act upon. My strategy will be to apply this line of Dworkin's thinking, i.e., applying the minimum standards of rational defensibility, to Legal Moralism as opposed to Moral Conservatism, in order to restrict the kinds of argument that can be made on legal moralist grounds to those that can be backed up by some kind of rationally defensible overall moral position.

One difficulty facing Dworkin's view, which has been duly noted by any number of critics, is that many types of behavior are determined to be morally prohibited according to one rationally defensible moral position, morally required by another rationally defensible moral position, and morally optional by yet another. This will be the case if there are any moral controversies on which there is more than one rationally defensible position, and surely Dworkin's defeasibility conditions are (by design) too weak to exclude this possibility. And if the position that Dworkin defends in this piece is, as I and others take it to be, that legal sanctions are justifiable if there is some minimally rationally defensible position that would allow it, there is the serious risk that some uses of legal sanctions will be permitted on Dworkin's view although they are ultimately unjustifiable. Almost any moral judgment that is not completely beyond the pale will satisfy Dworkin's conditions (since some minimally rationally defensible overall moral position will be consistent with it), and hence even judgments that are ultimately indefensible will be legally enforceable according to Dworkin's conditions, as long as some society's moral consensus includes that judgment.[27]

Since Dworkin's defeasibility conditions are (by design) so weak, when rationally defensible moral positions diverge on the moral status of some type of conduct, Dworkin's view might also face a serious indeterminacy problem. In a sense, Dworkin's conditions will not include anything like a law of excluded middle for such judgments: given that both p and -p are supported by some minimally rationally defensible overall moral position, then if one's society's moral consensus includes p and another's includes -p, then legal enforcement of p will be morally justified in one society and legal enforcement of -p will be morally justified in the other.[28]

I propose that we put aside Dworkin's reworking of Moral Conservatism and its concern with enforcing a moral consensus in a society, but salvage his idea that the use of legal sanctions must be rationally justifiable, and incorporate that idea within a legal moralist framework. I also think that Dworkin's defeasibility conditions need to be strengthened beyond the weak requirement that a moral judgment merely cohere with some conceivable minimally rationally defensible moral position, although I will not take up that task in this paper. The best name that I've been able to come up with (so far) for this position is "Realist Legal Moralism," since the idea behind the view is that the use of

legal sanctions is morally justifiable only if the behavior in question is really immoral, and only if legal sanctions really ought to be used in order to prevent people from engaging in this conduct. In short, the assumption is that moral realism of the sort I described earlier (i.e., either substantive or procedural, but not necessarily "stark raving" realism) is true, so that whether a type of conduct is immoral and whether legal sanctions are justified is a function of moral facts which are (in at least the sense required by procedural realism) independent of what we happen to say, think or believe about them. And given this assumption, it is not terribly difficult to see what such a view would amount to. A formal characterization of Realist Legal Moralism would run roughly as follows:

1) A type of conduct C is immoral according to Realist Legal Moralism (RLM-Immoral) only if C is identified as morally wrong and, all things considered, ought not to be engaged in, according to the Moral Facts (MF).

2) A type of conduct C ought to be discouraged according to RLM only if a) C is RLM-Immoral, and b) C ought to be discouraged according to MF.

3) Legal sanctions should be employed in order to prevent people from engaging in a type of conduct C only if a) C is RLM-Immoral, b) C ought to be discouraged according to MF, and c) C is a serious enough wrong to warrant the use of legal sanctions to prevent people from engaging in C according to MF.

4) The use of legal sanctions to prevent people from engaging in C is justifiable on legal moralist grounds only if 1), 2) and 3) are satisfied.[29]

As this view is stated, it could be interpreted as proposing a necessary condition for applying legal sanctions, but that claim would probably be too strong. Understood in that manner, it would undermine the distinction between malum in se and malum prohibitum in the following respect: although not all conduct that is malum in se would be malum prohibitum (some instances of wrongdoing would not be legal wrongs), all that is malum prohibitum would be malum in se, since legal sanctions could justifiably be applied only to conduct wrongful in itself. Instead, it should be viewed as stipulating necessary conditions for having a good legal moralist reason for employing legal sanctions, leaving it open that there may be other legitimate reasons that issue from other Liberty-Limiting Principles (harm, offense, etc.), and leaving it open further that legal moralist reasons could be overridden by other reasons. In essence the view states that the use of legal sanctions is justified according to Legal Moralism only if the moral facts entail that it is justified. My claim is that this is what a good legal moralist reason for employing legal sanctions must look like. Perhaps it's a long way to go for what is very close to being a tautology, but it does possess tautologies' one unassailable virtue: it's probably true.

True it may be, but hardly useful. This version of Legal Moralism is arguably a reworked version of the Classical Thesis, some of whose shortcomings it shares. I have already noted that the view presupposes the truth of substantive or procedural moral realism, but that seems to be a relatively uncontroversial presupposition in the context of Liberty-

Limiting Principles, all of which purport to provide good moral reasons for employing legal sanctions. If neither substantive nor procedural moral realism is true, it's difficult to see how any such principle could be justified. But this view also presupposes, if its proponents are to recommend it as a principle that we can actually use to determine when we ought to employ legal sanctions, a rather bold epistemological claim that we have adequate access to those moral facts--that we can determine whether we ought to use legal sanctions against certain conduct, again, according to the moral facts. But given the epistemological difficulties involved in determining whether conduct satisfies any of its conditions, we cannot reliably determine whether any use of legal sanctions would be justifiable according to Realist Legal Moralism. Of course, if we knew with Cartesian certainty what all the moral facts (understood substantively or procedurally) were, then it would be relatively unproblematic to determine whether or not legal sanctions should be applied to certain types of conduct (true moral dilemmas and moral indeterminacy aside).

III-The Epistemological Versions of Realist Legal Moralism

In the following section I will introduce two modifications of Realist Legal Moralism which attempt to address epistemological issues concerning moral facts. My hope is that each of these versions can be shown to be superior to Classical Legal Moralism in being epistemologically modest on the issue of our knowledge of the moral facts, and to be superior to Conventional Legal Moralism in being normatively informed in maintaining that moral judgments should be backed up by good reasons. The first of these, which I'll refer to as the Unanimity Version (of Epistemological Realist Legal Moralism), requires unanimous agreement among reasonable moral views in order to justify imposing legal sanctions on legal moralist grounds. The other, which I'll call the Consensus Version, requires a clear or overwhelming consensus among reasonable moral views. Each has its advantages and its shortcomings, but I believe each is also clearly superior to other versions of Legal Moralism. As varieties of Legal Moralism go, I think these are the best.

Let us first consider the Unanimity Version, according to which justifiable imposition of legal sanctions requires conduct to be identified as a serious moral wrong which ought to be discouraged through the use of sanctions, by all reasonable moral positions. Here is a formal characterization of the view:

The Unanimity Variant

1) A type of conduct C is immoral according to Realist Legal Moralism (RLM-Immoral) only if C is identified as morally wrong and, all things considered, ought not to be engaged in, according to every rationally defensible moral position.

2) A type of conduct C ought to be discouraged according to RLM only if a) C is RLM-Immoral, and b) C ought to be discouraged according to every rationally defensible moral position.

3) The use of legal sanctions to prevent people from engaging in C is justifiable according to RLM only if a) C is RLM-Immoral, b) C ought to be discouraged according

to every rationally defensible moral position, and c) C is a serious enough wrong to warrant the use of legal sanctions to prevent people from engaging in C according every rationally defensible moral position.

4) The use of legal sanctions to prevent people from engaging in C is justifiable on legal moralist grounds only if 1), 2) and 3) are satisfied.

In essence this position maintains that in order to impose legal sanctions, and to do so on the grounds that some conduct is immoral, that conduct must be judged immoral and deserving of sanctions by all reasonable moral positions. This view maintains that Legal Moralist arguments for imposing legal sanctions should be limited to conduct that falls within a Rawlsian overlapping consensus of reasonable moral positions: all reasonable positions would deem sanctions justifiable.[30]

An alternative way to address epistemological difficulties regarding moral facts would be to require that each application of legal sanctions be justified by a clear or overwhelming consensus of rationally defensible moral positions. Here is a formal characterization of the view:

The Consensus Variant

1) A type of conduct C is immoral according to Realist Legal Moralism (RLM-Immoral) only if C is identified as morally wrong and, all things considered, ought not to be engaged in, according to a clear consensus of rationally defensible moral positions.

2) A type of conduct C ought to be discouraged according to RLM only if a) C is RLM-Immoral, and b) C ought to be discouraged according to a clear consensus of rationally defensible moral positions.

3) The use of legal sanctions to prevent people from engaging in C is justifiable according to RLM only if a) C is RLM-Immoral, b) C ought to be discouraged according to a clear consensus of rationally defensible moral positions, and c) C is a serious enough wrong to warrant the use of legal sanctions to prevent people from engaging in C according to a clear consensus of rationally defensible moral positions.

4) The use of legal sanctions to prevent people from engaging in C is justifiable on legal moralist grounds only if 1), 2) and 3) are satisfied.

One advantage of the Consensus Version, with its somewhat weaker set of restrictions, would be the availability of a wider net of legal sanctions than the Unanimity Version. Still, if Legal Moralism is taken to be one among a plurality of Liberty Limiting Principles, so that reasons pro and con regarding imposing sanctions might issue from other considerations, this might not be as significant an issue as it would be if Legal Moralism were held to provide the only legitimate grounds for sanctions.[31]

These versions of Legal Moralism offer no blanket endorsement of positive morality, nor do they make any claim to have produced a single, truly rational, correct or most reasonable morality. They prescribe a theoretical limit in terms of a moral minimum (and a rather formidable one) that arguments made on legal moralist grounds for legal sanctions must satisfy. One decided advantage is that neither view requires producing a full blown truly rational morality as an alternative to enforcing mere conventional morality. Recall how some writers opposed Legal Moralism fearing that it would result in an overly expansive net of legal sanctions. For instance, Bayles argues that the reasonable person would reject Legal Moralism since it would result in a dictatorship, preventing the reasonable person "from acting in ways [he] thinks morally permissible or even obligatory, or requiring him to perform acts that he considers immoral."[32] And Feinberg argues that a moral conviction might satisfy Dworkin's criteria for being a moral judgment in the discriminatory sense yet still be mistaken.[33] However, Bayles and Feinberg view Legal Moralism as holding that legal sanctions would be implemented in the service of either any conventional moral judgment, or an equally ignorant or mistaken critical morality. But the views I am suggesting contain no appeal to popular sovereignty or blind conventionalism, nor is there a set of rules that implement some ideal moral code. Instead, each requires that arguments for legal sanctions made on Legal Moralist grounds meet strict criteria for rational defensibility. Unlike other versions of Legal Moralism, this approach should not be regarded as unacceptable by the reasonable person.[34]

My aim here is neither to provide a detailed account of either the Unanimity or Consensus Version, nor to mount a thoroughgoing defense of either version against each of its criticisms, but instead to look briefly at some of the more formidable objections each view is likely to encounter, to suggest a direction that such a defense might take, and in the process to give some indication of how the view might ultimately be developed.

For one thing each version assumes the truth of moral realism. But my initial response is: who would deny it, and on what grounds? Surely those who advocate other Liberty-Limiting Principles are in no position to deny that some version of moral realism (whether substantive or procedural) is true. If there are no independent standards of the sort I have referred to as "realist," and which they think justify their position, or at least show it to be "more reasonable" than its competitors, what do they think does serve as a justification? It's hard to see how anyone could think that the use of legal sanctions could be morally justified in any meaningful sense if neither substantive nor procedural realism is true. Moreover, in the context of evaluating the Supreme Court's arguments on the merits of specific pieces of legislation, amoralism or normative neutrality is clearly not an option, and the four Supreme Court cases that I will examine involve arguments that purport to be deeply normative all the way down.

These versions of Realist Legal Moralism also assume the existence of standards according to which moral positions can be judged to be "rationally defensible." Of course I have produced no such set of standards, and I admit that to produce a complete account of such standards would be a rather daunting task. But Dworkin's defeasibility conditions (which he used effectively against Devlin's version of the Conservative Thesis) provide a

good starting place. In short, he requires that one must be able to adduce reasons for one's moral judgments, that those reasons must not be based on purely emotional reactions, prejudices, or blatantly false assumptions, that the reasons adduced be applied consistently, and must be based on some coherent set of moral standards. These defeasibility conditions arguably outline the minimum standards of rationality in any domain of discourse, and would need to be fleshed out in detail. But the prospect of doing so is far better than the prospect of providing the complete account of the moral facts required by the epistemologically less modest version of Realist Legal Moralism. And once again, in the context of the four Supreme Court cases, it is simply not an option to question the appropriateness of rational standards for such arguments: the issue is what those standards ought to be.

Turning now to objections that are specific to each version, the most obvious (though not the only) worry over the Unanimity Version is underinclusiveness, whereas for the Consensus Version it is overinclusiveness.

On the question of underinclusiveness and the Unanimity Version, one worry would be that, as it has been for Rawls' idea of an overlapping consensus,[35] while the view would virtually ensure that each application of legal sanctions would be morally justifiable (a strong set of limitations on when sanctions would be justified), the result would no doubt be a strikingly narrow net of sanctions that would be justifiable on legal moralist grounds, since few types of conduct would satisfy this condi-tion. While this might raise a serious concern about underinclusiveness if legal moralist arguments were claimed to be necessary for legitimate implementation of sanctions, it might not be as serious a problem if Legal Moralism is seen as offering a good reason for legal sanctions, leaving it open that there may be other sources of good reasons. For example, if the Harm Principle also yields good reasons for legal sanctions, then it might be enlisted to cover harms to others that would fail to be identified as wrongful by each and every minimally rationally defensible moral position. And as for harms to oneself and harmless wrongdoing, if these would not be identified as wrong by all rationally defensible moral positions, then one might have to bite the bullet and maintain that legal sanctions would not be justified, unless there is some principle other than the Harm Principle and Realist Legal Moralism available to justify imposing sanctions. It strikes me as intuitively plausible to maintain that if the only ground one has for imposing sanctions on some type of conduct is its immorality, one had better have overwhelming grounds for concluding that the conduct really is immoral. So it seems that the underinclusiveness objection's force will depend on which, if any, other Liberty Limiting Principles are ultimately seen as providing good reasons for imposing sanctions.

Critics of Legal Moralism (Bayles, Feinberg and others) have raised serious concerns about overextending the net of sanctions, and the Consensus Version would no doubt face charges of overinclusiveness. By requiring that legal sanctions be viewed as justifiable by only a consensus (however clear or overwhelming), the worry is that some conduct would face sanctions that are deemed justified by the Consensus Version, but ultimately are not justifiable. A reasonable person might not go along with the Consensus Version for the following reason: if that person holds a rationally defensible moral position that permits

or requires x, but there is an overwhelming consensus of rationally defensible views that condemns x, then the Consensus Version will employ legal sanctions in ways that force a reasonable person to behave in ways contrary to her (ex hypothesi) rationally defensible moral view.[36]

Nor does this view fit well with some important principles that underlie modern democratic political theory. On this issue I would be willing simply to endorse what Rawls refers to as the fact of reasonable pluralism, viz. that there will be in modern democratic societies a plurality of comprehensive moral views, each of which satisfies the minimum standards of reasonableness (i.e., not being patently unreasonable), and which conflict both at the level of principle as well as at the level of specific moral judgment.[37] Consequently, a reasonable person, who holds a reasonable comprehensive moral position (in Rawls' sense), might find herself being legally coerced to engage in or refrain from conduct contrary to what her (ex hypothesi) reasonable comprehensive position dictates. This would be at odds with any number of core tenets of modern democratic theory, and hence a reasonable person would find it difficult to assent to this view.

But the sting of this objection seems to depend on exactly how one specifies the threshold point that must be satisfied for a clear or overwhelming consensus of rationally defensible moral positions to be achieved: the lower the threshold, the more likely that overinclusiveness objections will gain some traction, and the higher the threshold, the less so. I will of course attempt to provide no precise specification of that threshold here, although I will make a few preliminary suggestions on how one might proceed. One could begin with one of Locke's arguments, in the Second Treatise. Locke's basic point is that one can never expect unanimity within an electorate, and that simple majority agreement is insufficient to indicate that a consensus exists in society.[38] He suggests that the level of agreement indicating a consensus must be fixed somewhere in between, but that's about as specific as he gets. Rousseau maintains that the level of agreement necessary to establish the existence of a consensus should vary in direct proportion to the importance of the issue in question. Questions regarding the imposition of legal sanctions would presumably demand a very high threshold point.[39] Alternatively, we might adopt something resembling a strategy that Devlin employs in a different context, i.e., dealing with unabashedly nondiscriminatory moral views in his version of the Disintegration and Conservative Theses. Devlin holds that for a society's moral consensus to be wide enough to merit legal enforcement, it must be reasonable to expect that a group of twelve citizens, chosen at random, would be unanimous in their moral appraisal of the type of conduct. Statistical details aside, that point would lie somewhere short of (but quite close to) unanimity and far beyond mere majority.[40] Admittedly, this issue requires much more careful and detailed treatment, but I view the task of establishing and defending such a threshold point to be far more manageable than addressing the difficulties faced by either Classical or Conventional Legal Moralism.

One final point on the issue of overinclusiveness: if (as I am proposing) Legal Moralism should be viewed as one among a plurality of Liberty Limiting Principles, then even though there might be legal moralist reasons for using legal sanctions against some type

of conduct, then if (say) the threshold criterion of Consensus Version is minimally satisfied (so that the conduct is condemned by whatever counts as an overwhelming consensus of rationally defensible moral positions), that reason in favor of sanctions can be overridden by reasons not to employ sanctions. This will be the case for any legal moralist position that refuses to endorse such reasons as sufficient for employing sanctions. After all, I take Bayles and Feinberg to be claiming that Legal Moralism will label as permissible the imposition of sanctions in cases in which it is morally objectionable to do so. But i) within Realist Legal Moralism as I have formulated it such moral concerns would at least get a hearing (every rationally defensible moral position gets to weigh in), and ii) if Legal Moralism is merely one among a plurality of Liberty Limiting Principles, presumably some other principle will be capable of giving voice to the reasons why, despite Legal Moralism's holding sanctions to be justified, it would be wrong to impose them, thus overriding Legal Moralism's reason for imposing them. Admittedly this is quite vague and uncertain, but it suggests a way or arguing that the worry about overinclusiveness might not be insurmountable for the Consensus Version.

Concerns about overinclusiveness seem less pressing for the Unanimity Version. How might some conduct be judged as a serious wrong deserving legal sanctions according to every rationally defensible moral position, yet ultimately not be deserving of sanctions? This sort of worry appears to be motivated by the possibility that some conduct might be judged worthy of legal sanctions by either every (known) rationally defensible moral position yet ultimately not be worthy of legal sanctions. More specifically, what appears to bother Feinberg is the possibility of some yet undiscovered rationally defensible moral position that shows up in the future and demonstrates that however rationally defensible we might have viewed prior moral positions to be, they and the judgments that follow from them are ultimately indefensible.[41] In my judgment this type of worry should not be trivialized: in some respects pre-and post-enlightenment conceptions of morality seem to fit this paradigm (and I view religious and secular accounts in pretty much the same way). Even though the focus of this paper (the role of legal moralist arguments in SC decisions) doesn't require taking on this issue directly, I will briefly suggest that the Unanimity Version may not be any worse off than other Liberty Limiting principles in this regard: mightn't they also be vulnerable to unforeseen arguments that undermine all available rationally defensible moral paradigms (including what were thought to be legitimate Liberty Limiting Principles)? Since the problem of fallibility on the issue of the set of rationally defensible moral positions (we can never be absolutely certain that all such positions have been identified) is not unique to Legal Moralism, it is disingenuous to suppose that only Legal Moralism is vulnerable to such concerns. Further, although perhaps from a God's eye view, those who legislate conscientiously on the basis of the best available rationally defensible moral views might not ultimately be justified in having done so, it would be difficult to find fault with those who conscientiously scour the bushes for rationally defensible moral views and then conscientiously legislate in accordance with what each and every one of those views (or even an overwhelming consensus of them) would dictate. One wants to invoke a version of "ought-implies-can" and ask: how might they have behaved otherwise? One final point bears repeating: if the Unanimity Version is not the sole source of reasons pro and con regarding the justifiability of legal sanctions, then even if there were some conduct that satisfies its

conditions for justifiable imposition of sanctions, but for which sanctions are actually unjustifiable, it would be odd if some other Liberty Limiting Principle would fail to incorporate the reason why it would be wrong to impose sanctions.

It is my contention that the Unanimity and Consensus Variants of the Epistemological Version of Realist Legal Moralism provide a sketch of the most plausible versions of Legal Moralism. Indeed, if each of these versions of Legal Moralism must be abandoned, then I am prepared to agree with Cranor that we can dispense with Legal Moralism in all its forms once and for all.

IV--Four U.S. Supreme Court Cases

I will now examine Legal Moralism's role in the four Supreme Court cases which I mentioned earlier.[42] My thesis is that although the prevailing arguments in Bowers and Barnes are ultimately untenable, Legal Moralism per se is not the enemy. The Court's arguments are either not legal moralist arguments at all, or employ versions of Impure Legal Moralism that rely on alleged "secondary effects" of the failure to employ legal sanctions, or are versions of a primitive and uncritical Conventionalist Legal Moralism, whose shortcomings do not reflect on the merits of other (more plausible) versions of Legal Moralism. Somewhat surprisingly, the dissenting opinions in Bowers and Barnes most closely resemble Realist Legal Moralist arguments. And in Loving and Lawrence, the majority opinions contain reasoning that approximates what either Epistemological Version of Legal Moralism would count as legitimate, whereas the dissenting opinions in Lawrence (there was no dissent in Loving), are either not based on Legal Moralism at all, or invoke implausible versions of the view.

Turning first to the arguments in Bowers, the Court employs three arguments that have arguably legal moralist overtones.

Argument 1--Justice White argues that the Georgia statute did not violate any of Michael Hardwick's fundamental rights, given the accounts of fundamental rights that the Court had previously endorsed. The first, from Palko v. Connecticut, includes those rights "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist [if] they were sacrificed" (at 191-192). The second, from Moore v. East Cleveland, requires fundamental rights, if not explicit in the Constitution, to be "deeply rooted in the Nation's history and tradition" (at 192). Interestingly, in arguing that the Georgia statute violated no fundamental right of Hardwick's, Justice White focuses exclusively on the claim that a fundamental right to homosexual sodomy fails to satisfy the "deeply rooted" requirement of Moore while nearly completely ignoring the claim about ordered liberty in Palko. He cites "ancient roots" against homosexual sodomy, and the fact that sodomy's criminalization goes back a long way in U.S. law. Rather amazingly, Justice White then claims that this demonstrates not only that Hardwick's claim fails to satisfy the "deeply rooted" criterion; its failure to do so shows that it fails the "ordered liberty" test as well. But of course such a claim is ludicrous; it is perfectly conceivable that a society's legal and other traditions would include a plank that denies a fundamental liberty of this sort to a segment of its population. Moreover, as Justice Kennedy points out in his argument in

Lawrence, the roots of statutes explicitly and exclusively condemning homosexual sodomy are hardly deep at all.[43]

But the merits of the argument aside, my main concern is with whether this argument is best understood as invoking or relying on Legal Moralism. While it could be construed as an attempt to enforce conventional morality (and hence a species of Conventional Legal Moralism), it remains open that certain rights that form part of society's conventional morality will fail to satisfy the Court's "deeply rooted" requirement. And the "deeply rooted" requirement might be taken to indicate a closer link to the Moral Conservatism. And as far as either Epistemic Version of Realist Legal Moralism is concerned, the "deeply rooted" requirement is neither necessary nor sufficient for justifiable legal sanctions. Thus this argument would find support in only the least plausible (i.e., conventionalist) versions of Legal Moralism, but most closely resembles Moral Conservatism.

Argument 2--Justice Burger, echoing and elaborating on a similar point made by Justice White, argues that proscriptions against sodomy have "ancient roots" in the "history of Western civilization, Judeo-Christian moral and ethical standards and English common law" (citing even Blackstone's description as a "crime against nature" "not fit to be named"), and therefore to hold that there is a fundamental right to sodomy is to "cast aside millen-nia of moral teaching" (at 196). Again, we have an argument that is an instance of either Moral Conservatism or Conventionalist Legal Moralism. But even applying Dworkin's relatively loose defeasibility conditions, this represents either a set of fallacious appeals to moral authority or a blind, uncritical appeal to history, since there is no attempt to provide any reasons, let alone rationally defensible grounds, for the prohibitions to which Justice Burger refers. As such, the argument would pass muster according to only the least plausible versions of Legal Moralism which implement conventional morality uncritically.

Argument 3--Justice White argues that the "presumed belief of the Georgia electorate that homosexuality is immoral provides a rational basis for the statute." But as Lawrence Tribe points out, there are hardly conclusive grounds for even that presumption; since the statute was passed by legislators, not the electorate itself, it hardly provides conclusive grounds for the presumption, and Tribe provides good reason to doubt that such a consensus existed within the Georgia electorate.[44] But putting that issue aside, even though such a belief on the part of the electorate would provide grounds for the statute according to Conventionalist Legal Moralism, it would fail to provide adequate grounds for any other version of Legal Moralism. Indeed, what would need to be shown in order to satisfy Realist Legal Moralism (and even a Dworkinian Moral Conservative) is not simply that the statute bears a rational relation to the beliefs of the electorate. Instead, the Dworkinian Moral Conservative would require the Court to provide some possible minimally rational basis for the beliefs of the electorate, and Realist Legal Moralism would require showing that the beliefs of the electorate are consistent with rationally defensible moral positions. And Justice White has done no such thing. So once again, there is little legal moralist thought in Justice White's argument.

On the other hand, consider Justice Blackmun's dissent. He begins by asserting that no matter how "natural and familiar" the moral judgments that are expressed by the Georgia statute may be, "I believe we must analyze . . . [t]he values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is 'an abominable crime not fit to be named among Christians'" (at 199-200). In essence, he is insisting that a society's moral consensus, whether the grounds for enforcing it derive from Moral Conservatism or Legal Moralism, be backed up by some kind of reasons. And he finds that in the case of the Georgia statute, no such reasons have been given, nor are any likely to be found.

Citing cases such as Thornburgh v. American College of Obstetrics and Gynecology and Griswold v. Connecticut, he argues that the right to privacy encompasses a set of decisions that are an important part of one's way of life, and that embody the "moral fact that a person belongs to himself and not to society as a whole" (at 204). Further, a "way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different" (at 206). And he argues further that neither "the length of time [n]or the passions with which it defends" its moral convictions can justify blind implementation of a society's moral judgments (at 210). Nor does it matter if religious doctrine condemns the conduct, because "[a] State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus" (at 211-212). Moreover, Justice Blackmun points out that "[r]easonable people may differ about whether particular sexual acts are moral or immoral" (at 212). What Justice Blackmun seems to be asserting in those passages is that beyond the mere expression of moral disapproval, there are no reasons given in support of the Georgia statute, and that on the issue of moral disapproval of consensual adult homosexual sodomy, there is nothing even approaching an overwhelming consensus (let alone unanimity) to be found among reasonable moral positions. Also noteworthy is Justice Blackmun's reference to the "moral fact" (not a feeling or even a belief, but a fact) that establishes a right to personal autonomy that is more than broad enough to include the type of conduct that Georgia seeks to criminalize. So I conclude that the only defensible arguments of a legal moralist stripe to be found in the opinions in Bowers would have it that the Georgia statute should be overturned, and that if the holding in Bowers should be viewed as mistaken, it is not the result of the Court's reliance on Legal Moralism.[45]

Let us now turn to Barnes. In this case, the Justices were split 5-4 in favor of upholding the statute, but there were three separate concurring opinions (as well as two dissents). As one would expect, the arguments are all over the map.

The concurring opinions contain three arguments that have legal moralist overtones.

Argument 1--Three times Justice Rehnquist argues that the purpose of the statute is to "protect public order and morality" (although he once refers to "societal order and morality") (at 2461-2462). Unfortunately, he never specifies which aspects of public order need protecting, what they need to be protected from, or what might happen if this protection were not extended. Thus it is difficult to determine whether what he has in

mind is Conventional Legal Moralism (although here the emphasis would be on enforcing public morality), the Disintegration Thesis (hinted at in "protecting public order"--but how seriously can that be taken? "Totally nude" bars threaten complete erosion of all moral restraint?), or Moral Conservatism (some drastic change in the way of life in Indiana). But there is no hint of anything resembling Realist Legal Moralism in his argument.

Argument 2--Justice Rehnquist asserts that the statute "reflects moral disapproval" of public nudity, which is "the evil the State seeks to prevent," and that the governmental interest served by the statute is "societal disapproval of nudity in public places and among strangers" (at 2463).[46] Justice Scalia is even more forthcoming, stating that "moral opposition to nudity supplies a rational basis for its prohibition" (at 2468). These arguments reveal unabashed endorsement of Conventional Legal Moralism: mere disapproval alone provides a compelling reason for legal sanctions. And here we see clearly an important difference between Conventional Legal Moralism on the one hand and both Dworkin's view and Realist Legal Moralism on the other: where Conventional Legal Moralism holds that moral disapproval provides a rational basis for legal sanctions, Dworkin's view and RLM each hold that one must provide a rational basis for backing up moral disapproval with legal sanctions. Neither Justice Rehnquist not Justice Scalia has done any such thing.[47]

Argument 3--Justice Souter argues that the statute is justified on the basis of "the State's substantial interest in combating the secondary effects of adult entertainment" (at 2468). Among these secondary effects Justice Souter lists the encouragement of prostitution, increased sexual assaults, and attracting "other criminal activity" (at 2469). My guess is that Justice Souter would agree that the Harm Principle would cover sexual assaults, and that prostitution might fall under the heading of either Moral Conservatism (a malignant "way of life" change) or Conventional Legal Moralism. But the problem is not only that he never bothers to establish any causal link between the presence of these establishments and the alleged secondary effects, he argues straightforwardly that no such causal link needs to be substantiated. He insists that correlation is sufficient, and that anecdotal evidence is sufficient to establish correlation. To say the least, this is a rather loose set of requirements for establishing a causal link between the restricted activities and the alleged secondary "effects" that justify the restrictions.[48] Hume's difficulties with causation seem trivial by comparison. So Justice Souter's argument fails to meet the criteria for even Impure Legal Moralism.[49]

The dissenting opinion in Barnes centers on criticism of the majority and concurring opinions' takes on whether topless dancing is speech at all, let alone protected speech, the alleged connections between topless bars and negative secondary effects, as well as whether one can outlaw topless dancing as a means toward combating those secondary effects (arguing for the need to employ more specific measures when protected speech is the issue). However, a portion of Justice White's dissent includes a discussion of Justice Scalia's concurring opinion's seeming commitment to the claim that the Indiana "law is directed against nudity," and that "the purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that

people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified" (at 2465). The criticism (at least in part) runs as follows: the statute doesn't apply to nudity in the home, nor does it apply to plays, ballets or operas that include nudity, so that can't be it (at 2472). And that looks very much like what a Dworkinian criticism of a legal moralist argument might look like: the alleged moral judgment that is alleged to justify this statute would require that this prohibition be extended to these cases that you are obviously unwilling extend it to. But then that moral judgment can't be the real reason for enacting this statute. So although, as one might expect, no Justice was prepared to offer a defense of "totally nude" dancing in public on moral grounds, the dissenting argument does employ a strategy that resembles in important ways the line of argument that one would expect from the more plausible versions of Legal Moralism.

Next I would like to consider the arguments made by the Court in deciding Loving. I see this case as important both because of how the Court did decide the case, and on what grounds it refused to decide the case. The lower court trial judge who upheld the statute argued as follows:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for them to mix. (cited at 3)

And the Brief for the Petitioner relies on both the Old and New Testaments, as well as the writings of Aquinas to show that "traditional Judeo-Christian values proscribe such conduct."

As Justice Blackmun notes in his dissent in Bowers, the parallel between Bowers and Loving is "almost uncanny." If the arguments based on tradition and history which were used by the Court to argue that Georgia's anti-sodomy statute passes muster were employed by the Court in Loving, Virginia's antimiscegenation statute would have been upheld as well. Instead, the Court argued that a) religious beliefs and traditions, no matter how longly held, deeply felt or widely believed do not provide a rational basis for employing legal sanctions, and b) any rationally defensible conception of ordered liberty will entail that the race of a person's choice of a marital partner is not a legitimate ground for legal interference. More specifically, Justice Warren argued that "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Marriage is also claimed to be "one of the basic civil rights of man" and a "fundamental freedom" (at 12). The application of rational standards to a society's moral convictions (dismissing blind appeals to religious traditions) and the appeal to "any reasonable conception of ordered liberty," while not identical to, are certainly consistent with the type of reasoning suggested by Realist Legal Moralism. So Loving provides a case in which Legal Moralism was not only not the enemy--it actually provides support for the decisive argument which enabled the Court to strike down a patently unjustifiable statute.

The Court's decision in Lawrence has arguably inspired more heated controversy than any decision since Roe v. Wade. Despite its reputation among those deeply involved in the "culture wars" as a watershed moment in the fight over the legal enforcement of moral standards, careful analysis of the opinions reveals the presence of very little legal moralist thought in the Court's arguments. Justice Kennedy's majority opinion is primarily concerned with providing grounds for overturning Bowers, and the bulk of his argument is actually an endorsement of the dissents of Justices Blackmun and Stevens in that case. At one point he simply asserts that Justice Stevens' argument should have prevailed in Bowers (at 578). More specifically, Justice Kennedy maintains that the alleged historical grounds for the condemnation of homosexual sodomy offered by Justices White and (especially) Burger are actually shaky at best (at 568 ff.). And further, no matter how deeply entrenched a majority's moral convictions may be, that by itself would not justify using the coercive power of the State to enforce those convictions. In one bold stroke, Justice Kennedy disallows Conventionalist Legal Moralist grounds for legal sanctions, and at least severely restricts Moral Conservative arguments as well. The closest Justice Kennedy comes to making a legal moralist argument of his own is in his claim that the freedom to engage in homosexual sodomy falls within a class of acts of autonomy with regard to personal intimacy, among consenting adults of course, which fall under the umbrella of the general liberty, shared by all adults, to self-determination absent State interference. This is central to, and at the heart of, liberty itself, not some particular conception of it. One way of recasting Justice Kennedy's point would be that liberty, understood in this way, must be acknowledged as a core moral value, especially within the political sphere, by all reasonable moral positions, an argument that closely resembles a Realist Legal Moralist argument, but of course he doesn't put it exactly that way.

Justice O'Connor's concurring opinion focuses narrowly on establishing that the Texas statute, which prohibits homosexual but not heterosexual sodomy, violates the Equal Protection Clause of the Fourteenth Amendment. One wouldn't expect Legal Moralism to play much of a role in that kind of argument. But she does argue that mere moral disapproval is not sufficient to establish that homosexuals and heterosexuals can legitimately be treated differently by the law without violating equal protection concerns. She equates moral disapproval with statements of "dislike and disapproval," "born of animosity toward the class of persons affected" (at 582-583). Although this may not be the most natural way to frame her argument, and although Justice O'Connor herself might shy away from this characterization, one could see her as arguing that what Dworkin would call mere nondiscriminatory moral positions, i.e., moral judgments not backed up by reasons, do not provide grounds for legal sanctions, and hence those Moral Conservative and Conventionalist Legal Moralist arguments that simply endorse such judgments would be ruled out as well.[50]

Justice Scalia's dissent is another matter entirely. His argument is at times apoplectic and highly undisciplined, but I will focus on those aspects that most clearly relate to the topic at hand.

His position is that other than when "fundamental rights" (those satisfying the "deeply rooted" criterion and/or--he vacillates on this[51]--those without which there would be no liberty or justice) are at stake, a State can do whatever it chooses (i.e., use legal coercion to limit any liberty interest) so long as its action bears a rational relation to some legitimate State objective (at 593-594). In the case of the Texas anti-sodomy statute, legal enforcement of the moral disapproval of the citizens of Texas supplies the legitimate State objective (see the discussion of the "rational basis" test at 599). Once again, it should be noted that it's one thing to say that a community's moral disapproval provides a rational basis for legal sanctions, it's quite another to say that a community's moral disapproval must have a rational basis in order to provide a legitimate ground for sanctions. Justice Scalia embraces the first, Realist Legal Moralism the latter. For Justice Scalia, expressing moral disapproval is a legitimate State interest, and justifies the Texas statute. At least this argument of Justice Scalia's is a straightforward version of Conventionalist Legal Moralism, distinct from Moral Conservatism in relying on the existence of a moral consensus itself, as opposed to damage to valued institutions, as the justification for sanctions.[52]

Another recurring theme in his dissent is that (echoing arguments made in Bowers) it is impossible to distinguish homosexual sodomy from other "morals" offenses, and since a great deal of the law is "based on notions of morality," if legislation against homosexual sodomy is deemed illegitimate so would be legislation against "fornication, bigamy, adultery, adult incest, bestiality and obscenity."[53] Justice Scalia seems oblivious to there being other grounds than mere moral disapproval for employing legal sanctions in most of these cases. Obscenity can be handled by a principle declaring profound offense to be a legitimate reason for legal sanctions (Feinberg endorses that principle), adultery and bigamy can be dealt with under contract law (provided exclusivity and fidelity are part of the agreement), bestiality can be covered under cruelty to animals. Adult incest and fornication would likely be off limits, but perhaps they should be. In clear cases of legitimate uses of legal sanctions, either there are reasons for legislating available beyond mere moral disapproval, or that moral disapproval is backed up by reasons that a reasonable person could endorse, so that it's not a case of mere moral disapproval. For Justice Scalia, "society's belief that certain forms of sexual behavior are immoral and unacceptable," "the promotion of majoritatian sexual morality," and "the enforcement of traditional notions of sexual morality" are each seen as individually sufficient for justifying sanctions. Whatever one may think of these arguments, they would not be condoned by the versions of Realist Legal Moralism that I have been considering.

V--Conclusion

Thus I conclude that it is not Legal Moralism per se that is frightening, but the appeal to indefensible and poorly thought-out versions of Legal Moralism that should worry all of us. The central aim of this project is to demonstrate that the only versions of Legal Moralism that can survive minimal rational scrutiny are "defanged" versions that pose little or no threat to the rights and liberties that form the core of "liberal" democratic political values. What I think we can learn from all of this is that Legal Moralism itself is not the enemy. The enemy is muddled and careless moral thinking, which can find its

way into the legal system via Legal Moralism but by many other routes as well. And Legal Moralism can be employed not necessarily to enlarge the net of legal sanctions, but to restrict their application to those instances in which a person's behavior is clearly a wrong that warrants such interference by the legal system.

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[1] 388 U.S. 1 (1967)

[2] 106 S.Ct. 2841 (1986)

[3] 111 S.Ct. 2456 (1991)

[4] 539 U.S. 558 (2003)

[5] Christine Pierce, "AIDS and Bowers v. Hardwick," Journal of Social Philosophy v. 20 #3, p. 21, 24.

[6] Justice Scalia's dissent in Lawrence relies in part on this type of argument.

[7] The most thorough discussion of Liberty Limiting Principles is Joel Feinberg's four volume work The Moral Limits of the Criminal Law. It includes Volume I: Harm to Others, Oxford University Press (1984), Volume II: Offense to Others, Oxford University Press (1985), Volume III: Harm to Self, Oxford University Press (1986), and Volume IV: Harmless Wrongdoing, Oxford University Press (1988). In Vol. I, Feinberg introduces and provides a finely nuanced discussion of numerous such principles, at p. 26-27.

[8] Although I will not argue for the claim here, it seems that he issues of how we, in general, justify the institution of imposing legal sanctions, and what justifies imposing legal sanctions on some person in some circumstances are separable. Rawls' classic "Two Concepts of Rules" (The Philosophical Review vol. 64 (Jan. 1955), p. 3-32) provides one example of how to separate these issues.

[9] Mill's view is most clearly articulated in On Liberty, H.L.A. Hart's in Law, Liberty and Morality (Stanford University Press [1963]), and Feinberg's in the four volume treatise cited in note 7 supra.

[10] It should be emphasized that one crucial difference between Mill's concerns in On Liberty and the contemporary discussion of Liberty Limiting Principles concerns their domain of application: whereas contemporary discussions focus on the legitimate employment of legal sanctions, Mill was at least equally concerned with subtler forms of coercion, including the tyranny of the majority, which need not rely on legal sanctions for their efficacy. And even within the legal realm, some legal phenomena are, while not coercive in themselves, clearly coercive in effect (marriage restrictions, poll taxes, literacy tests and photo identification requirements, e.g.). I thank Bob Hoag for alerting me to this point.

[11] At Question 96, Article 2 in Summa Theologica.

[12] Lord Patrick Devlin, The Enforcement of Morals, Oxford University Press (1968). Indeed, the only Legal Moralist who appears to have advocated the sufficiency view is James Fitzjames Stephen (see Liberty, Equality and Fraternity, Cambridge University Press [1967]), and it is not clear that even he does so in a thoroughgoing and consistent manner.

[13] See, e.g., Richard Posner, The Economics of Justice, Harvard University Press (1991).

[14] See Michael Bayles, "Legislating Morality," Wayne Law Review vol. 27 #3 (March 1976), p. 774.

[15] As Feinberg has argued, and as we shall see shortly, a retreat from the requirement of "true morality" to the weaker "critical morality," which requires that the (conventional) standards to be enforced meet some test of plausibility, would not do either, since the critical morality to be enforced might be just as ignorant and mistaken as the standards enforced uncritically by Conventional Legal Moralism.

[16] See Bayles, "Legislating Morality," Hart, Law, Liberty and Morality, and Feinberg The Moral Limits of the Criminal Law, Vol. IV.

[17] H.L.A. Hart, "Social Solidarity and the Enforcement of Morality," University of Chicago Law Review vol. 35 #1 (1967), p. 1-13.

[18] See Richard Galvin, "Two Difficulties for Devlin's Disintegration Thesis," The Philosophical Quarterly vol. 37 (Oct. 1987), p. 420-423.

[19] I suppose that failure to enforce a society's moral consensus could result in essential, malignant changes in valued institutions other than the moral consensus itself. I take Devlin's remarks on threats to the institution of marriage would be one example of this sort of causal connection, but I prefer the example of the demise of segregation in the American South.

[20] Feinberg, The Moral Limits of the Criminal Law Vol. IV, p. 9.

[21] Feinberg, The Moral Limits of the Criminal Law Vol. IV, p. 133. He also states that the pure, strict Legal Moralism represents the most difficult challenge for the liberal.

[22] Carl Cranor, "Legal Moralism Revisited," Ethics vol. 89 (1979), p. 147-164.

[23] Peter Railton, "Moral Realism," The Philosophical Review Vol.95 (apr, 1986), p. 163-207.

[24] Christine Korsgaard, The Sources of Normativity, Cambridge University Press (1996), p. 36-37.

[25] I am assuming that among ways of trying to discouraging conduct, legal sanctions would be regarded as the most intrusive, hence demanding a higher level of justification, and thus would be reserved for the most serious offenses.

[26] Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," originally published in Yale Law Review, reprinted as Chapter 10 of Taking Rights Seriously, Harvard University Press (1977).

[27] See Feinberg, The Moral Limits of the Criminal Law Vol. IV, p. 144.

[28] In Dworkin's defense, this line of argument must be understood within the context of the Conservative Thesis and his criticism of Devlin's version of it, viz. that Devlin's version comes nowhere near satisfying even the minimum standards for rational defensibility, moral or otherwise. There Dworkin claims to be considering the merits of Devlin's arguments on its own terms, i.e., he assumes only for the sake of argument that the Conservative Thesis is true, and then argues that Devlin's version of it is inadequate.

[29] The formal characterization structure is borrowed from Cranor, "Legal Moralism Revisited."

[30] See John Rawls, Political Liberalism, Columbia University Press (1993), on the idea of an overlapping consensus.

[31] Bob Hoag pointed out that in acknowledging a plurality of Liberty Limiting Principles, there is bound to be some overlap, and I agree: some types of conduct maybe harmful, wrong and profoundly offensive, in which case imposition of legal sanctions against that conduct might be overdetermined. Only Mill's "one simple principle," as opposed to Feinberg's and Hart's endorsements of multiple principles, would have any promise of avoiding this consequence.

[32] Bayles, "Legislating Morality," at p. 774.

[33] Feinberg, The Moral Limits of the Criminal Law Vol. IV, p. 44.

[34] The reasonable person might find grounds for objecting to the Consensus Version. I consider that issue below.

[35] An argument for a version of Legal Moralism that requires the imposition of legal sanctions to be justifiable according to every rationally defensible moral code can be found in "Richard Galvin, "Limited Legal Moralism," Criminal Justice Ethics vol. 7 #2 (Summer/Fall, 1988), p. 23-36. That argument also suggests that this version of Legal Moralism would justify approximately the same scope for the net of legal sanctions as would Mill's Harm Principle; what Mill identifies as actions that cause legally cognizable

harm to others (harms that one has a right to be protected against) would roughly approximate the class of actions that are judged immoral by every reasonable moral position. Given that the fairest rendition of Mill's position is that not all harms (as setbacks to interests) are legally cognizable, only those setbacks to an interest that violate some right are deserving of legal protection, the principles may be coextensive.

[36] Of course the Consensus Version might also require her to do what her own reasonable position forbids.

[37] See Rawls, Political Liberalism, on "reasonable pluralism."

[38] John Locke, Second Treatise of Government, Chapter 8, Par. 97-99.

[39] Jean Jacques Rousseau, The Social Contract, Book IV, Chapter 2.

[40] Devlin, The Enforcement of Morals.

[41] This theme runs throughout Vol. IV of Feinberg's The Moral Limits of the Criminal Law.

[42] Since most who reject Legal Moralism fear that it would allow an overly broad net of sanctions, I shall concentrate on the Consensus Version of Realist Legal Moralism, since this "weaker" version of the view produces a wider net than the stronger version, and since the difference between it and the unanimity version lies not so much in the kind of argument required to justify imposing legal sanctions (each requires appealing to the idea of a rationally defensible moral position), but whether every such position would see sanctions as justified, or whether a clear or overwhelming consensus of such positions would do so.

[43] See discussion of Justice Kennedy's argument in Lawrence below.

[44] Bowers, brief for respondent, at p. 25, 29.

[45] Some of the arguments in Justice Stevens' dissent also have legal moralist overtones; and those arguments were noted and endorsed by Justice Kennedy in Lawrence.

[46] There is also the following: to "reflect moral disapproval of people appearing in the nude among strangers in public places" (at 2461).

[47] Bob Hoag has suggested, correctly I believe, that a position can be rationally defensible even if on some occasion a person (say, a justice) in some context (say, a judicial opinion) fails to offer a rational defense of it. And it is important to note that Dworkin's criticism of Devlin addresses this point: it's not that citizens need to be prepared to back up their moral convictions with reasons that satisfy the defeasibility conditions. Rather, as I understand it, Dworkin's position is that when considering legislation that is backed up by popular "moral" sentiment, the legislators are supposed to

determine just what kinds of reason could be summoned in support of the conviction that underlies the legislation. Similarly, it seems that the whole enterprise of justices offering arguments for their conclusions commits them to offering a defense of, i.e., reasons for, their conclusions. A justice who is adopting the kind of position I have defended would, in appealing to that position as a premise in her argument, be committed to offering some reason for concluding that some type of conduct is judged seriously immoral enough to warrant legal sanctions according to a consensus of rationally defensible moral positions. Given that no such argument appears in these opinions, it is dubious that the justices were actually invoking anything like a realist version of Legal Moralism, and thus I conclude that they didn't rely on a plausible version Legal Moralism in making those arguments.

[48] Some might insist that to refer to such phenomena as "effects" constitutes, at the very least, an abuse of language.

[49] In discussing nude dancing and Barnes Bob Hoag (rightly) pointed out that one might view not just (or even) the nude dancing as the immorality to be combated, but the audience's watching the nude dancing, or taking the pleasure that they do in observing it. But here are some thoughts on that line of argument: if the patrons are the ones behaving immorally, then Legal Moralism would seem to require that the sanctions be directed at the patrons, not the dancers. And if, as Bob (giving voice to a certain kind of argument) suggests, this may be viewed a case of immorality without any immoral conduct, then the question would be: what kind of "immorality," and what kind of Legal Moralism, are we dealing with? How "freefloating" can these "immoralities" be, if they are not attached to any kind of immoral conduct? My guess is that when pressed, most who are likely to argue this way eventually reveal their concern with the secondary effects of such activities, and rely on some version of Moral Conservatism in making their case.

[50] Bob Hoag has suggested that the rejection of Conventionalist Legal Moralism by Justices Kennedy and O'Connor should be understood as rejecting that principle as providing a sufficient condition for imposing sanctions, leaving it open that they would accept it as providing a relevant reason. But Justice Kennedy states that "[t]he Texas statute promotes no legitimate state interest" (at 578), which suggests that the presumed conventional judgment of the immorality of homosexual conduct carries no weight whatsoever. Regarding Justice O'Connor's position the evidence is mixed: at 582 she writes that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale" for imposing sanctions, which seems to support the "relevant reason" claim, but at 583 she argues that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection clause," which supports the view that it isn't even a relevant reason.

[51] At times the claim is that only rights that are deeply rooted are fundamental rights, and fundamental rights demand higher scrutiny; at others it's that only those fundamental rights that are deeply rooted (leaving it open that some fundamental rights aren't deeply rooted) get heightened scrutiny.

[52] Alan Fuchs has suggested that an alternative reading of Justice Scalia's argument is that the Constitution delineates a set of fairly specific fundamental rights, which only a compelling interest can override, and outside of which legislators are relatively free to do as they see fit. Interestingly, at a deep structural level, this position resembles that which Dworkin introduced in Taking Rights Seriously, and has been refining since: principle overrides policy, but in the absence of some principle to constrain them, policy considerations may proceed relatively undeterred. I agree that this may even be the most charitable reading of Justice Scalia's argument, but of course Dworkin would disagree violently (and rightly so) with Justice Scalia's account of the nature and extent of those rights. And if Alan's interpretation of Justice Scalia's position is correct, this would entail that legal moralist considerations play almost no role at all in Justice Scalia's reasoning in this case, thus supporting my contention that the deficiencies in his argument are not due to his reliance on legal moralist premises.

[53] Bob Hoag suggests that this reliance on consistency might be viewed as evidence of Justice Scalia's adoption of at least one of Dworkin's defeasibility conditions, viz., that convictions be tested for consistency alongside other judgments. But a more natural way to understand this argument is as an application of stare decisis to the outcome of Lawrence: that all these other instances of "morals" legislation would now have to be deemed illegitimate. So the domains of Dworkin's consistency condition and stare decisis would seem to be fundamentally different. I would also add that accepting stare decisis is not sufficient for adopting a legal moralist position.