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Liberalism, Legal Moralism and Moral Disagreement

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ABSTRACT *According to "legal moralism" it is part of law's proper role to "enforce morality as such". I explore the idea that legal moralism runs afoul of morality itself: there are good moral reasons not to require by law all that there is nevertheless good moral reason to do. I suggest that many such reasons have broad common-sense appeal and could be appreciated even in a society in which everyone completely agreed about what morality requires. But I also critique legal moralism from the special perspective of liberal political justice. Liberalism requires that citizens who disagree with one another on a number of morally significant matters nevertheless coexist and cooperate within a political framework of basic rights protections. When it comes to working out the most basic terms of their political association, citizens are expected to address one another within the limits of what Rawls has called "public reason". Critics of liberalism claim that this is an essentially a-moral (or expedient) attempt to evade substantive moral issues — such as the moral status of the fetus. I argue, on the contrary, that liberalism's emphasis on public reason is itself grounded in very deep — though (suitably) "non-comprehensive" — moral considerations.*

Introduction

In pluralistic societies such as Australia, Canada and the United States, *political justice* is often conceived in roughly the following terms: citizens with significantly different moral views about the meaning, value and purpose of life must nevertheless coexist (and in certain respects, at least, cooperate) within a broad framework of basic protections. These protections include (but are not limited to): freedom of thought and expression, freedom of religion, freedom of association, the right to vote and to run for public office, the right to live under rule of law and to have established channels for redress of grievance against public authority. On this essentially "liberal" vision of a just political order, (i) issues of *legitimately public* concern are, or ought to be, subject to democratically enacted, state-enforced laws and policies. At the same time, however, (ii) other matters, even some matters of great moral significance, are *beyond* the scope of legitimate political authority.

In contrast, "legal moralism" (at least in its purest or most extreme form) is the view that what is morally required ought to be legally required as well: law's proper function *is* to enforce "morality as such". Some of legal moralism's appeal might seem to derive from the thought that genuinely *moral* reasons are reasons of the highest or weightiest sort. From this it would seem to follow that humanly-made laws ought to accord with the "higher law" of morality. But this line of thinking still leaves us some distance from *legal moralism* — for that view goes beyond the intuitively appealing claim that laws

must be morally acceptable. It further insists that we transcribe into the legal code, virtually item for item, all of what morality bids us to do. As it happens, however, *morality itself* may call upon us to be more cautious and more modest. The legal system that is most morally acceptable need *not* be the system that seeks to enforce "morality as such". On the contrary, there is likely to be *good moral reason not to enforce by law* all of what there is *nevertheless perfectly good moral reason* to do. The attempt to legislate and enforce "morality as such" itself involves a misunderstanding of morality's own requirements — it is thus rightly castigated as a *distortion* of morality, a form of moralism [1].

Legal arrangements and practices (for example, legislatures, hearings, police, investigations, trials, punitive measures, and so on) are, after all, rather special devices — blunt and powerful in some respects, somewhat precious, tedious and cumbersome in other respects. It should not be entirely surprising to discover that such devices are (morally) appropriate to the task of realizing *some of our most cherished* (moral) *concerns*, but (morally) ill-suited and inappropriate to the advancement of *other* equally significant (moral) concerns. Indeed, one doesn't have to be a "liberal" living in a "free and pluralistic" society, to appreciate a number of reasons why this is the case.

For example, with respect to at least some important moral demands, legal "enforcement" would be futile or pointless. Perhaps a well-designed justice system would be of some help (though even this is not beyond question) in bringing down the rate at which people murder one another, or increasing their compliance with traffic safety rules. But it is unrealistic to suppose that legal restrictions and criminal punishments can increase the number of people who genuinely love their neighbours as themselves, or reduce the number of people who form subtle antipathies toward other people merely on the basis of their superficial physical appearance. As the number of laws that cannot be realistically enforced increases, so does the risk that a growing number of people will lose their respect for, and fidelity to, the rule of law more generally. Extending law's scope to spheres of life in which it is likely to be practically pointless may be only another way to weaken public confidence in the legal system as a whole.

But even when criminalizing what is morally objectionable (or legally requiring what is morally mandatory) *would* make an appreciable positive difference in the way people actually do behave, the (moral) *costs* incurred in carrying the legal enforcement scheme out are in certain cases likely to be so great as to overshadow the prospective benefits. Indeed, there are several different ways in which an enforcement policy might wind up being at least as problematic, *morally* speaking, as the state of affairs that would have obtained in its absence. For one thing, enforcement efforts expend *general* resources such as money and personnel; hence, by trying to enforce one particular regulation, society may run the risk of being unable to provide adequate support for (morally) *higher-priority* requirements. The costs are, so to speak, general opportunity costs.

On the other hand, costs can outweigh benefits in a way that is more *specifically* a function of the *nature* of the moral wrong in question and/or of the moral quality of the *legal measures* that would have to be taken to combat it. Thus, some moral wrongs, real though they are, cannot be specified with sufficient clarity and precision to allow for a *morally* acceptable *legal* remedy. It may well be true, for example, that on at least some occasions a citizen speaking "in a (genuinely) disrespectful way" about "a (truly) sincere, conscientious, capable, hard-working public servant" has seriously wronged the target of his diatribe. It does not automatically follow, however, that there is a

reasonable legal response. For there may be no satisfactory way to spell out in advance, and without undue vagueness and ambiguity, the difference between morally unacceptable scorn and ridicule on the one hand, and more legitimate modes of criticism, on the other. If that is indeed the case, then *legally sanctioned measures* putatively aimed at addressing the wrong in question (for instance, censorship, the prerogative to sue) are too likely to serve another, quite different purpose — giving those in authority the means by which to "chill" *legitimate* criticism and to render themselves *less accountable* for their own misdeeds.

In addition, there are morally unfortunate behaviours (for example, people having children before they are ready and able to bear either the financial or emotional burdens of responsible parenting) which — in addition to resisting sufficiently clear and precise formulation in legal terms to allow for criminalization — would inevitably give rise to a number of other enforcement problems. Thus, it seems unlikely that there would be any way to pre-empt or intercept such conduct with any degree of practical success unless public officials were granted the prerogative to employ highly *invasive* measures and/or permitted to employ somewhat *unreliable* methods for gathering evidence and marshalling proof.

Of course, from a distinctively "liberal" point of view, authority so expansive would be in serious conflict with such fundamental rights as personal privacy and due process. But non-liberals would have plenty of cause for concern as well. If we extend to those in authority the prerogative to monitor even the most private and intimate aspects of people's lives, we also run the risk of enabling such authorities (for example, through blackmail, extortion, and so on) to silence their critics, enrich themselves, and in general to exercise undue leverage over citizens' lives. In permitting (putative) upholders of the law to use *unreliable* methods of evidence gathering and of proof, we not only give them a better chance of apprehending and convicting more actual offenders, but a greater liability to "catching" and "punishing" many *innocent* people as well. In their sincere zeal to catch the real offenders, those in authority might be eager to overlook this fact. But "power corrupts" and officials with such crude tools at their disposal will also be in a position to frame and "punish" their political (and personal) opponents and thus to retain their power even when they themselves are incompetent and/or corrupt.

Bringing law to bear on very minor wrong-doing might, at least in some cases, do more harm than good, albeit for a somewhat different reason. For example, there are likely to be at least some occasions on which parents — for example, by speaking to their children a little too harshly, or overseeing their activities just a bit too inattentively — fail to do as they ought. In the absence of a larger and more persistent pattern of genuinely serious abuse or neglect, these must be regarded as inevitable but modest mistakes for which even the mildest punitive remedies in law would be, from a moral point of view, disproportionately great. Of course, there is also the fact that whenever parents are penalized for their conduct toward their children, even for somewhat more seriously deficient conduct, the penalties must be very well-considered — lest the children, directly or indirectly, suffer as much or more in the process.

This last reflection is relevant to another, still more disturbing kind of conduct for which legal regulations are not likely to play a morally satisfactory role. Leaving aside the many pros and cons that moral thinkers have adduced on the subject of suicide, and on whether or not there ought to be a legally recognized right, either in general or

in certain special circumstances — to bring one's life to an end — there do appear to be at least some well-defined cases in which such conduct would be wrong. Though solely responsible for raising very young children, an adult commits suicide — not while suffering from clinical depression, not on account of an unrelievably painful terminal illness, not in the prospect of contracting a devastatingly debilitating disease, but for another less respectable motive — for example, out of "spite" toward someone who hadn't reciprocated in romance. It is not unreasonable to think that in such circumstances, and with such motives, the act of suicide cannot be morally justified. In more than one way, the parent has seriously wronged the children who are now left behind. But what is the role of the law? If suicide, at least in such circumstances, were a crime, we would have the paradoxical situation that those who succeed in committing the crime are not available for punishment, whereas those who attempt but fail are. (Here we can bracket the question of whether the individuals who try but fail might be suffering from responsibility-mitigating temporary depression — which partly contributes to their inability to carry through successfully.) The suggestion that such persons can be "punished" by withholding their estate from their heirs leads us back to the problem that it is the innocent victims, rather than the malefactor, who thus suffer. (It might be thought that for deterrent effect, such penalties can be threatened prospectively, but then, in the unfortunate event that deterrence has failed, not actually carried out. But of course, the credibility, and hence effectiveness, of a deterrent threat will depend, at least in part, on how consistently it is carried out.)

One more reason not to think that law and morality can completely coincide derives from the observation that moral guidance is not exhausted by prohibitions and requirements. There are moral *aspirations* and *ideals* as well. Thus, some of what might be morally worthwhile to do is in the realm of the supererogatory, *not* the mandatory. A person who performs a supererogatory deed is, or may well be, worthy of moral admiration, but someone who does not do what is supererogatory is generally not to be criticized, let alone penalized. Of course, law might attempt to enter the picture here, not by threatening punishments but by offering rewards. In many cases, this might be a reasonably happy alignment of law with morality. In other cases, however, the moral worth of the supererogatory conduct might well depend on the motivation of the agent. Thus, some deeds that are beneficent but (nevertheless) beyond the call of duty may lack *moral* significance unless the agent genuinely does them *for* the sake of the recipient, rather than for some ulterior motive, such as a public reward.

In the light of these reflections, there is a strong, common sense case against legal enforcement of the whole of what morality requires. Indeed, this case could be made even in (at least some) societies in which everyone were completely confident about, and in complete agreement concerning — the nature and scope of morality's demands. Thus it is interesting to note how even some of the staunchest advocates of the "principle" that law's proper role *is* to enforce morality came to acknowledge many of the considerations canvassed above. James Fitzjames Stephen, for example, while doing intellectual battle against the likes of J. S. Mill, and insisting on the use of legal coercion "for the purpose of establishing and practically maintaining morality" [2] — was also prepared to concede the *futility*, hence impropriety, of "legislating against unchastity" [3]. Moreover, Stephen recognized that in respect to certain kinds of wrongs, legal measures can be both inefficacious *and disproportionate*. Thus he wrote that "trying to regulate the internal affairs of the family, the relations of love and

friendship, or many other things of the same sort, is like trying to pull an eyelash out of a man's eye with a pair of tongs" [4]. Stephen's zeal for legal enforcement of morality was further tempered by his concern for privacy ("Legislation . . . ought in all cases whatever scrupulously to respect privacy" [5]) — and his appreciation of the unfairness of legislating against wrongs that are not "capable of distinct definition and specific proof" [6].

But for Stephen, these (and other) considerations that seem to reduce law's proper scope in enforcing morality merely reflect the "practical difficulty which limits the application" but not the validity of the "principle itself" [7]. In contrast with Stephen's interpretation of the situation, however, many of the moral objections to transcribing all of morality into law are *morally principled*, not merely "practical" (such as the costs of administration or the fallibility of administrators). For example, consider the idea that it would be unbefitting the nature of the moral deed itself to elicit its performance by the provision of external incentives. In cases of this sort, it is the inherent nature of morality rather than administrative costs, inefficiencies, fallibilities, and so on, that tells against legislating "morality as such". Or consider the point — also acknowledged by Stephen himself — that certain wrongs are *by their very nature* not crisply definable and that it would be *unfair* to punish people in accordance with standards that, in the nature of the wrong, must remain vague. The difficulty has less to do either with administrative costs or with the fallibility of the administrators than with *the nature of the wrongs* in question and *the nature* of judicial fairness. It is true that such difficulties become apparent to us when we try to envision what it would be like for such a policy to become our actual practice — but all morality *is* about practice (what to do, how to live, how to treat one another, and so on) and so in that sense all moral concerns, and all moral difficulties, are (trivially speaking) "practical" ones. In a similar vein, limiting the scope of legal authority out of respect for personal privacy is a reflection of a principled, not merely "practical", worry.

To sum up this discussion so far: we have seen how a variety of moral considerations — some practical, others more deeply principled — come together to make a strong case against legal moralism in its purest form. Perhaps no thoughtful philosopher could ever maintain such a view without coming to acknowledge several important qualifications. Perhaps only (some of the most) authoritarian religious leaders, professing adherence (however sincerely it may be difficult to tell) to a received faith or text, can, without equivocation or embarrassment, associate themselves with it. The crucial point is that even those moralists whose aspiration is that everyone live in accordance with one and the same morality can (and probably should) oppose the enforcement of "morality as such". What then is, or ought to be, the position of "liberals" — i.e., of people who seek a political society in which people are free to have (within limits) *different* moral outlooks? Is liberalism a form of amoralism about the law, or are liberals concerned, albeit for *moral* reasons of their own special sort, to limit the scope of law's authority to enforce morality? To this question, I now turn.

Liberalism and Conscientious Disagreement: Three Strategies

Now *liberalism*'s case against legal moralism could and certainly would tap into considerations of the sort canvassed above — for example, that enforcement would be

altogether ineffective, or effective but at too great a cost to the enforcement of other, higher-priority moral objectives, or enforceable only by measures that are themselves at least as morally objectionable as the proscribed conduct, and/or by measures that would arm those in authority with excessive discretion all too readily abused, or by measures disproportionate, or otherwise inappropriate, to the nature of the offence. Thus we might envision, in Rawls's terminology, an "overlapping consensus": the exponents of somewhat divergent moral viewpoints — both liberal and non-liberal — nevertheless concurring in the judgment that not all morally objectionable conduct can rightly be proscribed and punished by law.

There is, however, another more distinctively "liberal pluralistic" reason for rejecting legal moralism as well. And this has to do with the very fact that in a free society people *will not be in complete agreement* on *what is morally* right or wrong in the first place. Given the many (other) good reasons (some of which we have just been canvassing) that there are for *not* enforcing all of what is (in truth) morally appropriate for people to do, citizens in a pluralistic society might well think it a very good idea to "agree to disagree" and thereby leave one another free to go their separate ways in a number of important areas of their lives. In this spirit, some issues would then be regarded as more "private" than "public" and hence appropriately taken off the public political "agenda" from the very start.

It would be a mistake, however, to suppose that as soon as a controversy arises, an issue must be *removed from* public political debate and treated as a purely "private" matter. In many cases, this would be neither practical nor appropriate. For example, there are significant ends that are widely acknowledged to be legitimate public policy preoccupations (for instance, national defence, environmental protection) but that can only be satisfactorily pursued through well-coordinated efforts on a society-wide scale. People, especially in a free and diverse society, are likely to disagree, not so much about the objectives, but about their more specific interpretation and about the best means by which to achieve their realization. In liberal constitutional democracies, such controversies are generally addressed and resolved *through* ordinary electoral and political processes, processes whose scope of authority is nevertheless constrained by constitutional guarantees of certain fundamental civil and political rights.

Of course, if people *never* disagreed about anything of legitimately joint concern, there would be little or no need for authoritative public-policy-making decision-procedures in the first place. But needless to say, no such prospect can be realistically anticipated. What then is the moral merit of settling disagreement through "democratic" political processes rather than, say, a "benevolent" despot? It might be argued that such processes are an especially fair way to resolve matters peacefully. For matters of genuinely collective concern, citizens may differ in their conscientious opinions, but they are nevertheless equally entitled to speak, to participate, to vote, and so on. Of course, if the resources with which to study, learn, speak out, listen, be heard, and so on are not widely and equitably available, the fairness of the process must be somewhat more in doubt. But to the extent that a society really does approximate to the democratic ideal of meaningful participatory opportunity for all, it might also be claimed that its political processes will be not only fairer, but more likely to lead to better informed and more thoroughly considered public policy decisions (and/or to the election of better informed representatives who are more responsive to those they represent).

A Third Category and A Third Strategy

Some controversial issues may yet fall into a third category — issues whose resolution is, or would be, "constitutive of" the very *framework* of political society. I have in mind here questions about political society's basic membership conditions, basic rights, and fundamental legal and political procedures. I would suggest that an issue of this sort cannot be so reasonably addressed in either of the aforementioned ways — that is, either as a purely private matter or as a matter to be settled by ordinary democratic political processes. To relegate such issues to the realm of the private would be to abandon the project of trying to live together in one and the same political society.

In this vein, such questions as, "Who is to count as a living *member of political society, entitled to its most basic protections*? When does someone's tenure in that status *begin?* When does it *end*?" do appear to be matters that cannot simply be "taken off the political agenda" from the start (even if, *in the end*, the wisest course is to provide at least *some* legally protected scope for the exercise of individual discretion). These are *public* issues that must be resolved by public procedures. Then why *not* deal with them "through ordinary political processes, in which any and all moral and religious concerns are vigorously pressed and whichever position receives a majority of the votes then prevails"?

This robustly democratic response seems to raise a number of questions of its own, and/or to beg the very questions at issue — at least where matters of such fundamental constitutional significance are concerned. After all, at stake in such debates is the very question of who or what is a member of society, and which ways of resolving disputes should count as sufficiently reasonable and fair. Thus we may well ask, *who are* the "voters" in *this proceeding* and what warranted *their* having that privileged status? Who should they consider themselves as representing? And why should the mere number of voters on one side or the other be decisive? *How then*, and *on what basis*, are such controversial but seemingly fundamental public policy issues to be addressed and resolved?

The Ideal of Public Reason

It has been suggested that when it comes to matters of this sort — "constitutional essentials" according to Rawls's terminology [8] — persons who are capable of having and giving reasons, should proceed in a very special way: instead of invoking their own personal authority or adducing special premises from their own respective religious and/or philosophical standpoints (which have pitted them against one another in the first place), they should try to appeal to considerations that they can reasonably expect to be intelligible to, and to have the force of reason for, others no less than for themselves. They may also strive for consensus on such issues, *not* by appealing to considerations they and others *share*, but by adducing considerations *internal* to *other* people's point of view. The idea is that even though one must sincerely acknowledge that the reasons one presents are grounded in an outlook to which one doesn't oneself subscribe, one is nevertheless reasoning in a way that expresses one's respect for others and *their* capacity for morally conscientious reflection. This insistence on finding considerations that others can appreciate (either in their own terms or on grounds that

are mutually appreciated) has been called (most notably by Rawls [9]) the ideal of "free public reason".

Now the request to try to persuade one another by reasoning in accordance with such an ideal, *appears* to involve a more sweeping dismissal of "legal moralism", or more accurately perhaps, a further *distancing* of liberalism *from morality*. This, at any rate, seems to be the opinion of one of liberalism's leading critics, Michael Sandel. Considering the question of abortion (which I have identified above as a fundamental "constitutional" question for liberal political society) Sandel writes that a liberal "political conception of justice sets aside the controversy about the *moral* status of fetuses" [10] (emphasis added). Sandel seems to believe that since at least some moral arguments are to be "bracketed" in favour of what can be offered within the limits of free public reason, liberals must somehow consider the true moral status of the fetus to be irrelevant. A bit later, Sandel suggests that what liberals are really doing is betraying their own substantive view that the fetus doesn't really have significant moral standing in the first place. Thus he adds, that debates such as the one over abortion "show that a political conception of justice must sometimes presuppose an answer to the moral and religious questions it purports to bracket."

There are, I believe, two problems with this representation. First, the form of liberalism we have been considering does not "bracket" the "moral aspect" of such issues as abortion, or call upon people to consider them on purely "political" rather than moral grounds. As we have noted above, the question of who or what is to be counted as a protected member of society is a constitutional "essential" that can neither be dismissed as a purely private matter nor properly addressed through ordinary politics. It is a moral question about the most fundamental terms of political association. Secondly, because it concerns *particularly fundamental* uses of *public political power*, persons who are capable of giving and attending to reasons are called upon to reason with one another in certain ways — not merely to say, "this is the true doctrine", or "this is what the highest religious authority for my faith has declared" — but to offer considerations that one can reasonably expect to have the force of reason for others as well. This does *not* mean, however, that whatever cannot be established on this basis is to be dismissed as silly or false. One of the root ideas of liberalism, at least of the sort under consideration here, is that it does not purport to be about the "whole" of life's meaning, value and purpose, but only about the *fairest* way for citizens to relate to one another concerning the exercise of state coercive authority.

Indeed, the moral importance of taking such an approach has been appreciated by fervently religious opponents of abortion. In this connection, it is interesting to take note of the most recent Papal Encyclical on abortion [11]. There tribute is paid, not to the need for uncritical obedience to religious authority, but to conclusions that can be delivered by universally available modes of understanding. Thus the idea that there is a right to life from the moment of conception is said to be "based upon natural law" (and not only on "the written Word of God"), a law that "is written in every human heart, knowable by reason itself"!

In a similar vein, Robert George, a political philosopher who also happens to be a devout Catholic opponent of abortion, writes — "Then there is the claim that the argument for the human status of the early embryo depends on controversial religious premises about 'ensoulment'. It does not. The question is not about the embryo's eternal destiny. That is a religious matter. . . . The question is whether embryos are or

are not whole, living members of the species Homo sapiens . . . There is no need for those of us who oppose embryo destruction to appeal to religion. The science will do just fine. If anything, the theological judgment that the early embryo is already "ensouled" *follows from* the fact — established by science — that it is a human being, not the other way round" [12]. Of course, arguments have also been offered in the spirit of free public reasoning on the *other* side of the debate, that is, in support of the right to choose abortion, and such arguments can be found in the writings of Judith Thomson, Ronald Dworkin and others [13].

Thus, it remains to be seen just how a good faith debate about abortion, conducted with fidelity to the ideal of public reason, would play itself out. I elsewhere explore the extent to which some arguments offered in the spirit of public reason nevertheless fail to qualify, while other arguments, which do indeed fall within the bounds of such reasoning, fail to establish their conclusion [14]. But within the limits of the present discussion, it will not be possible to do justice to the substance of this controversy. What I shall try to do instead, is rejoin the more fundamental question of why we should appreciate the ideal of free public reason in the first place.

As already suggested, the call to argue with one another within the limits of free public reason seems to be rooted in an ideal of fairness and mutual respect. But, following Sandel and others, perhaps the question still remains not entirely well-answered — why should this attitude typically take priority over respect for the "truth" about how people *morally* ought to live? Alternatively, why should respect for one another's status as free and equal moral deliberators carry any significant weight over and against one's own most conscientious views about what *ought* to be done?

(I) Some familiar but problematic ideas about the nature and defence of "liberalism"

Liberalism as Amoralism. Liberalism is sometimes represented (and attacked) as an *a-moral* view. On this caricature, liberals are said to have no substantive moral commitments of their own (or none in which they place any confidence). And this is said to be what explains how and why they can urge a political system in which persons are at liberty to have and pursue many different moral conceptions, and yet are sometimes *urged to refrain from* invoking, at least in certain kinds of arguments with one another, the *full* resources of their own moral position. Of course, an a-moral view cannot be the basis for substantive moral conclusions. But liberalism aims to provide significant guidance in the design of basic political institutions, guidance intended to *override* competing claims arising from *substantive* moral viewpoints. So this "amoralist" reading of liberalism is clearly inadequate.

Liberalism as Value-Neutralism. A related but importantly different view is that liberalism represents a "neutral" standpoint from which we can "fairly" resolve conflicts among substantive moral views. Against this approach, it has often been argued that there is no "view from nowhere" — that any standpoint constitutes a *particular perspective* from which some positions will be favoured and others disfavoured. On this view, "neutrality" is an incoherent possibility. If our aim is to be "fair" then we must specify "to whom" and "in respect to what." Once we do this, we are already committed to one particular set of values and can no longer pretend to be "neutral." (This is a point about "neutrality" of reasons and not the more familiar and trivial concession about the impossibility of achieving "neutrality of effects".)

Liberalism as a Modus Vivendi. Alternatively, it is said that liberalism represents a "modus vivendi" — a pragmatic, working solution which persons advocating otherwise irreconcilable points of view can and should find it in their best interest to settle for, whenever it becomes clear that no group holds sufficient power to achieve safe and lasting control of society. On this approach, liberal political society is (at best) a kind of "second-best". And (more importantly) the "legitimacy" and the stability of a free, pluralistic society is merely *contingent on a stalemate* in the balance of force within society.

Liberalism as "Just Another" Morality. In response to these views, it may be urged that liberalism does indeed reflect significant, substantive moral values (for example, respect for persons as leaders of their own lives, capable of autonomous moral judgment) hence it is *not* based either on moral indifference, incoherent neutrality, or mere prudence. The problem then becomes — why isn't liberalism, thus construed, nothing more than *just another moral point of view*, "on all fours with" the others, *without* any special claim to serve as the grounding for the design of the larger framework within which all citizens can be constrained to operate? On this view, liberalism would be (as John Rawls once put it) "but another sectarian doctrine" [15]. Critics of liberalism might eagerly ask, "How are you 'liberals' any less 'moralistic' than the 'moralists' you oppose? And what greater right do you have to regulate the basic structure of political society in accordance with your values than they have in accordance with theirs?"

On this rather unflattering way of thinking about liberal political justice, liberalism's apparent opposition to "moralism" can be re-cast as follows: the "moral requirements" that liberals are loathe to see the State enforce are requirements that liberals themselves, from the standpoint of their own "liberal" *morality*, *reject*. Thus if liberals oppose laws regulating drugs or intimate sexual practices between consenting adults, it is because their own liberal values predispose them to be in favour of "free sex" and experimentation with drugs. If liberals oppose official state establishment of religion, it is not so much because they believe in freedom of religious conscience, but because they themselves are *indifferent* to religion and greatly value freedom from (imposition of) religion.

On this view, what is distinctive about liberalism is not that it is "anti-moralist" but that it recognizes only a comparatively *small number of substantive moral requirements*. Taking this interpretation to its logical conclusion, one might suggest that the only reason liberals typically oppose regulation of conduct between "consenting adults in private" is that they happen to believe that whatever is done consensually and in private must, for that reason alone, be morally all right. In response, defenders of liberalism might urge that liberalism is *not* committed to the rather ambitious view that anything people do consensually in private is therefore morally permissible, but only to the *more modest* claim that *making laws against* such conduct is morally *im*permissible.

To steer a course between such alternatives as value-indifference (or skepticism) on the one hand, and the "sectarianism" of imposing one particular (albeit fairly limited) "comprehensive" moral doctrine on the other, Rawls, in his later years, developed a position he called "political liberalism." The idea is to frame liberalism in a way that does not depend on controversial moral, religious or even philosophical positions. At one point, Rawls puts his philosophical strategy this way — "justice as fairness deliberately stays on the surface, philosophically speaking" [16]. In contrast with "liberalism" (understood as just another "comprehensive" moral viewpoint), liberalism as a "political

conception of justice" has three distinctive features: (i) it is not a view about the "whole of life" but solely about the basic political structure of society; (ii) it is not presented as resting on any particular more comprehensive conception; (iii) it is worked up on the basis of intuitive ideas that could plausibly be represented as latent in the shared political culture of liberal democratic society. The two ideas that seem to be most pivotal in this regard are the idea (or ideal) of persons as free and equal citizens, and the idea (or ideal) of political society as itself a fair scheme of cooperation.

In partial defence of Rawls, I think it must be pointed out that if we were to make the case for liberalism depend on *one particular view* of what gives life its meaning, value and purpose, we would have to be untrue to liberalism itself: for liberal justice is meant to provide a framework within which people may hold and pursue different conceptions of life's meaning, value and purpose. Nevertheless, I have a number of reservations, not about political liberalism, but about Rawls's particular interpretation and defence of it: (i) What are political liberals to say to, or about, those who do not share the relevant "intuitive ideas"? (ii) What are they to say to, or about, those societies for whom such ideas are not indeed "latent" in the public political culture? And above all — (iii) How can we effectively "stay on the surface, philosophically speaking" *if* we are to overcome fairly deep divisions in people's value-thinking and find a sufficiently authoritative common ground on which to coexist and cooperate?

Rawls's response is to suggest that many people will find political liberalism plausible *in its own right*, as an appealing, "free-standing" view, so to speak; *or*, *if* any further support is needed, it can (and should) come from *within* the "comprehensive" viewpoints to which the factions in a free society subscribe, insofar as such viewpoints are indeed "reasonable." But this move gives rise to at least two additional worries: (i) Can we rule out the possibility that there are "reasonable" viewpoints which *cannot* participate in the appropriately overlapping consensus? (ii) Indeed, does the appeal to what is "reasonable" implicitly incorporate fundamentally liberal preoccupations without adequately explaining just *how* they are grounded in "reason"?

An Alternative Proposal

I believe Rawls's warning that we should not defend liberalism by appeal to a "comprehensive" moral, religious or philosophical position is sound. But I would also urge that his concern neither warrants nor requires "staying on the surface" in our philosophical defence of liberalism. What is needed, I suggest, is a defence that runs "deep" but is at the same time "lean" or narrow. Liberalism's defence must be "deep" enough to explain how and why liberal democratic values and arrangements are the appropriate basis for regulating deeply-rooted divisions in society; at the same time, however, such a defence must not appeal to considerations which, if taken seriously and applied consistently, would provide determinate answers to virtually all the questions we might ask about life's meaning and purpose. Such sweeping comprehensiveness would indeed constitute an over-moralization of the appropriate attitudes required for living in a political community — in terms of Tony Coady's characterization (in this issue) of the forms of moralism more generally, it would be a version of "moralism of scope" [17].

In contrast with the image of "staying on the surface" — we might form instead the metaphor of lean but deep (and strong) support pillars: pillars constitutive, not of

a fully elaborated and furnished house, but of a strong and stable framework, within whose spacious expanses many different kinds of living "spaces" can be freely installed and safely inhabited. The root idea is that persons must acknowledge both their own, and one another's, equal status as beings capable of having reasons, forming judgments, and leading their lives accordingly.

This perspective is not, to be sure, neutral with respect to all possible values and life-styles (for no such "neutrality" is possible) but it does not presuppose or require any particular "comprehensive" outlook. In other words, it does not attempt to spell out the *whole* of life's meaning, value and purpose, nor does it try to guide every significant aspect of human conduct. Rather, it specifies morally essential features of the process by which matters of common concern can be settled in a mutually respectful way and it sets reasonable limits to the ultimate scope of legitimate political authority. Here I can only conclude, as follows, by offering a sketch of the lines along which I believe this view might be more deeply defended as "most *morally* reasonable".

Someone who, in debating the fundamental terms of political association, is unwilling to try to stay within the limits of what might be established by free public reason, can be reasonably accused of a kind of inconsistency on the highest level of reflection — an inconsistency that is implicit either in one's dealing with others *and/or* in one's attitude toward oneself.

Thus, suppose that in seeking state-enforcement of fundamental restrictions on other people's lives, such a person offers nothing more in support of that aspiration than his or her own "gut feeling" or the religious authority of someone in whom he or she believes. It is natural to ask whether the person in question would find it acceptable *for others* to force their will upon him on grounds comparably opaque to *his* understanding and conviction. If *not*, then he is appropriating to himself a special, privileged position and implying, without reasonable warrant, that comparable scope should not be given to others' capacity for discerning what public law and policy should be. After all, persons should not be treated differently without good reason.

(I take it that it would only be question-begging for him to answer that "Since they don't subscribe to the true doctrine, that is proof that they are inferior in their capacity to discern what is truly right." An interesting question then is what *would* count as an appropriate, non-question-begging demonstration that someone — whether oneself or another — is, or will be, lacking the appropriate "capacity" to be taken seriously as a free and equal participant in constitutional debates.)

But suppose, instead, that such a person "bites the bullet" and, while allowing that he cannot reasonably prove his own superiority, goes on to claim (however sincerely, it may be difficult to tell) that "other persons are just as entitled to try to get *their* views implemented by the use of state power, even if *their* reasons are no more 'public' in character than my own!" Someone who takes this stance is abandoning the project of trying to "reason together" — in favour of a contest of sheer numbers, force, charisma, etc. And in this way, he/she is not really respecting *other persons* as beings capable of moral reason, judgment, understanding, etc. To be "consistent" of course, he also has to allow that others have just as much "right" to *disrespect him in the same way*.

But this seeming consistency is purchased at a price. Such a person is, in a puzzlingly *inconsistent* way, not taking seriously his or her *own* moral conscience. After all, we are considering a person who has put so much stock in *his own understanding* of

how people should live, that he is fully prepared even to *force* them to behave accordingly. How then can he be willing to grant others the right to *force their will on him*, *without* requiring them to make any effort to engage *his* ability to understand and appreciate *their* reasons? (Here arises the suspicion that such a person could not really accept the principle that everyone has a right to impose his or her moral understanding upon everyone else, but is only making a pretence of so acknowledging (i) in order to appear impartially consistent and (ii) in the confidence that in such a free-for-all, he has the *de facto* power to prevail.)

In this section, I have tried to offer at least the sketch of an argument for the ideal of free public reason — an argument that is not grounded in any particular "comprehensive moral outlook" but is *addressed to any* morally conscientious person who seeks to play a role, whether by reason or by force, in shaping the fundamental terms of political association.

Conclusion

According to "legal moralism" the proper role of law is to "enforce morality as such". In this paper, I have explored a variety of reasons for believing that *morality itself* calls upon us to be more cautious. Such a view may appear to be unique to the moral ethos of "liberal constitutional democracies" — to pluralistic societies such as Australia, Canada and the United States, where citizens with significantly *different* moral views must nevertheless coexist (and in certain respects, at least, cooperate) within a certain broad framework of basic protections (including, but not limited to, freedom of thought and expression, freedom of religion, freedom of association). But as we have seen, a strong case against legal moralism can be made by appealing to broader, commonsense, moral concerns. Such concerns have the force of moral reason for non-liberals as well as for liberals, and could make good moral sense even for a society in which everyone were in complete agreement on what morality requires.

After exploring such considerations, we turned to a more distinctively "liberal pluralistic" reason for rejecting legal moralism — the fact that in a free society people will *not completely agree* on *what is morally* right or wrong in the first place. Where there is moral disagreement, the liberal conception of political justice seems to suggest two strategies: (i) to regard some issues as more "private" than "public" and hence to have them "taken off the public political agenda"; (ii) to acknowledge that some morally controversial issues have a legitimate place on the public agenda, but then try to resolve such matters through ordinary democratic politics. Here I suggested that there is a third category as well: issues whose resolution is *constitutive* of the very *framework* of political society. These include questions about political society's *basic membership conditions*, basic rights, and most fundamental decision-making procedures.

To settle such constitutional matters, it has been urged that — instead of invoking their own personal authority or adducing special premises from their own respective religious and/or philosophical standpoints (which have pitted them against one another in the first place) — citizens should strive for consensus on such issues, *either* by appealing to considerations they and others *share*, or by adducing considerations *internal* to *other* people's point of view. In Rawls's terms, this is the ideal of staying within the limits of "free public reason".

Such an ideal — along with the "political conception of liberal justice" associated with it — might *appear* to involve not merely a rejection of "legal moralism" but a distancing of liberalism from *morality itself and from the quest for genuine moral insight.* Thus critics of liberalism such as Michael Sandel, have complained that a liberal "political conception of justice sets aside" substantive moral issues such as "the *moral* status of fetuses". To meet this challenge, I surveyed a number of different ways of trying to make moral sense of "political liberalism" and its approach to such questions as the abortion controversy. I argued against such claims as that liberalism, with its emphasis on "public reason" is an "a-moral" view, or an expression of mere expedience, or "just another sectarian" moral doctrine. I suggested instead that liberalism can, and must, be supported by moral considerations which though "lean", are nevertheless especially deep. I concluded by sketching a *moral* defence of the idea that when citizens seek to shape the most fundamental terms of their political association they must address one another within the limits of "public reason". That defence was not tied to some particular "comprehensive moral outlook"; rather, it was addressed to any morally conscientious person who cares deeply about, and hence wishes to play a role in shaping, the political framework in which everyone will be constrained to live.

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NOTES

[1] See the other papers in this issue more directly concerned with characterizing the nature of moralism as a vice.
[2] James Stephens *Liberty, Equality, Fraternity* (Chicago and London, University of California Press, 1991; first edition, 1873), p. 62
[3] *Ibid.*, p. 152.
[4] *Ibid.*, p. 162.
[5] *Ibid.*, p. 160.
[6] *Ibid.*, p. 151. It is worth comparing Stephen's position with that of Patrick Devlin, a leading twentieth century exponent of the idea that it is "the duty of the law" to "concern itself with immorality as such" (*The Enforcement of Morals* London, Oxford University Press, 1965, p. 3; cf. p. 14). While allowing that "as far as possible privacy should be respected" (p. 18), Devlin insisted that considerations of privacy "do not justify the exclusion of all private immorality from the scope of the law" (p. 19). Instead, what Devlin envisioned was that "The boundary between the criminal law and the moral law" be "fixed by balancing in each particular case." (p. 22).
[7] *Ibid.*, p. 141.
[8] Cf. John Rawls *Political Liberalism* (New York, Columbia 1996).
[9] *Ibid.*
[10] Michael Sandel *Democracy's Discontent: America in search of a public philosophy* (Cambridge, Mass., Belnap Press of Harvard University), pp. 20–21.
[11] *Evangelium Vitae* (*The Gospel of Life*) (New York, Random House, 1995).
[12] Robert George *Clash of Orthodoxies: law, religion and morality in crisis* (Wilmington, Del., ISI, 2000), pp. 320–21.
[13] Cf. Ronald Dworkin, *Life's Dominion* (New York, Vintage Books, 1994); Judith Thomson, Abortion, *Boston Review*, Summer 1995; A defense of abortion, *Philosophy & Public Affairs*, Fall, 1971.
[14] Liberalism and abortion, an unpublished manuscript.
[15] Justice as fairness: political not metaphysical in *John Rawls: Collected Papers*, edited by S. Freeman (Cambridge, Mass., Harvard University Press) p. 409.
[16] *Ibid.*, p. 395.
[17] Tony Coady, The moral reality in realism, this issue.