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Defining Legal Moralism

Abstract: This paper discusses how legal moralism should be defined. It is argued that legal moralism should be defined as the position that “For any X, it is always a *pro tanto* reason for justifiably imposing legal regulation on X that X is morally wrong (where “morally wrong” is not conceptually equivalent to “harmful”)”. Furthermore, a distinction between six types of legal moralism is made. The six types are grouped according to whether they are concerned with the enforcement of positive or critical morality, and whether they are concerned with criminalising, legally restricting, or refraining from legally protecting morally wrong behaviour. This is interesting because not all types of legal moralism are equally vulnerable to the different critiques of legal moralism that have been put forth. Indeed, I show that some interesting types of legal moralism have not been criticised at all.

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Should morality as such¹ be legally enforced? This is the claim of the legal moralists (Devlin, 1963; George, 1993; Moore, 1997; Stephen, 1878). Recently there has been a “revival of legal moralism”(Duff, 2010, p. 19), with a surge in papers defending legal moralism.² This renewed interest makes legal moralism interesting as a rival to other theories of criminalization.

However, there is considerable confusion about the core claim of legal moralism. The legal moralists’ claim about the relation between morality and law has been defined as the statement that moral wrongfulness is a sufficient condition for imposing legal restrictions,³ the claim that it *can* be sufficient,⁴ and the

1 By morality as such, I mean *all* of morality as opposed to a specific part of morality.

2 Cf. (Alexander, 2010; Duff, 2014; Dworkin, 1999; Galvin, 2008, 1988; George, 1993; Green, 2013; Kekes, 2000; Moore, 1997; Petersen, 2010; Scoccia, 2013; Wall, 2013)

3 Cf. (Hart, 1963, p. 6; Alexander, 2003, p. 128)

4 Cf. (Petersen, 2011)

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claim that it is a reason for imposing legal restrictions.⁵ It has been seen as the claim that all of morality is the proper concern of the law,⁶ *some* harmless immoralities are the proper concern of the law,⁷ *all* harmless immoralities are the proper concern of the law,⁸ the improvement of character is the proper concern of the law,⁹ some parts of morality are the proper concern of the law,¹⁰ and “the criminal law must be harmonized with ordinary moral intuitions[...]” (Ristroph, 2010, p. 1152).

In this paper, I discuss the definition of legal moralism and draw some key distinctions between different types of legal moralism. It is important to engage with legal moralism in general because it claims to provide an answer to the question of what laws we ought to have. One can hardly think of a question that is more important for lawmakers, and those who elect them, to reflect on. Identifying the proper definition of legal moralism is an important first step to properly engaging with legal moralism for at least two reasons. First, it clarifies the debate between the legal moralists and their critics, by identifying who counts as a legal moralist and who counts as a critic. If the core claim of legal moralism remains unclear, having a structured debate about the legal enforcement of morality becomes difficult. Second, many critiques of legal moralism apply only to specific types of legal moralism, whereas other types remain unscathed by the critiques. Thus a distinction between different types of legal moralism is useful.

What we should want of a definition of legal moralism

A definition of X should contain a list of necessary and jointly sufficient conditions of being X, i. e. every view contained within the definition of legal moralism should be an instance of legal moralism, and no view outside of the definition should be an instance of legal moralism. The question is how the necessary and sufficient conditions of qualifying as a legal moralist should be determined. A helpful tool is the *use criterion*, according to which the definition of legal moralism should reflect how the term “legal moralism” is used. However, as this

5 Cf. (Devlin, 1963, pp. 12–13; Feinberg, 1988, p. 324; George, 1993, p. 47)

6 Cf. (Moore, 1997, p. 80)

7 Cf. (Petersen, 2011, p. 85)

8 Cf. (Scoccia, 2013, p. 515)

9 Cf. (Wall, 2013, p. 456)

10 Cf. (Duff, 2014)

paper is partly motivated by the observation that legal moralism is used in multiple ways, this raises the question of which uses of legal moralism should be taken as authoritative.

Fortunately, there is more agreement about *who* the legal moralists are than about what legal moralism is. This agreement allows us to extract a definition of legal moralism from the views defended by scholars, who are widely considered to be paradigmatic legal moralists. I focus on Devlin and Moore. It was in response to Devlin that Hart first coined the term “legal moralism” (Hart, 1963, p. 6), and generally at least a brief reference to Devlin is a staple in papers on legal moralism.¹¹ While Moore is not cited as a legal moralist as often as Devlin, it is notable that recent criticisms of legal moralism largely seem to be addressing Moore. In Husak’s “Overcriminalization”, as well as in Duff’s “Answering for Crime”, the attacks on legal moralism are synonymous with an attack on Moore’s position (Duff, 2007, pp. 47–49, 84–89; Husak, 2008, pp. 196–206). Therefore the views of Devlin and Moore play key roles in finding a proper definition of legal moralism. The converse is also true. If, by a given definition of legal moralism, paradigmatic opponents of legal moralism, like Feinberg, qualify as legal moralists, this is a good reason to be sceptical of that definition. The central claims of Devlin and Moore are summed up in the following passages:

[I]t is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter. (Devlin, 1963, pp. 12–13)

On such a theory [Moore’s own], legislatures *prima facie* should criminalize all immoral behaviour because it is immoral (Moore, 1997, p. 80).

We should also make another requirement for a definition of legal moralism. Namely, legal moralism should be a view of the relation between the law (the *legal* component) and whatever conduct qualifies as morally wrong (the *moral* component). The most important consequence of this requirement is that it cannot be part of the definition of legal moralism that legal moralists hold certain substantive moral views about what conduct is, or can be, morally wrong in the first place. Many commonly proposed definitions of legal moralism run afoul of this requirement. For instance, the requirement forbids making the conviction that harmless immoralities exists a part of the definition of legal moralism. Nevertheless, I think we have a weighty reason for making the requirement.

¹¹ Cf. (Arneson, 2013, p. 435; Dworkin, 1999; Feinberg, 1988; Galvin, 2008, p. 94, 1988, p. 24; George, 1993, p. 5; Green, 2013, p. 473; Husak, 2008, p. 196n; Kekes, 2000, p. 26; Murphy, 2013, p. 420; Ristroph, 2010, p. 1151; Scoccia, 2013, p. 513; Wall, 2013, p. 456)

Namely, including substantive moral views about what conduct is morally wrong is to misconstrue the debate between legal moralism and its critics. The critics of legal moralism rarely attack the legal moralists for holding false substantive moral views. Instead, the line of attack tends to be that morality should not be legally enforced. In their critiques of legal moralism, neither Feinberg, nor Husak, nor Duff claim that the legal moralists are mistaken about what conduct is morally wrong, rather they claim that legal moralists are wrong about the appropriate legal regulation of morally wrong conduct, whatever may constitute morally wrong conduct (Duff, 2007, pp. 47–48, pp. 82–89, 144; Feinberg, 1988; Husak, 2008, pp. 196–206).

Legal moralism as the claim that wrongdoing is sufficient for criminalization

The term “legal moralism” was originally coined by Hart (1963, p. 6). In “Law, Liberty, and Morality”, Hart asks the following questions:

Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime? (Hart, 1963, p. 4)

Hart then proceeds to identify those who answer the questions in the affirmative as legal moralists (Hart, 1963, p. 6). The three questions resemble each other but are not identical. Someone who answers yes to the first and third questions endorses the enforcement of morality by the criminal law,¹² whereas someone can answer yes to the second question without believing that morality should be enforced by *law* at all, to say nothing of criminal law. Those who answer yes to the second question hold that there is a moral permission to enforce morality, while those who answer yes to the third hold that there is a moral duty. As the three questions are not completely equivalent, it is possible to answer yes to one of them, without answering yes to any of the others. Thus, if we hold legal moralism to be the position of someone who answers yes to one of these questions, we arrive at three different definitions of legal moralism, depending on which question we focus on. However, it is possible to conceive a definition that is compatible with answering yes to all three claims, which will be a good candidate for Hart’s definition:

¹² On the assumption that any law that imposes punishment is a criminal law.

LM1: For any X,¹³ it is an all-things-considered sufficient condition of justifiably imposing legal regulation on X that X is morally wrong.¹⁴

Whereas the second question only mentions the enforcement of morality without going into detail about whether the enforcement is through legal means, it is safe to assume that Hart had legal enforcement in mind. Both the first and third questions explicitly make reference to the *legal* enforcement of morality; furthermore, Hart's book is itself called "Law, Liberty, and Morality", and large parts of it are aimed at Devlin's argument for the permissibility of the *legal* enforcement of morality. Because of this, LM1 seems a fair representation of the position Hart had in mind when he characterised legal moralism.

LM1 is not a good definition. From the perspective of Hart's aim, which was criticising Devlin, LM1 is a bad definition because it does not necessarily capture Devlin's view. Devlin claimed that there could be no *principled* limits to the legal enforcement of morality, not that there could be no limits at all (See Devlin, 1963, pp. 12–13, pp. 21–22, p. 118). If Devlin believed that the immorality of an act was all-things-considered sufficient to justify imposing legal restrictions, he could have dispensed with the word "principled" altogether (Simester, 2012, p. 183). Neither does it fit the position of Moore, who lists a number of ways in which X can be immoral without this being a sufficient condition of permissibly imposing legal regulations on X (Moore, 2014, 1997, chap. 18), and provides several examples of moral wrongs that should not be criminalised, like morally wrongful suicide and morally wrongful exercises of one's freedom of speech (Moore, 2014, pp. 204–205). In fact, LM1 describes a view that nobody defends. If this is the definition of legal moralism, there are no legal moralists.

Limiting the scope of the moral component of legal moralism

Informed by the failure of LM1, two amendments can be made to the definition of legal moralism. First, the scope of the moral component of legal moralism

¹³ Typically X will be an act or omission, but it could also be different mental states, statuses, or anything that could plausibly be morally wrong.

¹⁴ Alternatively, Hart's use of "sufficient" can be interpreted as meaning "*pro tanto* sufficient", such that he suggests a weaker definition of legal moralism, namely that "the immorality of X is *pro tanto* sufficient to justify imposing legal restrictions." Hart is not entirely clear on this. As my primary aim here is not to criticise Hart but to criticise LM1, I adopt the stronger claim. The weaker interpretation of Hart would yield a definition of legal moralism more like LM3, discussed below.

can be limited such that legal moralism is no longer a position about the relation between morality *as such* and the moral permissibility of imposing legal restrictions. Second, the proposed relation between the immorality of X and the moral permissibility of imposing legal restrictions on X can be changed in such a way that the immorality of X provides a *pro tanto* reason for legally restricting X. These amendments lead legal moralism to be defined as follows:

LM2: For any X, it is a *pro tanto* reason for justifiably imposing legal regulation on X that X is morally wrong in a certain way.

Duff's definition of "modest legal moralism" (2014, p. 222) as well as the definition proposed by Feinberg (1988, p. 324) are examples of LM2. I shall discuss each definition in turn, as it will highlight why a definition along the lines of LM2 cannot be a good definition of legal moralism.

Duff's "Modest Legal Moralism"

Duff defines modest legal moralism in the following way:

A modest Legal Moralism, by contrast, holds that only certain kinds of moral wrongdoing are even in principle worthy of criminalization; for many kinds of wrongdoing, the conduct's wrongness gives us no reason at all to criminalize it. (Duff, 2014, p. 222)

It should be noted that Duff speaks of criminalization, not the imposition of non-criminal legal restrictions. However, the problems with Duff's definition arise independently of whether one focuses on criminal or non-criminal restrictions. Duff's definition and LM2 in general is problematic. If we adopt Duff's definition, then a great number of people are suddenly transformed into modest legal moralists, including Feinberg because he too claims that certain kinds of moral wrongdoing provides reasons for criminalization, namely the wrongs that are also harms or offenses (Feinberg, 1984, p. 105). In order *not to* qualify as a modest legal moralist on Duff's definition, one has to claim that *no kinds of moral wrongdoing are even in principle worthy of criminalization*. This erodes the usefulness of the concept of legal moralism because it turns modest legal moralism into a thesis that exceedingly few would deny.

Feinberg's definition

Another example of a definition of legal moralism that restricts the moral component is the one proposed by Feinberg, he defines legal moralism as the view

that “it is always a good reason in support of criminalization that it prevents non-grievance evils or harmless immoralities.” (Feinberg, 1988, p. 324).¹⁵ Unlike Duff’s “modest legal moralism”, Feinberg’s definition is not too weak. Many scholars, including Feinberg himself, deny that harmless immoralities provide good reasons for criminalization.

However, Feinberg’s definition provides neither sufficient nor necessary conditions for being a legal moralist. To see why, consider the two following positions:

- (1) *The bizzaro harm principle*: The only good reason in support of criminalization is to prevent harmless immoralities.¹⁶
- (2) *Harm-focused moralism*: Morality as such should be legally enforced, but only behaviour that harms other people can ever be morally wrong.

By Feinberg’s definition, (1) is an example of legal moralism and (2) is not. However, (1) is incompatible with both Devlin and Moore, whereas (2) is compatible. To Devlin, (1) would be an example of the kind of principled limit to the enforcement of morality that could not exist. Even though Devlin would disagree with (2),¹⁷ the disagreement has nothing to do with Devlin’s legal moralism but is due to (Devlin’s perception of) the moral convictions of the English population in 1965, and thus, Devlin’s legal moralism is compatible with (2). The opposition between the legal moralism defended by Devlin in “The Enforcement of Morals” and (2) is contingent on the content of positive morality. According to Devlin’s *legal moralism*, whatever morality is affirmed by the population should be legally enforced (Devlin, 1963, p. 15), but it is perfectly possible for a population to believe that only harmful behaviour can be immoral, and if this is the case, the opposition between Devlin’s legal moralism and (2) vanishes.

¹⁵ In Feinberg’s terminology, “non-grievance evils” and “harmless immoralities” are the same thing. Like Duff, Feinberg is speaking of criminalization, not legal restrictions as such, and like Duff, the problems with the definition are independent of this difference between Feinberg’s view and LM2.

¹⁶ (1) is a purely theoretical construct and probably has no actual defenders. It is nevertheless interesting as an example of a view that qualifies as legal moralist according to Feinberg’s definition. This is so as we would want a definition of legal moralism to not only classify actually existing views correctly, but also merely possible views.

¹⁷ Feinberg argues that Devlin may in fact be a harm-focused moralist (Feinberg, 1988, pp. 133–140). However, Petersen and Häyry have raised some doubts about this by pointing to Devlin’s commitment to a principle of the sanctity of human life, according to which several instances of harmless conduct can be morally wrong (Devlin, 1963, p. 7; Häyry, 1991, p. 205; Petersen, 2010, p. 219).

According to Moore all immoral acts should *pro tanto*¹⁸ be criminalised because of their immorality. If harmful behaviour can be morally wrong, as nobody disagrees that it can, then (1) is incompatible with Moore's legal moralism. Moore does not endorse (2), but he would still see it as compatible with legal moralism. To Moore, whether a position is an example of legal moralism only depends on whether morality as such should be legally enforced according to that position. The entirely different question of what can actually be immoral has no bearing on what qualifies as legal moralism (Moore, 1997, p. 80). Thus, holding the position expressed in Feinberg's definition is neither a necessary nor sufficient condition of being a legal moralist. This is so because persons who affirm (1) qualify as legal moralists by Feinberg's definition, even though they are not legal moralists, and persons who affirm (2) cannot qualify as legal moralists according to Feinberg's position, even though they are legal moralists.

A more charitable reading of Feinberg can yield a small amendment to the definition, so that it now reads: *If* harmless immoralities exist, it is always a good reason in support of criminalization that it prevents non-grievance evils or harmless immoralities. This definition avoids the problems posed by (2), for even if a given legal moralist does not think that harmless immoralities exist, she would still have to concede that *if* they did, they would provide good reasons in support of criminalization. Otherwise, she would be defending a position that is neither compatible with Devlin nor Moore and would not be a legal moralist in any recognizable sense. Amended in this manner, Feinberg's definition provides a necessary condition for qualifying as a legal moralist. However, the problems posed by (1) remain unalleviated, and the amended definition fails to provide sufficient conditions for qualifying as a legal moralist, as (1) would still be exactly the kind of principled limit to the enforcement of morality, which Devlin based his legal moralism on denying the existence of. As long as Feinberg defines legal moralism as a view *about* harmless immoralities, the problems will remain, for though it is true that legal moralists have spilled a lot of ink on harmless immoralities, the doctrines espoused by both Devlin and Moore are about more than harmless immoralities. They are concerned with the legal

18 Moore uses the term "prima facie", but "*pro tanto*" seems to convey his meaning more clearly, as Moore does not believe that there is a reason to legally enforce morality that upon closer inspection can cease being a reason, but rather that there is a reason to legally enforce morality that can be outweighed by other reasons. Consider for instance, the following passage on abortion; "The woman's autonomy may *outweigh*, but does not *exclude*, the wrongness of killing a foetus."(Moore, 1997, p. 660). This is incompatible with holding that moral wrongness only provides prima facie reasons, but quite compatible with the view that it provides *pro tanto* reasons.

enforcement of morality *as such*. This includes harmless immoralities, but it is not limited to it.

It might be objected that the critique of Feinberg's definition is not fair, because according to Feinberg's taxonomy of liberty-limiting principles,¹⁹ legal moralism is one principle among other principles (e. g. the harm principle, the offense principle) that are not mutually exclusive (Feinberg, 1984, p. 10). Thus, one might defend Feinberg's definition of legal moralism by claiming that Devlin and Moore are pluralists in the sense that they accept both the harm principle and legal moralism as valid liberty-limiting principles. The critic might then say that the incompatibility of (1) with Devlin's and Moore's views about the relation between morality and law is not due to a conflict between (1) and legal moralism, but due to a conflict between (1) and the harm principle, which Devlin and Moore also affirm.²⁰ However, this objection presupposes that we accept Feinberg's harm-based taxonomy of liberty-limiting principles according to which a normatively and legally relevant distinction can be made between harmful and harmless immoralities. However, legal moralists would not accept such a harm-based taxonomy, and indeed Moore explicitly rejects Feinberg's taxonomy in "Placing Blame" (Moore, 1997, pp. 647–652). It is precisely part of the point of the legal moralism of Moore to deny that the distinction between harmless and harmful immoralities is relevant for the law. In Moore's view there are not two separate principles governing the relation of harmful and harmless wrongs to the law, but a single principle governing the relation of *wrongs* to the law (Moore, 1997, pp. 647–652). The objection fails because it presupposes taxonomy of liberty-limiting principles, which prominent legal moralists would not accept.

Legal moralism and *pro tanto* reasons

Restricting the moral component of legal moralism was not a fruitful strategy. However, this was not the only new feature of LM2. LM2 also introduced the notion that the immorality of X provides a *pro tanto* reason for imposing legal restrictions. We may try to keep this feature of LM2 and propose the following definition of legal moralism:

LM3: For any X, it is always a *pro tanto* reason for justifiably imposing legal regulation on X that X is morally wrong.

¹⁹ The kind of principle that legal moralism is.

²⁰ I thank an anonymous reviewer for suggesting this objection to me.

This definition has some clear advantages. It is a good description of the claim originally made by Devlin that there can be no principled limits to the legal enforcement of morality (Devlin, 1963, pp. 12–13). On this definition, it is always a reason for justifiably legally restricting X that X is morally wrong, but the reason can be overridden by other reasons. Thus, there is no “principled limit” because every decision not to legally regulate what is morally wrong must depend on a concrete weighing of reasons and not on *a priori* claims about this particular moral wrong just not being the business of the law. LM3 also coheres with the view of Moore (1997, p. 80). However, if only harmful conduct could be morally wrong LM3 would have the same extension (i. e. the same implications for what could be criminalised) as the harm principle. Thus LM3 might be challenged on the grounds of being too weak.

Is LM3 too weak?

In his paper on the definition of legal moralism, Petersen discusses defining legal moralism as: “(b) If the conduct of type A is regarded as (or is) immoral, then the state has *a reason* to criminalize A” (Petersen, 2011, p. 84). He rejects (b) in favor of defining legal moralism as (d): “If the conduct of type A is regarded as (or is) immoral this *can* provide a sufficient reason for the state to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed” (Petersen, 2011, p. 85). Petersen’s reasons for rejecting (b) in favor of (d) is (b)’s “lack of distinctiveness”, by which he means that on this definition legal moralism is indistinguishable from other theories of criminalization (Petersen, 2011, p. 84). This is so for two reasons: first, most justifications of criminal prohibitions centre on the immorality of the prohibited conduct; second, if only harmful acts can be wrongful, there is no difference between (b) and the harm principle (Petersen, 2011, p. 84). Because of the similarities between (b) and LM3, this is relevant as a critique of LM3 and raises the question whether LM3 is too weak. I argue that the first of Petersen’s criticisms of (b) fails, while the second criticism reveals the way in which LM3 differs from (b). However, a variation of the second critique does point to a weakness in LM3, which leads me to revise the definition.

It does not follow from the fact that every justification of criminal prohibitions ultimately appeals to the immorality of the criminalised conduct that the state has a reason to criminalise all immoral conduct. Even if all criminal prohibitions are justified by reference to the immorality of the criminalised conduct, there may be some immoral conduct that there is no reason to criminalise, specifically it may be that only certain kinds of immorality provide reasons for

criminalization. This is exactly what is denied by legal moralism defined as LM3. According to LM3 all immoral conduct provides a reason for criminalization. This is clearly distinct from the claims made by the critics of legal moralism like Feinberg, who hold that only harmful or offensive immoralities provide reasons for criminalization (Feinberg, 1984). Furthermore, Duff, Husak, Simester, and Von Hirsch all deny that the state always has a reason to criminalise immoral conduct (Duff, 2007, pp. 47–48; 89; Husak, 2008, p. 200; Simester and Von Hirsch, 2011, pp. 29–30) making it is exceedingly hard to see why (b) (and LM3) is “not distinct” from other theories of criminalization as it is not just distinct, but downright incompatible with the, far from obscure, theories of criminalization favoured by those scholars. Therefore Petersen’s first argument for the indistinctiveness of (b) fails because it does not apply to (b), but rather to a definition of legal moralism as the position that immorality is *necessary* for justifying criminalization.

The second line of attack is that if only harmful conduct can be wrong, then (b) is *not distinct from the harm principle*. Petersen might be correct in this. However, in this case, LM3 has some advantages over (b). To say that the immorality of X is a *pro tanto* reason for justifiably imposing legal regulations on X, rather than just saying that X is a *reason*, is to say that we have a reason for justifiably imposing legal regulation on all moral wrongs *because they are morally wrong*. When we stipulate that only harmful conduct can be morally wrong, the extension of LM3, (b) and the harm principle become similar, but LM3 still has a different intension than the harm principle. Even if all morally wrong conduct is harmful (as we stipulate) and all harmful conduct is morally wrong, LM3 and the harm principle will focus on different aspects of the conduct when assessing what we have a reason to criminalise. LM3 would take its starting point in the conduct’s wrongfulness, while the harm principle would take its starting point in the conduct’s harmfulness. Even if the principles would ultimately have the same implications for what legislation was justified, this difference in intension would still be an interesting difference. As Tadros writes about the difference between two other principles that might have similar extension but have dissimilar intension “[i]ts practical importance would be in the kinds of arguments that decision-makers are entitled to rely on when justifying the decision to criminalize something” (Tadros, 2012, pp. 171–172). Similarly, even if we stipulate that only harmful conduct can be wrong, and LM3 and the harm principle would thus have the same extension, the lingering difference in intension would have practical importance in the kinds of arguments that legislators could use to justify new legislation.

However, the second line of attack could be sharpened. If it is not only the case that harmful conduct can be morally wrong, and vice versa, but also the

case that *harmfulness* is conceptually equivalent to *moral wrongfulness* such that there is no difference between saying “X is harmful” and “X is morally wrong”, then LM3 and the harm principle would not only have the same extension, but also the same intension. To guard against this possibility, LM3 is revised as follows:

LM3*: For any X, it is always a *pro tanto* reason for justifiably imposing legal regulation on X that X is morally wrong (where “morally wrong” is not conceptually equivalent to “harmful”).

Claiming that harmfulness and moral wrongfulness are not conceptually equivalent is compatible with both claiming, and denying, that harmless immoralities exist. For instance, harmless immoralities might not exist, even though harmfulness and moral wrongfulness are not conceptually equivalent. This would be the case, if all immoral conduct was harmful, but some harmful conduct was not morally wrong. Thus, adding the clause does not violate the requirement that substantive views about what can be morally wrong in the first place should not be a part of the definition of legal moralism. Furthermore, there is a real difference between making it part of the definition of legal moralism that legal moralists do not believe harmfulness and moral wrongfulness are conceptually equivalent and making it part of the definition of legal moralism that harmless immoralities exist.

Petersen’s favoured definition, (d), faces some problems of its own because of the weirdness of the claim that the immorality of X *can* provide a sufficient reason for criminalising X. If it is the immorality of X *qua* immorality that provides a sufficient reason to criminalise X, then all immorality must have this property, and therefore the immorality of X *must always be sufficient for criminalization*, but this definition is rejected by both me and Petersen (Petersen, 2011, p. 83). So what can Petersen mean? One interpretation is that the immorality of X is sometimes not a sufficient reason for criminalising X because it can be outweighed by countervailing reasons, like the harm caused by criminalization (Petersen, 2011, p. 86). But then (d) collapses into (b) because in reality the reason that the immorality of X is sometimes sufficient for criminalising X and sometimes not is because the immorality of X *always provides a reason* for criminalising X, but this reason can be outweighed. A second interpretation is that (d) says something more than (b) because it also contains the clause that the legal moralist must believe that there *actually exists* some harmless immoralities that we do have sufficient reason to criminalise. But this claim runs afoul of the requirement outlined above, that holding a certain substantive moral view about what can be morally wrong in the first place should not be part of the definition of legal moralism. To make the claim that harmless immoralities ex-

ists part of the definition of legal moralism is to include holding a certain substantive moral view about what can be morally wrong in the first place in the definition of legal moralism, albeit a very broad one. In the beginning of this paper, I tried to give some reasons to be sceptical of including substantive moral views about what can be morally wrong in the first place in the definition of legal moralism,²¹ (though these reasons hardly qualify as a knockdown argument). Thus, Petersen's own favoured definition (d) either collapses into (b) or runs afoul of the requirement that it should be part of the definition of legal moralism that one holds certain substantive moral views, which gives us a reason to be sceptical of it.

In the end it seems that affirming LM3* is a necessary and sufficient condition of being a legal moralist, making LM3* an appropriate definition of legal moralism. Unlike LM1, LM3* does have supporters. Unlike LM2, LM3* reflects the views defended as legal moralism by Moore and Devlin. In the remainder of this paper, I distinguish between different types of legal moralism and show that this typology provides a useful heuristic for understanding the debates about legal moralism by classifying the defenders and critics of legal moralism. This classification of the legal moralists and their critics will show that some types of legal moralism have been entirely overlooked in the debate.

Six types of legal moralism

It is possible to identify different types of legal moralism by distinguishing between different interpretations of LM3* based on different understandings of the words “morally wrong” and “legal regulations”. Interpreting these words in various ways yields six types of legal moralism. It is important to distinguish between different types of legal moralism because not all types of legal moralism are vulnerable to the same criticisms. First, I merely outline the two distinctions. Second, I classify the adherents of legal moralism accord-

²¹ Note that the clause added in LM3* is not vulnerable to the same critique. The claim that harmfulness and moral wrongfulness are not conceptually equivalent is not a substantive view about what can be morally wrong in the first place, but a clause about how the concept of moral wrongfulness should be understood. Unlike the claim that harmless immoralities exists, the claim that harmfulness and moral wrongfulness are not conceptually equivalent tells us nothing about what can be morally wrong, but only that when we say “moral wrongfulness” we are not just saying “harmfulness”.

ing to the type they endorse and the critics according to which type of legal moralism they criticise.

Positive and critical morality

Hart distinguishes between positive and critical morality (Hart, 1963, p. 20). Positive morality should be understood as the moral convictions that are dominant in the society, whereas critical morality concerns what is actually morally required. Legal moralism can concern both positive and critical morality. To the positive legal moralist, the mere moral disapproval of homosexuality by the majority is a *pro tanto* reason to legally restrict homosexuality, whereas the critical legal moralist will deny that anything other than the *actual* immorality of homosexuality can give such a reason.

Criminalization, legal restrictions, and regulation by omission

“Legal regulations” can be interpreted in three different ways. Traditionally, the opponents of legal moralism have focused on the criminal law (Duff, 2007; Feinberg, 1984; Hart, 1963; Husak, 2008) but even though many legal moralists also have this focus (George, 1993; Moore, 1997) others do not (Stephen, 1878, p. 144). As Alexander points out, one can hold the position that moral wrongfulness provides reasons for legal restrictions but not for criminalization (Alexander, 2003, p. 135). An example of legal restrictions other than criminalization would be the taxation of immoral behaviour. This dichotomy does not exhaust the possible ways of legally enforcing morality. The legal moralist legislator can also impose restrictions on what is morally wrong by *omitting* to legislate. As certain kinds of immoral behaviour are only possible (at a reasonable risk and cost) if the state takes some sort of action, a lack of legislation may place just as severe limits on the possibility of doing moral wrong as an outright prohibition. An example of this is the non-enforceability of slavery contracts, even when the slave has made a fully informed and fully voluntary choice to sell himself into slavery. Nothing prevents the two parties from drawing up the contracts, but the contract cannot have any legally binding force.²² This leaves us with six forms of legal moralism, summarised in the table below.

²² The unconscionability doctrine, according to which American courts can refuse to enforce “manifestly unfair” contracts could be an example of this kind of legal moralism. In an interes-

Table 1 Overview of the six types of legal moralism.

Types of legal moralism	Criminalization of immorality	Other legal restrictions on immorality	Omitting to legislate or restrict of immorality
Positive morality as the basis on which to legislate	(1) Positive criminalizing legal moralism	(2) Positive restricting legal moralism	(3) Positive omitting legal moralism
Critical morality as the basis on which to legislate	(4) Critical criminalizing legal moralism	(5) Critical restricting legal moralism	(6) Critical omitting legal moralism

NB: The different types of legal moralism are numbered for later reference.

It is important to distinguish between the six types of legal moralism because most critiques of legal moralism target only some types of legal moralism while leaving others untouched. Indeed, I shall go on to show that some types of legal moralism are left unembarrassed by *any* of the classic critiques of legal moralism. Below, I provide an overview of who endorses which type of legal moralism and which critiques target the different kinds of legal moralism.

Classifying the legal moralists

To demonstrate the usefulness of the definition and typology outlined above, I will here try to determine which kind of legal moralism three paradigmatic legal moralists, James Fitzjames Stephen, Lord Patrick Devlin, and Michael Moore, have defended.

James Fitzjames Stephen

Stephen is classified as a critical restricting legal moralist (type 5). Determining whether Stephen is a positive or critical legal moralist poses some difficulties. Consider the following passage:

[The aim of law] is to establish, to maintain, and to give power to that which the legislator regards as a good moral system or standard (Stephen, 1878, p. 150).

ting paper, Shiffrin argues that the unconscionability doctrine is not paternalist, but provides only a legal moralist justification instead (Shiffrin, 2000).

Neither positive nor critical legal moralism fits comfortably with this claim. On the one hand, Stephen is clearly not saying that the prevailing morality of the population should be legally enforced. On the other hand, his position differs from critical legal moralism because he is not advocating that critical morality should be legally enforced, but rather that what should be legally enforced is what the legislator regards as a good moral system. However, if we ask *how* a critical legal moralist legislator can determine what morality actually requires, the answer will correspond to Stephen's claim in the passage. As a legislator, I can come no closer to the actual truth about the requirements of morality than to conscientiously examine my considered judgment on what is a "good moral system". This seems to support the claim that Stephen was a critical legal moralist. However, another passage seems to indicate the opposite:

Legislation should be graduated to the existing level of morals in the time and country in which it is employed. [...] To try to do [otherwise] is a sure way to produce gross hypocrisy and furious reaction. [...] Law cannot be better than the nation in which it exists, though it may and can protect an acknowledged moral standard, and may gradually be increased in strictness as the standard rises (Stephen, 1878, pp. 159–160).

This seems to fit better with positive legal moralism. However, the reason Stephen gives for fitting legislation to the existing level of morals, is the bad consequences of not doing so, not that there is no positive reason to enforce critical morality. This seems like a claim about the conditions under which the *pro tanto* reasons to enforce critical morality are outweighed by other reasons, not a claim that the legislator only has *pro tanto* reasons to enforce positive morality. Therefore, Stephen is best understood as a critical legal moralist. Stephen is a restricting legal moralist as he acknowledges that if Mill's harm principle had only concerned the criminal law, then:

[I]t would be hardly worth discussing. It would not affect in practice the questions of liberty of opinion and discussion (Stephen, 1878, p. 144).

Furthermore, in several places, Stephen states that the criminal law ought only to concern itself with "the grosser forms of vice" (Stephen, 1878, p. 152), while lesser forms of vice can be regulated by the civil law (Stephen, 1878, p. 150). This indicates that Stephen does not think that we have *pro tanto* reasons to *criminalise* all immoralities, but only to *legally restrict* them.

Lord Patrick Devlin

Devlin is a positive criminalising legal moralist (type 1). Consider the following passage:

Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral (Devlin, 1963, p. 15).

This places Devlin among the positive legal moralists. Note the difference with Stephen's view. While according to Stephen, the legislator should legislate on the basis of what she regards as a good moral standard, which must be what she sincerely believes is the demands of critical morality, according to Devlin, the legislator should legislate on the basis of the moral convictions of "right-minded" persons, whose moral convictions could very well differ from what the legislator regards as the true demands of morality. This subtle difference makes Stephen a critical legal moralist and Devlin a positive legal moralist. As Devlin's key claim, that there could be no principled limits to the legal enforcement of morality by the state (Devlin, 1963, p. 13), is made in Devlin's discussion of the criminal law, it seems that Devlin thought that there is a *pro tanto* reason to *criminalise* all immoral behaviour. This would make him a criminalising legal moralist.

Michael Moore

Moore is classified as a critical criminalising legal moralist (type 4). Moore claims that the legal moralist legislator has to believe in some sort of moral realism:

[A] legislator acting on this theory of legislation [legal moralism] would believe that in some sense there are right answers to moral questions [...] and that such right answers do not depend upon what most people in this society happen to think these matters (Moore, 1997, p. 645).

This makes Moore a critical legal moralist. Furthermore, Moore is very clear that his thesis only concerns the criminal law, making him a criminalising legal moralist (Moore, 1997).

Classifying the scope of the criticisms of legal moralism

In the previous section three legal moralists were classified. In this section, I examine which types of legal moralism have been the focus of the critiques of

legal moralism put forth by John Stuart Mill, H. L. A. Hart, Joel Feinberg, and Joseph Raz. I focus on what types of legal moralism the critics criticise, without assessing the plausibility of their arguments.

John Stuart Mill

Though Mill's harm principle is incompatible with any version of legal moralism, it is striking that in "On Liberty" Mill never mentions any *actual* immorality that the harm principle protects from legal regulation. Rather he seems exclusively concerned with arguing against paternalism and the legal enforcement of positive morality²³ and makes his case by arguing that the behaviour in question is simply not morally wrong but merely a question of prudence or a demand of positive morality (Mill, 1859, pp. 75–77; 81). Furthermore, Mill frequently contrasts the impermissibility of paternalism and positive legal moralism with the *permissibility* of the legal enforcement of critical morality (Mill, 1859, pp. 75–77; 81). In "Utilitarianism", Mill even seems to make a positive case for the legal enforcement of morality when he writes that "the idea of penal sanction, which is the essence of law, enters not only into conception of injustice, but into that of any kind of wrong" (Mill, 1863, p. 157). Thus, Mill only actually argues against the variants of positive legal moralism (types 1, 2, and 3). However, as the harm principle runs counter to all types of legal moralism, I should add that Mill's position could potentially be used to argue against critical legal moralism (types 4, 5, and 6) as well.

H. L. A. Hart

Some scholars have mentioned that Hart's criticism of Devlin's legal moralism gains much of its strength from the example of the criminalization of homosexuality, a trait which does not seem morally wrong at all (Arneson, 2013, p. 452; Dworkin, 1999, p. 946). However, if we have reasons for legally enforcing positive morality, then we have reasons to legally restrict whatever public opinion holds to be immoral. This means that the choice of homosexuality as an example is only problematic for the argument against positive legal moralism if the nature of homosexuality is such that public opinion cannot possibly hold it to be immoral. This is hugely implausible given the long history of persecution of homosexuals. This means that Hart's criticism of legal restrictions on homosexuality applies to all

²³ Mill uses the term "social morality" instead of positive morality.

versions of positive legal moralism, however it does not apply to critical legal moralism. Hart also endorses the claim of the Wolfenden report, that certain immoralities are just not the business of the criminal law (Hart, 1963, p. 38ff), which means that, in addition to positive legal moralism, Hart provides an argument against criminalising legal moralism. Hart thus argues against legal moralism of types 1, 2, 3, and 4. This leaves critical restricting (type 5) and critical omitting legal moralism (type 6) untouched.

Joel Feinberg

In “Harmless Wrongdoing” (Feinberg, 1988), Feinberg attacks legal moralism and considers the enforcement of both critical and positive morality,²⁴ so his critique applies to positive as well as critical legal moralism. However, Feinberg explicitly restricts himself to the criminal law (Feinberg, 1984, p. 1), which means that Feinberg only criticises legal moralism of types 1 and 2.

Joseph Raz

In “The Morality of Freedom” (Raz, 1986), Joseph Raz argues against legally enforcing morality by putting forth his own version of the harm principle, “the autonomy-principle”. According to this principle, coercion is only justified in order to prevent harm, which should be understood in terms of autonomy (Raz, 1986, p. 415). The reason that coercion is only justified to prevent harm is the negative impact of coercion on autonomy (Raz, 1986, p. 418). However, Raz also maintains the following:

The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones. (Raz, 1986, p. 417)

Perfectionist goals need not be pursued by the use of coercion. A government which subsidizes certain activities, rewards their pursuit, and advertises their availability encourages those activities without using coercion (Raz, 1986, p. 417).

According to Raz then, it is the proper function of the state to promote morality as such (Raz, 1986, p. 415). As Alexander remarks, Raz may have provided an argument against “criminalizing legal moralism”, but in the process, he has provided an argument *for* a weaker form of legal moralism (Alexander, 2003,

²⁴ See especially pp. 124–176.

p. 135). According to Raz, public opinion about what is immoral has no weight. Only what is actually immoral counts (Raz, 1986, p. 412). The upshot of this is that, while he argues against positive and criminalising legal moralism (i. e. legal moralism of types 1, 2, 3, and 4), Raz himself qualifies as a critical restricting legal moralist (type 5).

I have identified no adherents of the omitting variants of legal moralism, according to which morality can legitimately be enforced by refraining from some legislative act. The lack of adherents might be because the omitting variants are so weak that most legal moralists try to make a stronger claim. However, the omitting forms of legal moralism are nevertheless interesting for two reasons. First, the distinction captures a number of (proposed) “morals laws” that would otherwise not count as legal moralism. The best example is opposition to homosexual marriages, which is the view that the state should not enable a specific option for homosexuals. Second, omitting legal moralism is structurally similar to other types of legal moralism, and the critic of legal moralism who does not wish to commit to the view that grossly immoral contracts (e. g. voluntary slavery) are enforceable in principle should consider what enables her to consistently oppose the stronger forms of legal moralism, while supporting omitting legal moralism.

The distribution of friends and foes of legal moralism is presented in the table below.

Table 2 Friends and foes of legal moralism.

Friends and foes of legal moralism	Criminalization of immorality	Other legal restrictions on immorality	Omitting to legislate to restrict of immorality
Positive morality as the basis on which to legislate	(1) Devlin, Feinberg , Hart , Mill , Raz	(2) Hart , Mill , Raz	(3) Hart , Mill , Raz
Critical morality as the basis on which to legislate	(4) Moore, Feinberg , Hart , [Mill] , Raz	(5) Raz, Stephen, [Mill]	(6) [Mill]

NB: The names of adherents are written in a regular font. The names of critics are presented in **bold**. The brackets around Mill indicate positions that are incompatible with Mill’s position, but which Mill does not argue against.

As Table 2 shows, every critique of legal moralism considered here either targets variants of criminalising or positive legal moralism. Even Mill, whose harm principle is incompatible with critical restricting and critical omitting legal moralism (types 5 and 6), never actually provides any argument against these versions of legal moralism. Thus, even if the critiques of legal moralism by Mill,

Hart, Feinberg, and Raz are so successful that they provide reasons for conclusively rejecting the types of legal moralism they target, two types of legal moralism remain. Not only have these types of legal moralism not been refuted, they have not even been criticised. Critical omitting legal moralism may be too weak to attract much interest, but critical restricting legal moralism is strong enough to give rise to interesting claims. This makes it an interesting position that merits the attention of anyone interested in legal moralism.

Conclusion

I hope to have shown that the best definition of legal moralism is the one specified in LM3*, and provided some useful distinctions. In the course of providing a definition of legal moralism and a typology of different kinds of legal moralism, it became clear that the critics of legal moralism have disproportionately focused on *criminalising* legal moralism and *positive* legal moralism. This leaves significant and interesting types of legal moralism unaddressed, notably critical restricting legal moralism (type 5). This is a strong view according to which the state is *pro tanto* justified in taxing moral wrongdoing, raising taxes to subsidise morally good acts, enabling citizens to raise civil law suits against each other for all morally wrong acts, changing the curriculum of schools to teach students to comply with the demands of morality as such, and limiting the right to public health care in such a way that surgery for morally wrong purposes is not publicly funded.²⁵ It is also a view with prominent contemporary defenders like Joseph Raz. Given the strong claims made by critical restricting legal moralism, and the sophistication of those who defend it, this would be an interesting topic for the critics of legal moralism to address in the future.

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²⁵ According to this view, the mentioned policies are only *pro tanto* justified, some of the measures will probably be all-things-considered unjustified, even though they are *pro tanto* justified.

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